

DANGEROUS WARRANTS

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Abstract: The Supreme Court has cast judicial warrants as the Fourth Amendment gold standard for regulating police discretion. It has embraced a “warrant preference” on the premise that requiring police to obtain advance judicial approval for searches and seizures encourages accurate identification of evidence and suspects while minimizing interference with constitutional rights. The Court and commentators have overlooked the fact that most outstanding warrants do none of these things. Most outstanding warrants are what this article terms “non-compliance warrants”: summarily issued arrest warrants for failures to comply with a court or police order. State and local courts are profligate in issuing such warrants for minor offenses. For example, the Department of Justice found that the municipal court in Ferguson, Missouri issued one warrant for every two of its residents. When issued as wantonly as this, warrants are dangerous because they generate police discretion rather than restrain it. Nonetheless, the Supreme Court has, most recently in *Utah v. Strieff*, treated non-compliance warrants as if they are no different from the traditional warrants that gave rise to the Fourth Amendment warrant preference.

This Article argues that non-compliance warrants pose unique dangers, constitutional and otherwise. Non-compliance warrants create powerful incentives for the police to conduct unconstitutional stops, particularly in poor and minority neighborhoods. Their enforcement also generates race and class feedback loops. Outstanding warrants beget arrests and arrests beget more warrants. Over time, this dynamic amplifies race and class disparities in criminal justice. The Article concludes by prescribing a Fourth Amendment remedy to deter unconstitutional warrant checks. More importantly, the Article identifies steps state and local courts might take to stem the continued proliferation of non-compliance warrants.

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INTRODUCTION

With guns drawn, 150 police officers stormed the dilapidated apartment building—nearly one officer for every unit.¹ The Detroit Police Department called the operation “Clean Sweep.” Officers would trawl the building for individuals wanted on outstanding warrants. The police department suggested that wanted felons were responsible for much of the crime in the building.² Officers went door to door, putting residents on edge, but ultimately netted thirty warrant dodgers.³ The department declared the operation a success. It failed to mention that virtually none of the arrestees was a wanted felon. More than two-thirds of the arrests were based on warrants for failures to appear in traffic court; most of the remaining one-third also stemmed from relatively minor misconduct.⁴ Were Clean Sweep’s shock and awe tactics necessary or even intended to reduce crime? Because arrest warrants for unpaid traffic tickets and other minor misdeeds are voluminous and far outnumber those for serious felonies, the police might have guessed that Clean Sweep would net more bad drivers than actual outlaws. It is possible that the police did know but were indifferent so long as the highly publicized raid generated a parade of arrestees for the press waiting outside the building.

The sheer number of outstanding warrants enables aggressive police enforcement tactics of which Clean Sweep is just one example.⁵ Such tactics are fraught with constitutional dangers, as is the judicial practice of summarily issuing arrest warrants based on trifling misconduct, some of which is not criminal at all. This Article describes both sets of practices and the constitutional harms that flow from them. Contrary to courts’ and commentators’ beliefs, warrants may amplify police discretion rather than constrain it.

1. Ryan Felton, *Operation: Restore Public Relations*, DETROIT METRO TIMES (Apr. 15, 2015), <http://www.metrotimes.com/detroit/operation-restore-public-relations/Content?oid=2334953> [<http://perma.cc/E2UR-Q34Y>].

2. *Id.*

3. *Id.*

4. *Id.*

5. See *infra* section II.A.

For generations, the Supreme Court has cast judicial warrants as the Fourth Amendment gold standard for regulating police. The Court has touted a “warrant preference,” stating that a search or seizure conducted without a warrant is per se unreasonable and, thus, unconstitutional.⁶ This reflects the Court’s view that Fourth Amendment rights are better protected when police enforcement choices are subject to judicial review *before* execution.⁷ The warrant preference requires that a “neutral and detached magistrate” vigorously review police warrant applications.⁸ In theory, this should entail a thorough questioning of witnesses’ credibility and evaluation of whether the police’s factual showing satisfies “probable cause,” the standard specified by the Fourth Amendment.⁹ I call this vision of courts’ role in screening warrant applications the “magisterial ideal.”

Critics have long charged that, in practice, judges do not live up to the magisterial ideal because warrant hearings are *ex parte* and cursory.¹⁰ Warrant applications are “rubber stamped” with far less scrutiny than the magisterial ideal presupposes.¹¹ Both the magisterial ideal and criticism of it assume that warrants are *supposed* to constrain police discretion. Both perspectives share the same blind spot. Both focus only on one type of warrant, the “investigatory warrant”—where police seek judicial permission to gather evidence or make arrests in order to advance a specific criminal investigation.¹² As suggested by operation Clean Sweep, however, the majority of outstanding warrants are not of the investigatory variety at all.

The most common outstanding warrants in the United States are what I call “non-compliance warrants.”¹³ These warrants are not intended to constrain police discretion but rather to secure a defendant’s submission. Because of their sheer numbers, non-compliance warrants affirmatively generate, rather than constrain, police discretion. This contravenes the warrant preference’s spirit by creating powerful incentives for the police

6. *See Katz v. United States*, 389 U.S. 347, 357 (1967).

7. *See id.*

8. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

9. U.S. CONST. amend. IV. The Fourth Amendment provides that

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.

10. *See Oren Bar-Gill & Barry Friedman, Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1639–40 (2012) (summarizing critical literature).

11. *See id.*

12. *See Katz*, 389 U.S. at 357; *Johnson*, 333 U.S. at 13–14.

13. *See infra* section II.A.

to unconstitutionally seize individuals to conduct warrant checks. Non-compliance warrants also play a central but unrecognized role in perpetuating race and class disparities in our criminal justice system.

Non-compliance warrants are issued for failing to comply with court or executive orders—for example, failing to appear for a court date, failing to comply with a probation condition, or failing to pay a traffic fine.¹⁴ They do not require a police application and usually take the form of a bench warrant issued summarily by a judge, court clerk, or probation official.¹⁵ Contrary to the magisterial ideal, judges and police are not counter-positioned when non-compliance warrants are issued.¹⁶ Rather, court and police interests are aligned, with the former calling upon the latter to secure the named person.¹⁷ Courts are profligate in issuing non-compliance warrants, particularly for relatively minor misconduct, much of which is not criminal.¹⁸ The Department of Justice's (DOJ's) 2014 investigation of Ferguson, Missouri highlights another example of why these warrants are dangerous.¹⁹

In 2013 alone, the municipal court in Ferguson issued enough non-compliance warrants to account for nearly half the city's population.²⁰ The vast majority of these warrants were for failing to appear (FTAs) for municipal code and traffic violations.²¹ The DOJ observed that Ferguson imposed exceptionally high fines for municipal code violations and used its criminal justice apparatus as a punitive collection agency.²² The city directed courts and police to maximize the revenue generated by violations.²³ The court did its part by, among other things, creating Kafkaesque obstacles to challenging citations and wantonly issuing bench warrants for FTAs.²⁴ These warrants had the advantage, from the municipality's perspective, of carrying additional fees.²⁵ The police did

14. *See infra* section II.A.

15. *See infra* section II.A.

16. *See infra* section II.A.

17. The warrant is typically framed as a judicial command. *See infra* note 130 and discussion.

18. *See infra* notes 132–36 and discussion.

19. *See* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) [hereinafter DOJ FERGUSON REPORT].

20. *See id.* at 3–4, 42.

21. *Id.* at 3–4.

22. *See id.* at 10–15.

23. *Id.* at 10, 14.

24. *See id.* at 46–47 (noting that warrants for FTAs were issued without having provided adequate notice of required appearance date and required full pre-payment of bond in order to challenge unlawfully imposed warrant).

25. *Id.*

their part by aggressively enforcing outstanding warrants, often discovering them in the course of unconstitutional stops and, of course, by issuing new citations.²⁶ While Ferguson might be an extreme example, it is likely different from numerous other jurisdictions in quantity, not kind.²⁷

Although investigatory and non-compliance warrants are fundamentally different, the Supreme Court has extended the same deference to both as if they were identical.²⁸ Most recently, in *Utah v. Strieff*,²⁹ the Court held that criminal courts need not provide a remedy where an officer makes an unconstitutional stop but discovers a valid non-compliance warrant in the course of the stop.³⁰ The bench warrant in *Strieff* was for an unresolved parking violation.³¹ After unconstitutionally stopping Strieff, discovering the warrant, and arresting him, the officer searched Strieff incident to arrest and discovered narcotics.³² This evidence became the basis for a new criminal case against Strieff.³³ He moved to suppress the narcotics.³⁴ The Court held for Utah because the outstanding bench warrant was “valid . . . and . . . entirely unconnected with the stop.”³⁵ The Court concluded that arrest was not the fruit of the constitutional violation but a “ministerial act” that the officer had “a sworn duty to carry out.”³⁶

Contrary to the Supreme Court’s characterization, an arrest pursuant to a non-compliance warrant is not “ministerial.”³⁷ Non-compliance warrants actually create rather than restrain police discretion. As is true with criminal laws, outstanding warrants create opportunities for police leniency and severity, both at the institutional and individual levels. This creates the dangers of arbitrariness and opacity that have worried police-discretion scholars since the 1960s.³⁸

26. *Id.* at 10.

27. *See infra* section II.A.

28. *See infra* section I.B.

29. ___ U.S. ___, 136 S. Ct. 2056 (2016).

30. *Id.* at 2060 (Utah conceded that the officer did not have reasonable suspicion to stop Strieff).

31. *Id.* at 2064 (Sotomayor, J., dissenting).

32. *Id.* at 2060 (majority opinion).

33. *Id.*

34. *Id.*

35. *Id.* at 2062.

36. *Id.* at 2062–63.

37. *Id.* at 2063.

38. *See infra* section II.C.2.

The sheer number of outstanding non-compliance warrants in conjunction with their demographic concentration among poor and minority groups create powerful incentives for police to conduct unconstitutional stops of individuals who belong to those groups.³⁹ Those incentives pre-existed *Utah v. Strieff* and would have continued to exist *even if* the case had been decided differently.⁴⁰ The Supreme Court has long held that there is no exclusionary remedy for an unconstitutional seizure where it subsequently emerges that there is probable cause to detain.⁴¹ An outstanding warrant of any variety creates probable cause. For officers in the field, there will usually be no cost to carrying out unconstitutional warrant checks, save for the time and energy required to actually conduct the stop. The limited data that exist suggest that the warrant hit-rate in low-income minority neighborhoods will be higher than other neighborhoods.⁴² This creates the incentive for police to conduct random unconstitutional checks in the former.⁴³

Warrant enforcement plays a critical role in cementing class and race disparity in the criminal justice system by creating “arrest feedback.” Not only do arrests generate warrants and vice versa, but warrant enforcement can also generate new criminal cases. Over time, police warrant enforcement and courts’ warrant-issuing practices are recursive, producing mutually reinforcing demographic effects. Where there are a disproportionately high number of outstanding warrants for poor and minority defendants, police will target those communities for warrant enforcement. In the course of doing so, police will likely identify new criminal cases. This feedback supplies its own self-supporting rationale because the demographic profile of those with outstanding warrants reaffirms pre-existing, racialized notions about crime-prone neighborhoods and communities.

In Part I, the Article describes the Fourth Amendment’s magisterial ideal and the warrant preference. Part II, the Article’s analytical core, demonstrates the prevalence and demographic concentration of non-compliance warrants and shows why this is harmful. Non-compliance warrants create powerful incentives for police to violate the Constitution, confer unchecked enforcement discretion, and generate racial disparity.

39. See *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting).

40. Justices Sotomayor and Kagan wrote dissents urging a different result in the case. *Id.* at 2068 (Sotomayor, J. dissenting); *id.* at 2073 (Kagan, J., dissenting).

41. This is on account of the *Frisbie-Ker* doctrine. See *infra* section II.C.1; *United States v. Crews*, 445 U.S. 463, 474 (1980) (“Respondent is not himself a suppressible ‘fruit,’ and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt . . .”).

42. See *infra* section II.B.

43. See *infra* section II.C.1.

Part III identifies the legal and policy prescriptions that flow from Part II. The Court should create a meaningful remedy for those seized unconstitutionally but for whom there is an outstanding non-compliance warrant. In the meantime, local courts have considerable power to limit non-compliance warrants' harmful consequences. The Article identifies specific steps these courts might take.

I. WARRANTS AND THE MAGISTERIAL IDEAL

The Supreme Court has characterized a warrant as “a judicial mandate to an officer to conduct a search or make an arrest” and any actual arrest that follows as a “ministerial act.”⁴⁴ The “magisterial act” is the issuance of a warrant: it is the magistrate who wields the most significant decision-making authority with regard to who is to be searched or seized. This view is embedded in the Court’s so-called “warrant preference.” It casts warrant-based searches and seizures as the gold standard of constitutional permissibility. The warrant preference hinges on an idealized view of the magistrate’s role: being “neutral and detached,”⁴⁵ vigorously reviewing police applications, and granting warrants only where there is a high likelihood of securing criminal evidence. The magisterial ideal also provides that warrants, if issued at all, must be limited in scope so as to minimize interference with suspects’ and third parties’ constitutional interests. Ironically, the Court’s warrant preference has led it to curtail the exclusionary remedy for unconstitutional police conduct when that conduct is based upon an invalid warrant, or, as held in *Utah v. Strieff*, when a valid warrant emerges immediately following an unconstitutional stop.⁴⁶

A. *The Warrant Preference*

A warrant is the gold standard for justifying searches and seizures under the Fourth Amendment.⁴⁷ There are so many exceptions to the Court’s so-called warrant requirement that the “warrant preference” exists more as a rhetorical reality than a practical one.⁴⁸ But the rhetoric

44. *Strieff*, 136 S. Ct. at 2062–63 (quoting *United States v. Leon*, 468 U.S. 897, 920 n.21 (1984)).

45. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

46. *Strieff*, 136 S. Ct. at 2060.

47. See *Katz v. United States*, 389 U.S. 347, 357 (1967).

48. See *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J. concurring) (“Even before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”); Oren-Bar & Friedman, *supra* note 10, at 1612 (noting prevalence of exceptions).

expresses a foundational concept of criminal courts' role in restraining the police. The Fourth Amendment's text requires that warrants be particularized as to place, person, and object of interest.⁴⁹ The Founders drafted the warrants clause to eliminate colonial courts' much-reviled practice of issuing "general warrants."⁵⁰ General warrants authorized state agents to search and seize without temporal or geographic limitation or the specification of particular individuals or objects.⁵¹ General warrants were the dangerous warrants of the founding era.

In *Katz v. United States*,⁵² the Supreme Court read the Fourth Amendment's requirement that searches and seizures be "reasonable" to entail a "warrant preference": a search conducted without a warrant is "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁵³ Whether the "warrant preference" continues to actually describe what the Fourth Amendment requires of police is questionable (if it ever did).⁵⁴ But rhetorically, if not otherwise, the Court continues to suggest the warrant preference's vitality.⁵⁵ This reflects the settled view that police officers' enforcement discretion is best vetted by a judicial actor in advance of an enforcement action.⁵⁶ Justice Jackson's formulation in *Johnson v. United States*⁵⁷ remains among the most eloquent formulations of the warrant preference:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must

49. U.S. CONST. amend. IV.

50. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 99–101 (1937).

51. See *id.*

52. 389 U.S. 347 (1967).

53. *Id.* at 357.

54. See *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring).

55. See, e.g., *Los Angeles v. Patel*, ___ U.S. ___, 135 S. Ct. 2443, 2452 (2015); *Arizona v. Gant*, 556 U.S. 332, 338 (2008); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

56. *United States v. Chadwick*, 43 U.S. 1, 9 (1977).

57. 333 U.S. 10 (1948).

reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman⁵⁸

This language suggests the essential features of the warrant preference.

First, and most importantly, Justice Jackson explicitly articulates the “magisterial ideal” in terms of judge and police being counter-positioned. Magistrates are to serve as “neutral and detached” bulwarks against officers’ potentially blinding “zealous[ness].”⁵⁹ This framing rightly presupposes that police officers will systematically and severely discount civilian privacy and liberty interests in favor of their crime-control mandate. Search and seizure targets do not have a formal, pre-deprivation opportunity to be heard.⁶⁰ Magistrates consider applications *ex parte*. A search’s precise target may be uncertain. Informing a known target of an impending search or arrest might undermine the state’s legitimate crime-control purpose—many a target would just as well flee or destroy evidence.⁶¹ But the *ex parte* nature of the application means that the magistrate must account for the absent parties’ interests.

The magisterial ideal hinges on “neutral[ity] and detach[ment],” which ensures that the search target’s interests are accounted for.⁶² Magistrates are to vigorously review the police’s facts regarding probable cause—assuring themselves of witnesses’ credibility and that the established facts actually demonstrate a sufficiently high probability of guilt. In this vein, the Court has held it unconstitutional for a jurisdiction to create formal incentives for approving warrants.⁶³ Even if issuing a warrant is justified, the magisterial ideal requires that the judge appropriately limit the scope of law enforcement conduct so as to minimize the intrusion endured by the target and third parties whose constitutional interests may be implicated.⁶⁴

58. *Id.* at 13–14.

59. *Id.* Commentators have long questioned the presupposition that magistrates can be neutral and detached in practice. See George R. Nock, *The Point of the Fourth Amendment and the Myth of Magisterial Discretion*, 23 CONN. L. REV. 1, 26–29 (1990); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1207 (1987).

60. Due process typically entails the right to some kind pre-deprivation hearing in the civil context, for instance if the government proposes to interfere with a property interest. See *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (deprivation of Social Security benefits).

61. See Nock, *supra* note 59, at 12.

62. *Johnson*, 333 U.S. at 13–14.

63. See *Connally v. Georgia*, 429 U.S. 245, 251 (1977) (invalidating system in which magistrates were compensated for each warrant issued).

64. See *Groh v. Ramirez*, 540 U.S. 551, 560–63 (2004) (holding warrant invalid unless issuing magistrate specifies scope of permissible law enforcement conduct).

Critics have long charged that, practically speaking, actual magistrates are unable to provide the kind of rigorous pre-deprivation review that the magisterial ideal supposes.⁶⁵ Without an adversarial process, magistrates are unable to meaningfully review the facts presented in officers' warrant affidavits. That problem is compounded when police forum shop and magistrates have heavy caseloads.⁶⁶ Officers will be inclined to forum shop for those magistrates who are least inclined to question officers' applications.⁶⁷ The incentives to conduct a searching review will be further diminished by the powerful docket clearing incentives that most criminal court magistrates confront.⁶⁸ These structural features will lead magistrates to issue "rubber stamp" approvals for all but glaringly egregious warrant applications. The empirical evidence supporting this conclusion is dated,⁶⁹ but critics' assessment of the incentives confronting magistrates remains true. That said, limited empirical evidence suggests that the "hit rate" for warrant-based searches is higher than it is for non-warrant-based searches.⁷⁰ This suggests a second theoretical underpinning for the warrant preference, one recently highlighted by Professors Friedman and Bar-Gill.⁷¹

When police officers are forced to systematically consider and articulate the bases for searches or seizures in advance, the constitutional quality of those enforcement actions will improve.⁷² There are two reasons for this. First, as Friedman and Bar-Gill emphasized, the pressure to think about and articulate the reasons for an enforcement action is likely to discourage officers from engaging in unconstitutional conduct.⁷³ One hopes that officers will hear themselves articulating patently unconstitutional reasons for an enforcement action and think the better of it.⁷⁴ Even if one does not fully accept this premise, it is plausible to think that officers take greater care investigating cases when they anticipate

65. See RONALD ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 422–23 (2016) (summarizing criticism); Bar-Gill & Friedman, *supra* note 10, at 1639–40 (same); Nock, *supra* note 59, at 3–4 (characterizing notion of neutral and detached magistrate a "myth").

66. See ALLEN ET AL., *supra* note 65, at 422–23.

67. See *id.*

68. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 270–72 (1992).

69. See ALLEN, *supra* note 65, at 422 (summarizing findings).

70. See Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. TECH. L. REV. 913, 922–23 (2009) (summarizing RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* 20 (1985)).

71. Bar-Gill & Friedman, *supra* note 10, at 1641.

72. *Id.*

73. *Id.*

74. *Id.*

applying for a warrant.⁷⁵ If that is generally true, it accounts for why warrant searches are more likely to generate contraband and undercuts the “rubber stamping” concerns articulated above. Second, as the late Professor Bill Stuntz noted, requiring police to obtain a warrant short-circuits judges’ inclinations to engage in post hoc constitutional rationalizing when a police search or seizure is fruitful.⁷⁶ When challenged after the fact, courts will view the constitutional challenge with a jaundiced eye because of deep-seated anxiety about letting guilty defendants go free.⁷⁷ In contrast, reviewing enforcement action before it occurs permits a more clear-eyed judicial evaluation of police’s reasons.

If one accepts the basic premises of the magisterial ideal, then one will view the most significant moments of law enforcement discretion as playing out in advance of an actual warrant-based search or seizure. Of course, there are choices to be made as to how and when to execute a warrant once issued.⁷⁸ But the most significant questions—whether to search or seize at all and if so, how extensively—will have been decided by a judge in advance, rendering the actual search and seizure “ministerial.”⁷⁹ That characterization is particularly apt where a warrant is specifically assigned to officers for execution: those officers are left to carry out discretionary decisions made by others.⁸⁰

B. *Exclusion and the Warrant Preference*

The warrant preference has led the Court to create a “good faith” exception to the exclusionary rule in cases where police have obtained a warrant that is found to be defective following execution. Ordinarily, any evidence that is the product of a Fourth Amendment violation is inadmissible against the defendant.⁸¹ The good faith exception to exclusion is tantamount to giving police the benefit of the doubt when they apply for a warrant. In theory, that should encourage police to apply

75. *See id.*

76. *See* William J. Stuntz, *The Warrant and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 892–93 (1991).

77. *See id.*

78. *See, e.g.*, *United States v. Banks*, 540 U.S. 31, 38–39 (2003) (waiting fifteen to twenty seconds after knocking and announcing before forcibly entering dwelling pursuant to warrant “reasonable” under Fourth Amendment).

79. *See* *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2062–63 (2016) (citing *United States v. Leon*, 468 U.S. 897, 920 n.21 (1984)).

80. *See* EDWARD CONLON, *BLUE BLOOD* 156 (2004) (discussing NYPD warrant execution teams).

81. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

for warrants because they will have greater assurance of evidence being admitted than if they proceeded without one.

In *United States v. Leon*,⁸² the police obtained a search warrant for Leon's home based upon a police-corroborated tip that he was distributing narcotics.⁸³ The initial tip came from a reliable source, but police nonetheless conducted an "extensive investigation" to corroborate the tip prior to applying for a warrant.⁸⁴ Upon executing the warrant, the police discovered large quantities of narcotics.⁸⁵ Leon successfully moved to suppress the narcotics evidence in the criminal case against him.⁸⁶ The trial court concluded that even though the police had relied in "good faith" on what appeared to be a valid warrant, it was actually constitutionally deficient because the magistrate incorrectly concluded that there was probable cause to search Leon's home.⁸⁷ The Supreme Court agreed that the search was unconstitutional, but nonetheless held the seized narcotics admissible.⁸⁸ The Court reasoned that where police and courts act in good faith, there is nothing to "deter"—and deterrence is the only function that the exclusionary rule serves.⁸⁹ "Reasonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause."⁹⁰ So one cannot fault a magistrate for making a mistake, the Court reasoned. Nor can one fault an officer for being no wiser for the magistrate's error.

Leon's good faith exception was subsequently extended to different kinds of warrants and criminal justice errors. In *Arizona v. Evans*⁹¹ and *Herring v. United States*,⁹² the Court applied *Leon* to bench warrants⁹³ without recognizing any difference between them and the investigatory warrant at issue in *Leon*. A bench warrant is usually issued without any application from the police. A defendant's failure to appear is among the

82. 468 U.S. 897 (1983).

83. *Id.* at 901–03.

84. *Id.* at 901.

85. *Id.*

86. *Id.* at 903.

87. *Id.* at 904. There is no good faith where the officer unreasonably relies on what is an obviously defective warrant or where a magistrate behaves egregiously in issuing it. *Id.* at 914–15.

88. *Id.* at 925–26.

89. *Id.* at 916–17.

90. *Id.* at 914.

91. 514 U.S. 1 (1995).

92. 555 U.S. 135 (2009).

93. *See Herring*, 555 U.S. at 137; *Evans*, 514 U.S. at 14.

most common bases for a bench warrant.⁹⁴ Nor was the “error” in these cases a magistrate’s reasonable mistake regarding a contestable, factual question. Rather, both *Evans* and *Herring* involved avoidable clerical errors.⁹⁵ In *Arizona v. Evans*, the Supreme Court held evidence admissible against Evans even though it was seized following his arrest based upon a court clerk’s erroneous computer database entry indicating an outstanding warrant.⁹⁶ Similarly, in *Herring*, the Court refused to exclude evidence seized following an arrest based upon an invalid bench warrant where a police department clerk failed to note that the warrant had been quashed.⁹⁷ In both *Evans* and *Herring*, the arresting officers were not, and likely could not have been, aware of the clerical errors regarding the outstanding warrants. In *Evans* the Court credited the trial court’s conclusion that, as far as the officer was concerned, he was “bound to arrest” and “would [have been] derelict in his duty if he failed to arrest.”⁹⁸ If one accepts the Court’s view that the exclusionary rule is designed only to deter police officers (as opposed to courts or clerks),⁹⁹ then *Evans* and *Herring* are on firm footing. But what happens if the police officer’s unconstitutional conduct precipitates an outstanding warrant’s discovery?

Recently in *Utah v. Strieff*, the Court denied exclusion in a case where the outstanding warrant was valid but would not have been discovered absent the police officer’s unconstitutional conduct.¹⁰⁰ Utah conceded that the officer in *Strieff* seized Strieff without reasonable suspicion in violation of the Fourth Amendment.¹⁰¹ Ordinarily, the exclusionary rule would preclude the state from using any evidence seized as a result of the unconstitutional seizure.¹⁰² In *Strieff*, however, following the unconstitutional seizure, the officer discovered an outstanding bench warrant that authorized Strieff’s arrest.¹⁰³ The Fourth Amendment permits a full search of a suspect’s person “incident to a lawful arrest” to ensure that the suspect is unable to harm the officer with a concealed weapon or

94. See *infra* section II.B.

95. See *Herring*, 555 U.S. at 138; *Evans*, 514 U.S. at 4.

96. *Evans*, 514 U.S. at 4.

97. *Herring*, 555 U.S. at 138.

98. *Evans*, 514 U.S. at 15.

99. See, e.g., *Herring*, 555 U.S. at 148 (Ginsburg, J., dissenting); Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 349–50 (2013) (summarizing contributing-symposium authors’ criticisms).

100. ___ U.S. ___, 136 S. Ct. 2056, 2060 (2016).

101. *Id.*

102. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1962).

103. *Strieff*, 136 S. Ct. at 2060.

destroy evidence.¹⁰⁴ When announcing this per se rule in *United States v. Robinson*,¹⁰⁵ the Court noted that officers may search incident to a “lawful arrest,”¹⁰⁶ a condition that was clearly unsatisfied in *Strieff*. In dicta, the *Strieff* Court hinted that the outstanding bench warrant might retroactively cure the unconstitutional seizure, but it declined to anchor its actual holding in this unorthodox principle.¹⁰⁷

Instead, the Court anchored its holding in “attenuation doctrine,”¹⁰⁸ which creates an exception to the general rule that evidence seized as a result of an unconstitutional seizure must be excluded.¹⁰⁹ Where there is a “break” in the causal chain linking unconstitutional conduct and evidence seized, the state may use the evidence against the defendant.¹¹⁰ Under *Brown v. Illinois*,¹¹¹ three factors suggest a causal break: a significant break in “temporal proximity” separating the constitutional violation from the evidence’s discovery, “the presence of intervening circumstances,” and “the purpose and flagrancy of the official conduct.”¹¹²

Strieff concluded that the pre-existing warrant for Strieff’s arrest satisfied the *Brown* factors, with particular emphasis on the second one.¹¹³ The Court’s reasoning leaned heavily on its earlier decision in *Segura v. United States*.¹¹⁴ In *Segura*, law enforcement unlawfully seized the contents of an apartment by entering it and then securing it pending application for a search warrant.¹¹⁵ The magistrate issued a warrant based upon an application that contained only information learned in advance of the unlawful seizure.¹¹⁶ The *Segura* Court concluded that the warrant was therefore an “independent source”: it would have been granted even if the illegal seizure had never occurred.¹¹⁷ According to the Court, the illegal seizure in *Segura* did not ultimately compromise the magisterial ideal.

104. See *United States v. Robinson* 414 U.S. 218, 235 (1973). In turn, any evidence of a new crime discovered in the course of a search incident to arrest would be admissible under the “plain view” exception. See *Horton v. California*, 496 U.S. 128, 134 (1990).

105. 414 U.S. 218 (1973).

106. See *id.* at 235.

107. *Strieff*, 136 S. Ct. at 2062.

108. *Id.* at 2061.

109. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1962).

110. *Strieff*, 136 S. Ct. at 2061.

111. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

112. *Strieff*, 136 S. Ct. at 2061 (quoting *Brown*, 422 U.S. at 603–04).

113. *Id.* at 2062 (quoting *United States v. Leon*, 468 U.S. 897, 920 n.21 (1984)).

114. 468 U.S. 796 (1982).

115. *Id.* at 800–04.

116. See *id.* at 800–01.

117. *Id.* at 813–15.

The problem with anchoring *Strieff* in *Segura* is that the warrant for Strieff's arrest preceded the illegal seizure and was only discovered *as a result* of that unconstitutional conduct.

The majority's analysis of the *Brown* factors failed to ask whether the officer foresaw that there would be an outstanding warrant for Strieff even though foreseeability is the touchstone of the proximate cause analysis upon which attenuation is based.¹¹⁸ Both Justices Kagan and Sotomayor, in separate dissents, noted how readily foreseeable it must have been, given outstanding warrants' prevalence in Utah, particularly for low-income, racial minorities.¹¹⁹ The majority assumed that police in Utah were not routinely stopping individuals without cause to do warrant checks.¹²⁰ The majority did, however, leave room for future defendants to move for exclusion in a case like Strieff's where there was evidence of "systemic or recurrent" pattern of such unconstitutional stops.¹²¹ How a defendant might go about making such a showing, however, is unclear.

While *Strieff* is not a model of analytical clarity, the result is consistent with what has become a long line of cases limiting the exclusionary rule's availability whenever the deterrent effect on police is even arguably unclear.¹²² If one accepts the Court's account of the exclusionary remedy as purely deterrence-based,¹²³ it is difficult to see what marginal deterrence would be achieved by excluding the narcotics evidence retrieved from Strieff incident to his arrest. Having discovered the warrant for Strieff's arrest, there was little to prevent the police officer from holding Strieff or prosecutors from proceeding on the underlying warrant

118. See *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting); *id.* at 2072–73 (Kagan, J., dissenting).

119. See *id.* at 2068 (Sotomayor, J., dissenting); *id.* at 2072–73 (Kagan, J., dissenting).

120. See *id.* at 2063 (majority opinion).

121. *Id.*

122. See *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (denying exclusion where police complied with substantive Fourth Amendment rule later found to be invalid); *Herring v. United States*, 555 U.S. 135, 138–39 (2008) (same where arrest was based upon invalid warrant); *Hudson v. Michigan*, 547 U.S. 586, 594–95 (2006) (same where police violated "knock and announce" rule); *Arizona v. Evans*, 514 U.S. 1, 3–4 (1995) (same where arrest based on invalid warrant); *United States v. Leon*, 468 U.S. 897, 925–26 (1983) (same); *Stone v. Powell*, 428 U.S. 465, 489–94 (1976) (same for Fourth Amendment violation raised in habeas corpus proceeding).

123. The Court has come to settle on deterring future law enforcement misconduct as the only rationale for the exclusionary remedy. See *supra* note 122. Commentators do not accept that this is the only rationale for the exclusionary remedy. See, e.g., Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 423–24 (2013); Robert M. Bloom & David H. Fentin, "A More Majestic Conception": *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 49 (2010). Nor should they, given that the Court itself has provided additional rationales when extending the exclusionary remedy to the States. See *Mapp v. Ohio*, 367 U.S. 643, 657–59 (1961).

offense. Denying the State evidence seized incident to arrest for a new criminal case would not have likely altered the already compelling incentives for police to conduct unconstitutional warrant-check stops.¹²⁴

The result in *Strieff* seems particularly consistent with the results in *Evans* and *Herring*. Of course, in those cases, the arrests were based on invalid warrants. The Court, however, still permitted the State to use incriminating evidence seized incident to arrest even though the State had no constitutional basis to hold the suspect absent the contraband. In *Strieff*, the outstanding bench warrant was actually valid, meaning the State was entitled to hold him separate and apart from the evidence seized incident to arrest. The *Strieff* Court invoked the warrant preference, noting that a warrant is a “judicial mandate . . . to conduct a search or make an arrest.”¹²⁵ Once a warrant has issued, the most significant and potentially dangerous dimension of police discretion has, in theory, been accounted for. Accordingly, the *Strieff* Court characterized a warrant arrest as a “ministerial act that was independently compelled” by the warrant.¹²⁶ Of course the problem with this gloss in *Strieff* was that the officer was unaware of the warrant’s existence when he first stopped the defendant in violation of the Fourth Amendment.¹²⁷

II. NON-COMPLIANCE WARRANTS AND POLICE DISCRETION

The Supreme Court developed the warrant preference in cases involving “investigatory warrants”—warrants that appear to conform with the magisterial ideal, as was true in *Leon*. The sparse data that are available, however, suggest that most outstanding warrants in the United States are not of this variety at all. They are what I call “non-compliance warrants.” As described in section A below, non-compliance warrants do not aspire to the magisterial ideal. In the aggregate, these warrants create many of the constitutional dangers the Court’s warrant preference is supposed to guard against.

As described in section B, non-compliance warrants number in the millions and likely constitute the majority of outstanding warrants in the

124. *But see* Michael Kimberly, Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 YALE L.J. 177, 179 (2008) (arguing courts should suppress evidence discovered incident to arrest where foreseeable that an unconstitutional stop would result in the discovery of an outstanding arrest warrant).

125. *Strieff*, 136 S. Ct. at 2062 (quoting *Leon*, 468 U.S. at 920 n.21).

126. *Id.* at 2063.

127. *Id.* at 2056.

United States at any given time. It is difficult to make conclusive quantitative claims about outstanding warrants nationwide because data collection is spotty at best.¹²⁸ From the little data that can be gleaned from local sources, one can be confident that these warrants are not just pervasive but are also demographically concentrated among the poor and minorities. This in turn means that officers will reasonably be able to assume that the “hit rate” for outstanding warrants will be higher in poor, minority neighborhoods than elsewhere.

Section C below demonstrates how, in the aggregate, outstanding non-compliance warrants amplify law enforcement discretion in a manner that is fundamentally at odds with the warrant preference and the magisterial ideal. Outstanding non-compliance warrants incentivize unconstitutional seizures. They also generate a species of police enforcement discretion that is homologous to the discretion created by the criminal law itself and is problematic for many of the same reasons. Police discretion and racial disparity often go hand in hand. Non-compliance warrants are no exception. They generate what I call “arrest feedback,” which can exponentially increase race and class disparity in the criminal justice system.

A. *Non-Compliance Warrants*

The vast majority of outstanding warrants are not of the “investigatory” species preferred by the Court. Rather, most outstanding warrants are “non-compliance warrants.” These warrants do not reflect the magisterial ideal as a matter of theory, let alone practice. This section describes non-compliance warrants’ key theoretical and empirical features.

First, as the title suggests, a non-compliance warrant is an arrest warrant issued for failing to comply with a legal obligation imposed on an individual, typically by a court or executive official in connection with a criminal or traffic-related proceeding.¹²⁹ Less frequently, the obligation is imposed in connection with a civil proceeding. Like an investigatory arrest warrant, a non-compliance warrant authorizes police officers to arrest a specific individual.¹³⁰ But the two operate towards different ends.

128. David M. Bierie, *Fugitives in the United States*, 42 J. CRIM. JUST. 327, 329 (2014).

129. In some jurisdictions, probation officers and court clerks have the authority to issue bench warrants without prior judicial approval. See NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 23:13 (1999).

130. In most states, this is framed in terms of a judicial “command[.]” to arrest, see, e.g., CAL. PENAL CODE § 1529 (West 2017); GA. CODE ANN. § 17-4-46 (2015), a point noted by the Supreme Court in *Utah v. Strieff*. 136 S. Ct. at 2062. As discussed in detail below however, that a bench warrant

With an investigatory warrant, the question is not just whether police will be permitted to interfere with an individual's liberty or privacy interest, but whether the individual will be forcibly drawn into a criminal court's jurisdiction. Should police be permitted to put the *suspect* on the path to becoming a *defendant*?¹³¹ In contrast, with non-compliance warrants, the question is how best to achieve submission from a defendant or convict who is already within the court's jurisdiction.

The most common example of a non-compliance warrant is for failing to appear before a court. When a defendant does not appear for a court date, judges typically have the authority to issue a "bench warrant" for the individual's arrest.¹³² The most common context in which individuals fail to appear is in the traffic context, where the obligation to appear is imposed by a police officer in the course of issuing a citation. Failure to pay the fine by the specified date or to appear in court for the scheduled hearing will often result in an arrest warrant. Similarly, a judge may issue a bench warrant for criminal defendants who fail to appear for any hearings at which their appearance was required; judges often have discretion to compel defendant's presence at any hearing they choose.¹³³

Another common species of non-compliance warrant is a "violation's warrant" issued for a probationer or parolee who (there is reason to think) has failed to satisfy one or more conditions of release.¹³⁴ The conditions that a judge might impose as part of a probationary sentence are vast, including payment of various fines, attending counseling, obtaining substance abuse treatment, or submitting to drug testing.¹³⁵ Failure to satisfy any one of these conditions may result in a judge issuing a warrant for the probationer's arrest. Some states even allow probation officers to issue arrest warrants without judicial approval.¹³⁶ Non-compliance warrants may sometimes even be issued in order to enforce conditions that were imposed in a civil proceeding. For example, family court judges are often authorized to issue bench warrants for a parent—typically a father—

is, formally speaking, a command does not extinguish the discretion that police typically enjoy to enforce (or not enforce) such warrants. *See infra* section II.C.2.

131. This distinction is expressed, for example, in the distinction drawn between a "warrant of arrest" and a "bench warrant" under New York Law. *See* N.Y. CRIM. PROC. LAW § 1.20 (McKinney 2017).

132. Different jurisdictions embrace different names for bench warrants such as "writs of arrest" or "capias warrants."

133. Presence can also be required by statute. For an example of how requiring defendants to appear can be used to generate public revenue, see DOJ FERGUSON REPORT, *supra* note 19, at 48.

134. *See* COHEN, *supra* note 129, § 23:12.

135. *See id.*

136. *See id.* § 23:13.

who has failed to make payments or otherwise comply with a child-support order.¹³⁷

A second feature of non-compliance warrants that is intimately related to the first is that judges and police are aligned rather than counter-positioned as the warrant preference and magisterial ideal presuppose. The police apply for an investigatory warrant *ex parte*, and the magistrate's task is to ensure absent parties' constitutional interests are accounted for.¹³⁸ In contrast, courts issue non-compliance warrants of their own accord and then turn to the police to execute them at their behest. Non-compliance warrants are not formally *ex parte*, but there is usually little if any practical opportunity for the defendant's interests to be considered. For example, defendants are usually not represented by counsel at traffic hearings. Similarly, those accused of probation violations are not constitutionally entitled to counsel for probation revocation proceedings, let alone for a warrant hearing if there is one.¹³⁹

Third, courts typically have wider discretion to issue (or not issue) non-compliance warrants than they do investigatory warrants. For example, California law dictates that an arrest warrant "shall" issue upon the police's showing of probable cause.¹⁴⁰ In contrast, California law is permissive with regard to bench warrants: a judge "may" issue a bench should an individual fail to appear.¹⁴¹ But even where this distinction is not formally expressed, it likely exists as a practical matter. To the extent that officers submit a warrant application that demonstrates probable cause, a judge is likely to feel compelled to grant it.¹⁴²

Because non-compliance warrants are designed to secure submission, they exist on a spectrum with other coercive, behavior-inducing techniques. Among the least coercive options is for a judge to simply postpone the court matter requiring the defendant's presence. State laws may also create a range of options depending on the nature of the proceeding. Some states, for example, allow for the suspension of an alleged traffic violator's driver's license.¹⁴³ Similarly, in the probation

137. See Nirej Sekhon, *Punitive Injunctions*, 17 U. PA. J. L. & SOC. CHANGE 176, 193–96 (2014).

138. See *supra* section I.A (discussing warrant preference and magisterial ideal).

139. See *Gagnon v. Scarpelli*, 411 U.S. 778, 784–85 (1973).

140. CAL. PENAL CODE § 817(a)(1) (West 2017).

141. *Id.* § 978.5(a). But see FED R. CRIM. P. 9(a) (upon request from government, court "must[] issue a warrant" for defendant that fails to appear).

142. This, again, is the basis for "rubber stamping" criticism that has been often leveled against warrant. See *supra* notes 65–69 and accompanying discussion.

143. See Larry Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 16–17, 16 n.64 (summarizing state laws).

context, judges have a range of coercive options for inducing compliance.¹⁴⁴

The existence of coercive options, however, does not necessarily mean that judges exercise their formal discretion with sensitivity to the unique circumstances of any particular defendant's case. In most state and local courts, the opposite is true.¹⁴⁵ Non-compliance warrants tend to be issued in rote fashion and in high volume. Most state and local criminal and traffic courts are examples of high-volume courts. Time and resource constraints lead such courts to deliver an abbreviated version of the process popularly associated with criminal law. Many have called this "assembly-line justice."¹⁴⁶ Assembly-line justice does not permit serious inquiry into whether individuals are actually guilty, let alone why they failed to appear. An absent defendant represents an opportunity to quickly move onto the next case. Even if a judge were inclined to inquire as to why a particular defendant failed to appear, there would frequently be no one to question. The judge is likely to just issue a bench warrant. Where defendants fail to appear for proceedings in which they are represented, judges might elect not to issue warrants if counsel proffer compelling explanations for the absence. But the more crowded a court's docket the more perfunctory such inquiries will be, and the more inclined the judge to issue a warrant and move on to other cases.¹⁴⁷

Fourth, non-compliance warrants do not generally operate as directives to specific officers to seek out and arrest particular individuals. Instead, non-compliance warrants tend to function as "red flags" in law enforcement databases. These warrants remain suspended in the digital ether until an officer comes across the individual in the future, identifies the outstanding warrant, and has reason to execute it.¹⁴⁸ State law sometimes requires police agencies to enter outstanding warrants into federal, state, and local databases.¹⁴⁹ The entries consist of information identifying the suspect/defendant along with information regarding the nature of the warrant issued. Law enforcement may also include information regarding the so-called "pick-up radius" which signals the jurisdiction's willingness to expend resources to obtain the

144. See Sekhon, *supra* note 137, at 187 (summarizing techniques available and judicial discretion).

145. See FEELEY, *supra* note 68, at 225–27.

146. See Sekhon, *supra* note 137, at 190.

147. See FEELEY, *supra* note 68, at 270–72.

148. See *infra* section II.C.2 (describing individual officers' discretion).

149. See, e.g., CAL. PENAL CODE § 980 (West 2017).

suspect/defendant if apprehended outside the jurisdiction.¹⁵⁰ Some police departments may focus on enforcing the most serious non-compliance warrants. For example, in jurisdictions that have dedicated parole and probation officers, specific officers may execute warrants for individuals alleged to have violated the terms of supervised release.¹⁵¹ But even there, it is likely to be only the most serious cases that receive attention from these officers.

The less serious the offense, and the more congested the docket, the less likely that a specific officer will be charged with executing the warrant or that the issuing jurisdiction will pick up the suspect if apprehended outside the jurisdiction. For example, resource constraints make it impossible for most jurisdictions to dispatch specific officers to arrest those who fail to appear for traffic violations.¹⁵² Jurisdictions are also unlikely to expend resources to pick up such a suspect from a neighboring jurisdiction, let alone extradite the suspect from out of state, even if detained over a warrant. That means that law enforcement in most jurisdictions will not arrest an individual pursuant to an outstanding warrant unless it is clear the person is within the pick-up radius specified in the database.¹⁵³

Although data are spotty at best,¹⁵⁴ it is safe to assume that the majority of outstanding warrants in the United States are non-compliance warrants, not investigatory warrants. The next section explains why.

B. Pervasiveness and Demographic Concentration

The number of misdemeanors and traffic cases in the United States outpace felony cases by an order of magnitude,¹⁵⁵ making it virtually certain that these cases generate the most non-compliance warrants in the United States. Extrapolating from the little data that are available on outstanding warrants confirms the intuition that most outstanding warrants in the United States are non-compliance warrants based upon

150. See, e.g., CINCINNATI POLICE DEP'T, POLICE DEPARTMENT PROCEDURE MANUAL 12.727 (2010), <http://cincinnati-oh.gov/police/department-references/police-department-procedure-manual/> [<http://perma.cc/L667-5BKM>].

151. See COHEN, *supra* note 134, § 23:16.

152. DOJ FERGUSON REPORT, *supra* note 19, at 56 (noting this point for Ferguson municipal court).

153. See Natalie Tendall, *Why Some Criminals Are Getting Away with Their Crime*, 2 NEWS (May 14, 2015, 6:11 PM), <https://web.archive.org/web/20171018031013/http://wtdn.com/investigative-story/why-some-criminals-are-getting-away-with-their-crime/> [<https://perma.cc/XVQ8-JWYR>].

154. Bierie, *supra* note 128, at 329 (no comprehensive empirical research on the question).

155. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–81 (2011).

misdemeanor or traffic offenses.¹⁵⁶ National and state databases contain records of nearly eight million outstanding warrants, more than half of which are for minor crimes, traffic-related offenses, and violations of civil orders like child support obligations.¹⁵⁷ This understates the total number of outstanding warrants because state and national databases are biased in favor of warrants for more serious crimes, most of which are likely to involve investigatory warrants.¹⁵⁸ Local police agencies enter warrants into national and state databases in part to signal (to other jurisdictions) how willing they are to expend resources on extraditing the wanted individual.¹⁵⁹ Separate and apart from federal and state databases, many urban and suburban jurisdictions maintain their own local databases.¹⁶⁰ The number of total outstanding warrants in the United States would require a tally of all these local databases' contents. That number is sure to be much higher than eight million. For example, the outstanding warrants for FTAs on NYPD-issued citations for minor offenses, often

156. See GREG HAGER, KY. LEGISLATIVE RESEARCH COMM'N, RESEARCH REPORT NO. 236, IMPROVED COORDINATION AND INFORMATION COULD REDUCE THE BACKLOG OF UNSERVED WARRANTS vii, ix (2005), <http://www.lrc.ky.gov/lrcpubs/rr326.pdf> [<https://perma.cc/KPB6-ECC4>] (most outstanding warrants in Kentucky are bench warrants for minor misconduct); SCI. APPLICATIONS INT'L CORP. & RANDALL GUYNES & RUSSEL WOLFF, INST. LAW & JUSTICE, UNSERVED ARREST WARRANTS: AN EXPLORATORY STUDY 12–13, 23 (2004), http://www.ilj.org/publications/docs/Unservd_Arrest_Warrants.pdf [<https://perma.cc/KP65-WSSA>] (same for Montgomery County, Maryland and Hennepin County, Minneapolis) [hereinafter UNSERVED ARREST WARRANTS STUDY]; Andrea F. Siegel, *In Anne Arundel, Tax Refunds Lure People with Outstanding Warrants to Come Clean*, BALT. SUN (Mar. 17, 2013), http://articles.baltimoresun.com/2013-03-17/news/bs-md-ar-tax-refund-warrant-20130312_1_warrants-sheriff-ron-bateman-maryland-sheriffs [<http://perma.cc/4FLH-ACYF>] (three-fourths of outstanding warrants in large suburban Baltimore area are bench warrants for traffic and minor offenses); Brief for Respondent at 1–5, *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056 (2016) (No. 14-1373) (summarizing additional sources of data) [hereinafter Respondent's Brief].

157. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2014, at tbl.5a (2015) [hereinafter BUREAU OF JUSTICE STATISTICS].

158. Bierie, *supra* note 128, at 329.

159. *Id.*

160. Such local databases are common and will typically reflect a fuller record of all the warrants issued by a jurisdiction. Many warrants for minor violations may not be eligible for inclusion in federal and state databases. See, e.g., CITY OF VA. BEACH POLICE DEP'T, WARRANT TRACKING AND SERVICE FIELD GUIDE 4 (2015), <https://www.vbgov.com/government/departments/police/Documents/WarrantTracking%20and%20Service%20%20Field%20Guide.pdf> [<http://perma.cc/HQ9Z-TX2M>] (noting that local database will contain more comprehensive record of local warrants than federal and state databases); TEXARKANA, TEX. POLICE DEP'T, GENERAL ORDERS MANUAL § 3 (2015), <http://ci.texarkana.tx.us/DocumentCenter/Home/View/2677> [<http://perma.cc/EK8T-HPYW>] (same); see also CITY OF MILWAUKEE, FIRE & POLICE COMMISSION, FPC INFORMATIONAL MEMORANDUM CONFIRMATION OF WARRANTS PRIOR TO ARREST (2013), <http://city.milwaukee.gov/ImageLibrary/Groups/cityFPC/Reports/130505FPCMemoreWarrants.pdf> [<http://perma.cc/53P3-LJUD>] (noting existence of local database).

called “desk summons,” are the equivalent of more than 15% of all records in federal and state databases.¹⁶¹

Recent media reports suggest that in New York City alone there are over one million outstanding warrants for FTAs on “desk summons”—police issued-citations for minor offenses.¹⁶² New York City police have discretion to issue “summons” in lieu of arrest for a host of minor offenses such as drinking in public, obstructing a sidewalk, jumping a subway turnstile, and so on.¹⁶³ Aggressive enforcement against minor offenses has been central to so-called “broken windows” policing in New York City, a policing strategy that purports to reduce serious crimes by eliminating the “disorder” that encourages perpetrators of more serious crimes.¹⁶⁴ Desk summons may seem gentler than arresting alleged violators outright, but when such individuals fail to appear in court on a summons or pay a fine, or if there is a processing error on the city’s part, an arrest warrant will typically issue.¹⁶⁵ In 2014, warrants for FTAs issued in more than one third of summons cases.¹⁶⁶

Outside of New York City, traffic infractions constitute a significant portion of municipal and county court dockets. Correspondingly, they tend to generate significant numbers of FTAs. For example, a 2004 study focusing on outstanding warrants in suburban Washington, D.C. and suburban Minneapolis also concluded that most outstanding warrants were bench warrants for failing to appear in court on traffic-related and other minor charges.¹⁶⁷ Seventy-two percent of the outstanding warrants in the suburban D.C. county were for FTAs or probation violations.¹⁶⁸ One-third of those FTAs were traffic-related, while another 27% were for minor offenses.¹⁶⁹ In the suburban Minneapolis County, nearly half the

161. See Allegra Kirkland, *How 1.2 Million New Yorkers Ended up with Arrest Warrants*, BUS. INSIDER (Aug. 4, 2015, 9:10 PM), <http://www.businessinsider.com/how-12-million-new-yorkers-end-ed-up-with-arrest-warrants-2015-8> [<http://perma.cc/GL3J-L2QM>]; Sarah Ryley et al., *EXCLUSIVE: Daily News Analysis Finds Racial Disparities in Summonses in ‘Broken Windows’ Policing*, N.Y. DAILY NEWS (Aug. 4, 2014, 2:00 AM), <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567> [<https://perma.cc/C2Y5-3HSW>].

162. See Kirkland, *supra* note 161.

163. See Ryley et al, *supra* note 161.

164. See *id.*; Kirkland, *supra* note 161.

165. See Kirkland, *supra* note 161.

166. See Michael Schwartz, *New York City Plans to Transform Summons Process*, N.Y. TIMES, Apr. 14, 2015, at A21.

167. UNSERVED ARREST WARRANTS STUDY, *supra* note 156, at 12–13, 23.

168. *Id.* at 13.

169. *Id.* at 14.

outstanding warrants stemmed from traffic offenses and another 20% were for minor offenses.¹⁷⁰

Ferguson, Missouri presents a troubling case study of non-compliance warrants' overuse. The DOJ investigated Ferguson after Michael Brown's shooting death sparked long-simmering community resentments.¹⁷¹ The DOJ's report highlighted the extent to which the city used its criminal justice machinery to extract revenue from Ferguson's citizens.¹⁷² Central to this scheme was aggressive enforcement against "minor violations such as parking infractions, traffic tickets, or housing code violations," many of which carried unusually high fines in comparison to nearby jurisdictions.¹⁷³ The municipal court was profligate in issuing bench warrants for failures to pay and appear, issuing 9,000 warrants in 2013 alone. This amounted to one warrant for every two Ferguson residents.¹⁷⁴ Compounding matters for Ferguson residents, the warrants carried additional fees. While Ferguson was extreme in its unitary focus on revenue, other municipalities in St. Louis County appear to have taken a similar approach.¹⁷⁵ And revenue motives likely inform even large cities' interest in citations and warrants.¹⁷⁶

Evidence and intuition suggest that outstanding non-compliance warrants will not be evenly distributed across a jurisdiction. Rather, the demographic and geographic distribution of warrants will likely reflect (and reinforce)¹⁷⁷ police enforcement patterns. To the extent that the poor and minorities are overrepresented in most jurisdictions' criminal justice systems, the same holds true for those who have outstanding non-compliance warrants. Few jurisdictions make information about outstanding warrants available, and fewer still provide demographic information. There are a few exceptions. For example, in Virginia Beach, approximately 50% of outstanding warrants listed in the publicly available database are non-compliance warrants and 53% of those sought

170. *Id.* at 23. Hennepin County did not keep track of warrants by FTA or probation violations, but rather only the underlying criminal charge. *Id.*

171. See Matt Apuzzo & John Eligon, *Ferguson Tainted by Bias, Justice Department Says*, N.Y. TIMES, Mar. 4, 2015, at A1.

172. See DOJ FERGUSON REPORT, *supra* note 19, at 10.

173. See *id.* at 3, 55.

174. It is unclear what portion of the warrants issued are for individuals who are not Ferguson residents.

175. See DOJ FERGUSON REPORT, *supra* note 19, at 10.

176. See Ryley et al., *supra* note 161 (noting that summons fees constituted second largest source of revenue for New York City's criminal courts).

177. See *infra* section II.C.3.

on non-compliance warrants are Black in a city that is only 20% Black.¹⁷⁸ In Omaha, Nebraska, more than 40% of all outstanding warrants listed are for FTAs, and 33% of those sought are Black in a city that is only 13% Black.¹⁷⁹ In Austin, Texas, 20% of those sought for outstanding non-compliance warrants are Black in a city that is only 7% Black.¹⁸⁰ As is true for virtually all large American cities,¹⁸¹ all three of these cities are residentially segregated by race and class.¹⁸² This likely means that the geographic distribution of outstanding warrants will skew towards the neighborhoods in which poor Black residents are concentrated.

Even when specific warrant data are unavailable, one can safely conclude that minorities are overrepresented amongst those with outstanding warrants whenever enforcement is focused on minority communities, as it frequently is.¹⁸³ New York City's broken windows policing provides a compelling example. It expressly and aggressively targeted low-income minority neighborhoods for low-level police enforcement.¹⁸⁴ High-volume street stops and citations were important

178. Virginia Beach maintains a publicly available database of outstanding warrants. See *About ePRO*, CITY OF VA. BEACH, <https://eprodms.vbgov.com/MainUI/Home/HomeDefault.aspx> [<https://perma.cc/HQ9Z-TX2M>]. Data were retrieved from this database between December 8, 2017 and December 13, 2017 and placed into an Excel spreadsheet. Individuals with multiple outstanding warrants were identified and excluded in order to reflect the number of unique individuals for whom there was at least one outstanding warrant. Excel spreadsheets are on file with author. Warrants characterized as "CAPIAS" were used as a proxy for non-compliance warrants.

179. Omaha maintains a publicly available database of outstanding warrants. See *Warrants*, OMAHA POLICE DEP'T, <http://police.cityofomaha.org/warrants?searchterm=A> [<https://perma.cc/U34Q-SY5D>]. For a description of how data was collected and sorted, see *supra* note 178.

180. Austin maintains a publicly available database of outstanding warrants. See Austin Police Dep't, *Court Services Unit*, AUSTIN TEXAS, <http://www.austintexas.gov/department/court-services-unit> [<https://perma.cc/4RAL-JT3G>]. The database lists outstanding warrants issued by the Municipal Court, which has jurisdiction over misdemeanors, and the Austin Community Court, which is a problem-solving court. All of the outstanding warrants listed are for cases in which a bond amount was set, suggesting that they are all non-compliance warrants. No publicly available information was discovered regarding investigatory warrants; thus no conclusion could be reached regarding the ratio of non-compliance warrants in relation to total warrants. For description of how data was collected and sorted, see *supra* note 178.

181. See SEAN F. REARDON & KENDRA BISCHOFF, *GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME 1970–2009*, at 14 & fig.2 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report111111.pdf> [<https://perma.cc/4TGL-EYF8>] (describing increasing income segregation for minority groups in a large distribution of American cities).

182. Brown University's Diversity and Disparities website includes sortable lists of American cities by income and race segregation. *Diversity and Disparities*, SPATIAL STRUCTURES SOC. SCI., BROWN U., <https://s4.d.brown.edu/projects/diversity/Data/data.htm> [<https://perma.cc/C2LN-KMF9>].

183. See *infra* section II.C.3.

184. Nirej Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1208–10 (2011).

parts of this policing strategy.¹⁸⁵ The vast majority of those who received violations were minorities.¹⁸⁶ Similarly, the DOJ noted that in Ferguson, a disproportionately high proportion of citations, arrests, and vehicle stops in Ferguson were of minorities.¹⁸⁷ Accordingly, in both settings, the vast majority of FTAs generated by these citations would inevitably be for minorities as well.

Outstanding non-compliance warrants' abundance further suggests that there will be a substantial number of arrests based upon such warrants. In New York City, for example, aggressive warrant enforcement was an express part of the broken windows policing strategy.¹⁸⁸ A 2004 study of suburban Washington, D.C. and Minneapolis counties suggested that roughly half and quarter of all arrests in each respective jurisdiction were based upon a warrant.¹⁸⁹ In her *Strieff* dissent, Justice Sotomayor noted data from New Orleans suggesting that one third of arrests were based upon "traffic or misdemeanor warrants," most of which were presumably of the non-compliance variety.¹⁹⁰ One would expect demographic disparities reflected in outstanding warrants to track through to the demographic profile of those arrested. The DOJ noted that the limited data available for Ferguson suggested just such a pattern in warrant-based arrests.¹⁹¹ Without concrete demographic data though, these conclusions are informed conjecture.¹⁹²

Greater data collection regarding warrant issuance and enforcement is urgently needed. But we can be confident that non-compliance warrants

185. See Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), <https://www.nytimes.com/2010/07/12/nyregion/12frisk.html> [<https://perma.cc/W9WL-DZ9X>].

186. See *id.*; Sarah Ryley, *supra* note 161 ("Roughly 81% of 7.3 million people hit with violations between 2001 and 2013 were black and Hispanic . . ."); Schwirtz, *supra* note 166 (comparing summons issued for riding bicycle on the sidewalk in middle-class White neighborhood versus lower-income, Black neighborhood).

187. See DOJ FERGUSON REPORT, *supra* note 19, at 4.

188. See Norimitsu Onishi, *Police Announce Crackdown on Quality-of-Life Offenses*, N.Y. TIMES (Mar. 13, 1994), <https://www.nytimes.com/1994/03/13/nyregion/police-announce-crackdown-on-quality-of-life-offenses.html> [<https://perma.cc/3R5E-WBTK>].

189. See Guynes & Wolff, *supra* note 156, at 25, 27 (analyzing Montgomery County and Hennepin County). The reports do not specify what portion of these arrests were based on non-compliance type warrants.

190. *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting).

191. See DOJ FERGUSON REPORT, *supra* note 19, at 65.

192. See Radical Washentaw, *Why Are Black People in Ypsilanti Disproportionately Arrested on Bench Warrants*, RAW (Jan. 14, 2016), <https://radicalwashtenaw.org/2016/01/14/why-are-black-people-in-ypsilanti-disproportionately-arrested-on-bench-warrants/> [<https://perma.cc/22BE-VTTB>] (noting high numbers of FTA arrests of Black men, but lack of data regarding demographic profile of those for whom warrants issued).

are prevalent and, in many jurisdictions, demographically and geographically concentrated. This allows us to raise deeper questions about the incentives these warrants create.

C. *Warrants, Discretion, and Disparity*

The surfeit of outstanding bench warrants, coupled with the absence of a remedy for unconstitutional seizures, generates three related sets of harms. First, it creates incentives for police officers to engage in unconstitutional stops. Second, these warrants amplify police discretion, raising the practical dangers of opacity and arbitrariness. Finally, police likely use that discretionary authority in a manner that increases race and class disparities in the criminal justice system. This occurs through arrest feedback loops. Put simply, arrests beget warrants and warrants beget arrests. Urban ethnography has begun to illustrate the extent to which outstanding warrants structure the social reality of poor, young men of color. In extreme cases, these warrants can even have tragic consequences, as recently suggested by the Walter Scott shooting in South Carolina.¹⁹³

I. *Unconstitutional Seizures*

The sheer numbers of outstanding warrants and their geographic concentration create powerful incentives for police to engage in unconstitutional, suspicionless seizures.¹⁹⁴ A defendant cannot rely on the Fourth Amendment exclusionary remedy if a warrant was discovered in the course of an unconstitutional seizure. This incentive structure was established long before the Court decided *Utah v. Strieff*. In *Strieff* the Court, over fierce dissents, turned a blind eye to that incentive structure, ratifying unconstitutional police practices.¹⁹⁵ Justice Sotomayor wrote a powerful rebuke to the majority,¹⁹⁶ but even she failed to acknowledge the

193. Walter Scott was shot in North Charleston, South Carolina after he ran from a police officer who had stopped him for a minor traffic infraction. Scott's family members speculated that he ran for fear of arrest on a warrant stemming from outstanding child support. See Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), <https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html> [<https://perma.cc/4XDE-65FP>].

194. See DOJ FERGUSON REPORT, *supra* note 19, at 17 (noting that many unlawful police stops in Ferguson, Missouri "appear to have been driven, in part, by an officer's desire to check whether the subject had a municipal arrest warrant pending").

195. See *Strieff*, 136 S. Ct. at 2064 (2016) (Sotomayor, J., dissenting).

196. See *id.*

full dimensions of the constitutional problems that outstanding warrants can create.

In theory, the police may not randomly stop people for warrant checks. The Fourth Amendment prohibits stops without individualized suspicion¹⁹⁷—meaning reasonable suspicion that an individual has or is about to commit an offense.¹⁹⁸ Officers may constitutionally conduct a warrant check in the course of an otherwise lawful stop.¹⁹⁹ When an officer stops an individual for the sole purpose of conducting a warrant check, the officer must have reasonable suspicion that there is an outstanding warrant for that person.²⁰⁰ But the protection afforded by the Fourth Amendment is only as vital as the remedy made available for its violation. And in most cases, there is no meaningful remedy afforded those who are subjected to an unconstitutional stop for a warrant check.

On its face, *Strieff* would appear to have been a case about unconstitutional seizures. But *Strieff* never made the argument that Utah could not hold him pursuant to the outstanding warrant. Rather, *Strieff* argued that the State should not have been permitted to use the fruits of the search incident to his unconstitutional arrest.²⁰¹ Officers discovered narcotics evidence while searching him incident to arrest and Utah sought to convict *Strieff* of a new crime based on that evidence.²⁰² Why did *Strieff* not challenge the seizure directly rather than indirectly through the evidence seized incident to the arrest?

The simple (and question-begging) answer is that exclusion is available for unconstitutionally seized evidence but not for an unconstitutionally seized suspect for whom there is probable cause to detain.²⁰³ As a practical matter, the fruits of a search conducted following arrest represent the only vehicle for challenging many arrests' constitutionality.²⁰⁴ In *Strieff*, the Court, like all the parties and amici, assumed this point. Had the officer failed to find any incriminating evidence incident to arrest, *Strieff* would have had no basis for seeking a remedy in criminal court.

197. See *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

198. See *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

199. See *Rodriguez v. United States*, ___ U.S. ___, 135 S. Ct. 1609, 1615 (2015) (suggesting that conducting warrant check during legitimate traffic stop is constitutionally permissible).

200. See *Prouse*, 440 U.S. at 663.

201. *Strieff*, 136 S. Ct. at 2064.

202. *Id.* at 2059–60.

203. See *United States v. Crews*, 445 U.S. 463, 474 (1980) (“Respondent is not himself a suppressible ‘fruit,’ and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt . . .”).

204. ALLEN, *supra* note 65, at 500 n.18.

The Court has stated that the exclusionary rule does not apply to a defendant's person.²⁰⁵ This idea first took shape in the nineteenth century and was later expressed as the *Frisbie-Ker* doctrine.²⁰⁶ The historical record prior to that is ambiguous.²⁰⁷ There is however, some support for the notion that dismissal was sometimes afforded criminal defendants for official misconduct occurring in connection with arrest.²⁰⁸

Frisbie-Ker holds that due process does not require a criminal court to consider how a defendant was brought before it, but only that the defendant receive a fair trial once there.²⁰⁹ Neither *Frisbie* nor *Ker* involved law enforcement's violation of the Fourth Amendment. Rather, in *Ker*, the earlier of the two cases, a federal agent unlawfully kidnapped the defendant from Peru for criminal trial in the United States.²¹⁰ *Ker*'s arrest constituted a kidnapping because it was not carried out in precise accord with the United States's extradition agreement with Peru. The federal agent had the "necessary papers" to obtain custody of *Ker*, but the agent failed to "[present] them to any officer of the Peruvian government."²¹¹ Peru was not party to the litigation; nor is there mention in the opinion of its having asserted any sovereign injury as a result of the federal agent's conduct. Extradition is more a matter of sovereign prerogative than an individual right.²¹² That is important context for the Court's statement that "we do not think [a defendant] is entitled to say that he should not be tried at all" because of "mere irregularities in the manner in which he may be brought into . . . custody."²¹³ Moreover, *Ker* was decided in 1886, before the advent of substantive due process concepts, modern procedural due process, or the exclusionary rule. Sixty years later, *Frisbie* invoked the same language in an interstate extradition case

205. *See Crews*, 445 U.S. at 474.

206. *See id.* (citing *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886)).

207. *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 15 (2009–10) (researching pre-foundation judicial practice is challenging because so little of it was reported).

208. *See id.* at 22–25. The analogy to contemporary criminal justice practice is also quite weak given that criminal justice was not bureaucratized and constitutional violations were not thought attributable to the government. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 621–22, 663–67 (1999).

209. *Frisbie*, 342 U.S. at 522 (citing *Ker*, 119 U.S. at 444).

210. *Ker*, 119 U.S. at 438.

211. *Id.*

212. *Id.* at 442 (noting that extradition treaty between United States and Peru did not create any positive right on the part of defendant to asylum in Peru).

213. *Id.* at 440.

without any new analysis.²¹⁴ All of this is to say, *Frisbie-Ker* provides weak conceptual moorings for denying a remedy for unconstitutional seizures.

Frisbie-Ker aside, granting an exclusionary style remedy for unconstitutional seizures might seem impractical. Excluding the person would amount to a court setting a wanted individual free but without legally altering the individual's wanted status. Since the constitutional problem is with the stop, not the warrant, there would be no legal basis for quashing it. To release a wanted defendant is to invite formalistic contrivance. The judge would "exclude" the defendant, who would then exit the court to confront the sheriff waiting just outside, ready to arrest on the valid warrant.²¹⁵ Perhaps clever defendants would find a way to evade the waiting sheriff, but letting a legitimately wanted individual *run* seems strange. Criminal prosecution "is not a fox hunt," Justice Holmes quipped.²¹⁶ The Court has dealt with this by simply eliminating the possibility of a practical remedy for an unconstitutional seizure where a valid warrant exists.²¹⁷ That too seems strange. But it is a defensible choice if one accepts a magisterial view of warrants (or extradition). In this sense, *Frisbie-Ker* returns us to *Utah v. Strieff*.

Both *Frisbie-Ker* and *Strieff* are based on the view that an arrest conducted pursuant to judicial order is "ministerial." Where a magistrate has made the choices as to who is to be arrested or what is to be searched, the dangers of law enforcement discretion are substantially contained. To use the Court's language in *Strieff*, an extradition order, like an arrest warrant, is "a judicial mandate to an officer to . . . make an arrest."²¹⁸ Warrants force the police to make their case for searching/seizing in advance of doing so.

The problem with this conception is that in cases like *Evans*, *Herring*, and *Strieff*, the Court proceeds as if all warrants were cut of the same magisterial cloth when, in fact, they are not. In the same vein, *Frisbie-Ker* has been generalized to apply far more broadly than those cases' unique facts might have suggested.²¹⁹ Generalizing in this way has allowed the Court to overlook the extent to which some, likely most, species of warrants generate precisely the kind of problematic enforcement discretion that has long been the Fourth Amendment's core concern.

214. *Frisbie*, 342 U.S. at 522.

215. *See id.*

216. *See Kelly v. Griffin*, 241 U.S. 6, 13 (1916) ("But merely to be declared free in a room with the marshal standing at the door having another warrant in his hand would be an empty form.").

217. *Cf. United States v. Crews*, 445 U.S. 463, 474, 474 n.20 (1980).

218. *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2062 (2016).

219. *See Crews*, 445 U.S. at 474 (1980).

The unconstitutional practices described here are not likely to be evenly distributed across most jurisdictions. The greatest protection afforded any individual's constitutional rights flows from the fact that suspicionless warrant checks are not efficient from an arrest-maximizer's perspective. But where an officer has reason to believe that a substantial number of people likely have outstanding warrants such that the hit rate of doing random warrant checks will be high, we should expect unconstitutional stops to occur.²²⁰ For these reasons, aggressive warrant enforcement is not likely to occur in neighborhoods where residents enjoy political and economic power. But in poor neighborhoods, outstanding warrants' prevalence combined with their geographic concentration makes the likelihood of a "hit" higher. This point is developed next.

2. *Expanding Enforcement Discretion*

Characterizing warrant enforcement as "ministerial" touts the magisterial ideal at the cost of denying the discretion that non-compliance warrants affirmatively generate. That non-compliance warrants take the form of a "command" to police officers should not be taken at face value.²²¹ They are no more a judicial command than the criminal law is a legislative command. Both "commands" generate pools of prospective arrestees. Law enforcement agencies and officers enjoy considerable discretion to select (and not select) from the pool. Scholars have long noted and criticized the broad discretion that police enjoy to enforce (or *not* enforce) criminal laws.²²² Enforcement discretion raises the dangers of arbitrariness and opacity.²²³ The same dangers exist with regard to warrant enforcement.

Scholars first took note of police discretion in the mid-twentieth century.²²⁴ The vast expanse of human conduct covered by criminal laws makes full enforcement impossible. That means that the police inevitably have choices to make about when to enforce those laws and when not to. Kenneth Culp Davis, one of the early legal scholars to critically engage the reality of police discretion, argued that these choices allowed

220. See *Strieff*, 136 S. Ct. at 2068–69 (Sotomayor, J., dissenting); Respondent's Brief, *supra* note 156, at 5–7.

221. See *supra* note 130.

222. KENNETH CULP DAVIS, *POLICE DISCRETION* 99, 139 (1975).

223. See *id.* at 99.

224. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 6–7 (1993) (summarizing early research).

individual patrol officers to be “policy makers” for their beats.²²⁵ Davis noted that most police manuals, where they existed at all, included nothing about enforcement priorities.²²⁶ Taking cover under the rhetorical blanket of “full enforcement,” police department administrators deferred to patrolmen to decide when and against whom to enforce criminal laws.²²⁷ The early scholars were particularly troubled by officers’ decisions *not* to enforce criminal laws because those choices were entirely invisible to supervisors.²²⁸

Institutional choices are an even more significant determinant of enforcement outcomes than individual officers’ choices. As I have argued in previous work,²²⁹ choices with regard to which criminal laws to enforce, how intensively to enforce them, in which locations, and with which tactics are all policy questions within police departments’ discretion.²³⁰ Departments’ choices with regard to each of these questions have significant distributive consequences.²³¹ For example, using arrest-intensive enforcement tactics will likely generate more arrests than using high-visibility deterrence tactics.²³² Electing to do arrest-intensive narcotics enforcement in a low-income minority community as opposed to a wealthier middle-class one will generate arrestees, defendants, and convicts that are correspondingly poor.²³³ The DOJ’s analysis of the Ferguson Police Department revealed a particularly insidious example of how institutional and individual officer discretion interact to produce unjust outcomes. The DOJ found that the Ferguson Police Department “communicated to officers that . . . they must focus on bringing in revenue.”²³⁴ Officers were required to meet specified citation quotas each month.²³⁵ The institutional emphasis on revenue generation led officers to engage in aggressive municipal and traffic code enforcement, issuing

225. DAVIS, *supra* note 222, at 99, 139.

226. *Id.* at 33–37, 52.

227. *Id.* at 52 (“[The] only open enforcement policy is one of full enforcement.”).

228. Wayne R. LaFare, *Police Rule-Making and the Fourth Amendment*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 211, 215 (Lloyd E. Ohlin & Frank J. Remington eds., 1993) (characterizing early scholars’ concerns). Discretion increases in inverse relation to the seriousness of the relevant crime: officers can ignore traffic offenses as they like, but not homicides.

229. See Sekhon, *Redistributive Policing*, *supra* note 184, at 1172.

230. *Id.* at 1186–91.

231. *Id.*

232. *Id.* at 1206.

233. *Id.* at 1199–2000.

234. DOJ FERGUSON REPORT, *supra* note 19, at 11.

235. *Id.* at 12 (twenty-eight tickets per month).

citations for minor misconduct²³⁶—for example, traffic and pedestrian violations, disturbing the peace, and even failing to maintain one’s yard—that were punished with unusually high fines.²³⁷

Non-compliance warrants suggest that courts are enmeshed in a complex ecosystem in which they sometimes restrain and at other times affirmatively generate police enforcement discretion. Ferguson provides a disturbing example of the latter. The court, like the police, played a central role in generating revenue for the city. To that end, it aggressively levied fees and fines against those charged with minor municipal infractions, made it procedurally difficult to contest those infractions, and wantonly issued non-compliance warrants for failures to appear.²³⁸ The warrants also carried fees payable to the municipality that were separate and apart from those for the underlying infraction.²³⁹

Just because non-compliance warrants are formally expressed as a “command” to police does not mean police understand them as such. The San Francisco Police Department, for example, permits its officers to forgo arrest in cases where an individual with an outstanding traffic warrant claims to have paid it.²⁴⁰ Officers are supposed to obtain supervisor approval first,²⁴¹ but how that would be enforced is unclear. Just as with criminal law violations, outstanding warrants afford individual officers analogous “policy making” authority to that Davis wrote about in the 1970s.²⁴² Officers’ acts of leniency in this context are no more visible to supervisors or the public than forgone opportunities to enforce criminal laws. One might imagine an officer directing a sympathetic suspect to “take care” of an unpaid traffic ticket rather than arresting the suspect on an outstanding warrant. That act of leniency is qualitatively no different than the officer letting a speeder go “with a warning” in the first instance. Such acts of leniency are sometimes publicly remarked upon, usually as laudatory examples of officers’ magnanimity.²⁴³ But few of those examples are likely brought to public light.

236. *Id.* at 4.

237. *Id.* at 52.

238. *Id.* at 42, 55.

239. *Id.*

240. S.F., Cal., Police Dep’t Gen. Order 6.18 II.A.1.b (July 27, 1994), <https://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/14754-DGO6.18.pdf> [<https://perma.cc/F9LM-JK3C>].

241. *Id.*

242. DAVIS, *supra* note 222, at 99, 139.

243. See, e.g., Kate Irby, *The Officer Could Have Taken Him to Jail, but Took Him to His Sister’s Funeral Instead*, STAR-TELEGRAM (Sept. 27, 2016), <http://www.star-telegram.com/news/nation-world/national/article104390156.html> [<https://perma.cc/GF3L-AZEY>].

As with criminal laws, departmental policy-making discretion in warrant enforcement has broader and deeper implications than any individual officers' discretionary choices. Nor are departments particularly transparent about these choices, let alone their implications.

As a threshold matter, it is a department's willingness to invest in technological infrastructure and personnel that enables the possibility of remote warrant checks and enforcement at all. For officers to routinely conduct warrant checks, they must be able to remotely access a complete and well-organized store of information regarding outstanding warrants. Without both communication and data-storage technology, ascertaining whether a bench warrant exists for a person in the field would be time and resource-prohibitive. The Los Angeles Police Department, often at the forefront of technological innovation amongst large American police departments, embraced high-tech communication and data storage beginning in the 1950s.²⁴⁴ By the 1970s, warrant checks were a routine feature of traffic stops in at least some jurisdictions.²⁴⁵ Today, there are vast federal, state, and local databases cataloging information regarding outstanding warrants, the nature of the underlying offense, identifying information regarding the individual sought, and other information.²⁴⁶ Officers in the field can often readily access those databases, particularly when their department has invested in patrol-vehicle computers.²⁴⁷

Police departments also enjoy discretion with regard to populating federal, state, and local databases,²⁴⁸ signaling to its officers and other departments how seriously it takes any particular warrant. Whether they do so or not turns on discretionary use of personnel resources. Entering warrant data into databases is labor intensive, and there is no mechanism for ensuring which, if any, warrants an agency has entered.²⁴⁹ It is likely that many outstanding warrants are not entered in any database. For those

244. See MIKE DAVIS, CITY OF QUARTZ 251 (Mike Davis & Michael Sprinkler eds., 1990); LeRoy McCabe & Leonard Farr, *An Information System for Law Enforcement*, 1966 AM. FED. INFO. PROCESSING SOC. 513, 515–18 (describing system design study for Los Angeles Police Department information system).

245. See John A. Webster, *Police Task and Time Study*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 94, 99 (1970) (noting possibility of remote warrant check during traffic stop).

246. See Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Twenty-One Technical Experts and Legal Scholars in Support of Respondent at 11–12, *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056 (2016) (No. 14-1373).

247. See *id.*

248. See BUREAU OF JUSTICE STATISTICS, *supra* note 157, tbl.5a.

249. See Lawrence Budd, *Many Wanted Felons Go Free*, DAYTON DAILY NEWS (Sept. 8, 2012, 12:00 AM), <https://www.daytondailynews.com/news/crime--law/many-wanted-felons-free/3A7pWp qam4WDWqzs3OHugP/> [https://perma.cc/NHJ4-E9UT].

that are entered, law enforcement agencies are able to specify a “pick-up radius”—the geographic scope within which the agency will expend resources on collecting a wanted person.²⁵⁰ The pick-up radius reflects how seriously a department takes a particular category of warrants.²⁵¹ Some relatively minor offenses may have a county-only pick-up radius while serious offense may have a nationwide pick-up radius.²⁵² There would be a legal basis for arresting someone on a warrant who was outside the pick-up area specified by the warrant-issuing jurisdiction, but the arresting agency would have to pay for transport. That is a discretionary act that an arresting agency is unlikely to undertake.

As with the enforcement of substantive criminal laws, police departments enjoy considerable discretion with regard to warrant enforcement. Departmental choices regarding whether, where, and how criminal laws are to be enforced determine the volume and demographic profile of arrestees.²⁵³ The same holds true for warrant enforcement. Once the infrastructure is in place to allow for quick warrant checks from the field, departmental choices will determine how harshly or leniently individual officers will use warrant checks as an enforcement tactic. A department could very well decide not to make arrests for certain categories of warrants at all.²⁵⁴ The Minneapolis Police Department recently announced just such a policy decision.²⁵⁵ It has elected not to make arrests for outstanding warrants where the underlying offenses are minor—like traffic infractions.²⁵⁶ The choice was not one in favor of leniency for its own sake, but rather to make resources available for more serious crime control exigencies.²⁵⁷ This is the same rationale that a department might offer for forgoing arrests of low-level substantive criminal law offenses, like possession of small quantities of marijuana.

250. See *Warrant Computer Entries, Prisoner Return and Extradition*, in CINCINNATI POLICE DEPARTMENT PROCEDURE MANUAL 12.727 (2010), <https://www.cincinnati-oh.gov/police/department-references/police-department-procedure-manual/> [<https://perma.cc/X5GR-ZHQK>].

251. *Id.*

252. *Id.*

253. See Sekhon, *Redistributive Policing*, *supra* note 184, at 1186–90.

254. See *Procedure 503 – Obtaining and Executing Arrest Warrants*, in SAN ANTONIO POLICE DEPARTMENT GENERAL MANUAL 503.05(B) (2014), [https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/503ObtainingandExecutingArrestWarrants\(10-03-14\).pdf](https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/503ObtainingandExecutingArrestWarrants(10-03-14).pdf) [<https://perma.cc/9PB8-3G5N>] (no arrest permitted for out-of-state misdemeanor warrant).

255. Lou Raguse, *MPD Not Arresting for Misdemeanor Bench Warrants*, KARE 11 (July 20, 2016, 11:55 PM), <http://www.kare11.com/news/mpd-not-arresting-for-misdemeanor-bench-warrants/278203637> [<https://perma.cc/VS75-3CVK>].

256. *Id.*

257. *Id.*

A police department could just as easily exercise its warrant enforcement discretion harshly. For example, as described in the introduction, warrant enforcement has been a centerpiece of high-profile Detroit Police Department raids.²⁵⁸ While the raids were supposed to target at-large felons, most of the arrests were of individuals with outstanding traffic warrants.²⁵⁹ Quality-of-life policing in New York City presents a more far-ranging and systematic example. Warrant enforcement has featured prominently in the New York City Police Department's quality-of-life campaign.²⁶⁰ As detailed at length by others, quality-of-life policing entailed aggressive policing against minor, so-called broken windows crimes on the premise that doing so would create the impression of "order" and thereby deter more serious crimes.²⁶¹ As part of the initiative, the New York Police Department incentivized patrol officers to issue more citations and make more arrests for a range of previously tolerated misconduct like drinking in public, aggressive panhandling, obstructing public sidewalks, and so on.²⁶² Concomitantly, the department devoted resources to developing the infrastructure required for tracking the warrants issued against those who had FTAs for quality-of-life crimes.²⁶³ This was, in turn, supposed to enable officers in the field to more readily make arrests on such warrants.²⁶⁴ In other words, New York Police Department policy makers conceived of warrant enforcement and criminal law enforcement as coterminous features of the same harsh, arrest-intensive strategy for creating "order" on New York's streets.

The order maintenance example in New York City suggests the extent to which enforcement discretion generated by warrants and substantive criminal law can amplify one another. The most acute danger with discretionary authority is that it will be systematically exercised to the disadvantage of marginal groups. The next section demonstrates why warrants are more than just *another* law enforcement practice that incrementally contributes to criminal justice's disproportionate impact on the poor and minorities.

258. Ryan Felton, *Operation: Restore Public Relations*, DETROIT METRO TIMES (Apr. 15, 2015), <http://www.metrotimes.com/detroit/operation-restore-public-relations/Content?oid=2334953> [<https://perma.cc/E2UR-Q34Y>].

259. *Id.*

260. See Onishi, *supra* note 188.

261. See Sekhon, *Redistributive Policing*, *supra* note 184, at 1203–06.

262. See Benjamin Weiser, *New York City to Pay up to \$75 Million over Dismissed Summonses*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/nyregion/new-york-city-agrees-to-settlement-over-summonses-that-were-dismissed.html> [<https://perma.cc/QHX9-ZJRH>].

263. See Onishi, *supra* note 188.

264. See *id.*

3. *Class, Race, and Arrest Feedback*

Aggressive warrant enforcement will create arrest feedback loops that amplify the demographic consequences of aggressive policing in poor, minority communities. Arrests for criminal law violations, non-compliance warrants, and warrant enforcement are recursive, generating mutually reinforcing demographic and geographic effects over time. Arrests for substantive criminal law violations generate non-compliance warrants in the form of FTAs, alleged probation violations, and so on. Those warrants will, in turn, generate arrests. But they will also help identify new substantive criminal law violations as was true in *Strieff*. The outstanding warrant in that case allowed the officer to arrest Strieff and search him incident to arrest, revealing narcotics, which generated a new criminal law offense.²⁶⁵ A new cycle of non-compliance warrants and arrests could then ensue. Police agencies are likely to rely upon the demographic profile generated by this feedback loop to channel arrest-intensive policing resources. Doing so contributes to the feedback and provides even greater rationale to continue the practices that sustain it.

In any given jurisdiction that has a substantial poor population, criminal courts are likely to issue disproportionately greater numbers of non-compliance warrants for poor defendants. In many of America's largest jurisdictions, minorities inordinately constitute the ranks of the poor and the non-compliance warrants issued will reflect that demographic fact.²⁶⁶ This will be true even if one assumes that there is proportionality in the number of well-to-do and poor defendants charged with criminal law violations and infractions at any given time—and as discussed in detail later on, that is an exceptionally unrealistic assumption. The poor are less likely to comply with the kinds of conditions that trigger warrants, particularly those that require payment. Even making appearances in court is more difficult for the poor, who tend to have marginal employment that affords little flexibility to take time off work.²⁶⁷ This makes appearing for court dates more difficult than for those who have more stable employment.²⁶⁸ Once a warrant has issued, those with unstable

265. *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2056, 2060 (2016).

266. See Elizabeth Kneebone & Richard V. Reeves, *The Intersection of Race, Place, and Multidimensional Poverty*, BROOKINGS (Apr. 21, 2016), <https://www.brookings.edu/research/the-intersection-of-race-place-and-multidimensional-poverty/> [https://perma.cc/JAM5-AG49].

267. See, e.g., DOJ FERGUSON REPORT, *supra* note 19, at 48.

268. See *id.*

employment stand a greater risk of losing their jobs if incarcerated, even for relatively short periods of time.²⁶⁹

The fear of incarceration may, ironically, lead the poor to be less likely to deal with outstanding warrants.²⁷⁰ This will be most true for non-compliance warrants that are for failures to pay.²⁷¹ Traffic and low-level criminal offenses are typically punished with fines. Similarly, paying fees and fines is often a condition of probation.²⁷² Other probation conditions, such as complying with treatment and counseling obligations, also may require making payment. And of course, warrants for failing to pay child support are almost exclusively leveled against poor men.²⁷³ When financial obligations like these go unpaid—or one fails to appear for a court hearing involving such a financial obligation—a bench warrant will often issue.²⁷⁴ Despite the constitutional requirement that courts level no greater fee or fine than a defendant can actually pay, poor violators may be afraid to appear in court because they fear being jailed for their inability to comply.²⁷⁵

Court rules and processes also can play a significant role in ensuring that the poor are more likely to be warranted than those with means. These processes often ensure that the poorest and most vulnerable defendants are unable to comply with court-ordered conditions, including the obligation to appear for court proceedings. The DOJ's Ferguson report details a stark example.²⁷⁶ The court liberally issued warrants for defendants charged with minor crime and citations, doing so at a disproportionately high rate for minority defendants.²⁷⁷ The court required in-person appearances for most municipal offenses. That requirement

269. See Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339, 354 (2009).

270. See DOJ FERGUSON REPORT, *supra* note 19, at 4, 47–49 (documenting belief amongst those unable to pay fine that appearing in court will result in immediate arrest); Daniel M. Flannery & Jeff M. Kretschmar, *Fugitive Safe Surrender*, 11 CRIM. & PUB. POL'Y 437, 451 (2012).

271. DOJ FERGUSON REPORT, *supra* note 19, at 4, 47–49.

272. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 314 (2016).

273. See Sekhon, *Punitive Injunctions*, *supra* note 137, at 193–96.

274. In theory, it is unconstitutional to jail a defendant for failing to pay a fee or fine that she is too poor to pay. *Bearden v. Georgia*, 461 U.S. 660 (1985). But, when the issue is raised at all, the “ability to pay” is a question of fact that judges have discretion to decide. In contexts like child support, judges have been known to impose financial obligations based upon fanciful projections of the potential earnings that a low-skilled, poor father might earn. See Sekhon, *Punitive Injunctions*, *supra* note 137, at 196.

275. See Flannery & Kretschmar, *supra* note 270, at 451.

276. See DOJ FERGUSON REPORT, *supra* note 19.

277. See *id.* at 68.

increased the likelihood that defendants would fail to appear—particularly those who worried about paying the high fines and those with inflexible work schedules. Compounding the appearance requirement, the DOJ found that the court did not provide information to defendants regarding their rights, the charges against them, or even the correct date or time of their hearing.²⁷⁸ Ironically, full payment was required as a precondition for quashing any warrant, however egregiously unlawful its issuance.²⁷⁹

Ferguson may be an extreme example, but it is likely different from other jurisdictions in quantity, not kind. Fees and fines are heaped upon poor defendants in many jurisdictions with similar consequences to those observed in Ferguson.²⁸⁰ Many jurisdictions, for example, rely upon private contractors to provide probation services for misdemeanors and traffic violations.²⁸¹ The private probation companies generate revenue by charging probationers a supervisory fee.²⁸² Company employees are, in turn, rewarded for maximizing revenue.²⁸³ This leads to aggressive use of revocation and the concomitant issuing of non-compliance warrants.²⁸⁴ This “aggressive collection agency” approach to collecting fines and fees impacts poor defendants most severely.²⁸⁵

The discussion thus far has assumed that police arrest the poor and the privileged proportionally for new criminal law and traffic violations. That, of course, is completely untrue. Police enforcement is usually directed more aggressively against poor and minority communities.²⁸⁶ At any given time, in most large urban jurisdictions in the United States, the majority of defendants who are forced into the criminal justice machinery

278. *Id.* at 51–52.

279. *See id.* at 47.

280. *See Profiting from Probation: America’s “Offender-Funded” Probation Industry*, HUM. RTS. WATCH (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [<https://perma.cc/J59A-APTY>] (describing fees imposed by private probation companies in Georgia) [hereinafter HUMAN RIGHTS WATCH].

281. *See Sarah Doisca Bellacicco, Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System*, 48 GA. L. REV. 227, 245 (2014).

282. *See id.*

283. *See* HUMAN RIGHTS WATCH, *supra* note 280, at 51.

284. S. CTR. FOR HUMAN RIGHTS, *PROFITING FROM THE POOR: A REPORT ON PREDATORY PROBATION COMPANIES IN GEORGIA* 8 (2008) [hereinafter S. CTR. FOR HUMAN RIGHTS]; *see also* HUMAN RIGHTS WATCH, *supra* note 280, at 51 (124,788 warrants issued in 2012 in Georgia for individuals on private probation). Some probation companies allow supervisors, who are rewarded for generating revenue, to shed non-paying probationers from their caseload as an incentive. *Id.*

285. *See* DOJ FERGUSON REPORT, *supra* note 19, at 4, 52–54; S. CTR. FOR HUMAN RIGHTS, *supra* note 284, at 8.

286. *See* Sekhon, *Redistributive Policing*, *supra* note 184, at 1199–200.

are low-income minorities.²⁸⁷ Calls for police service may be higher in low-income communities than other communities. The police might also elect to use aggressive arrest and citation-intensive enforcement tactics in poor neighborhoods as part of a broken windows campaign as occurred in New York City or narcotics suppression as has occurred in any number of cities.²⁸⁸ A city like Ferguson, motivated by revenue incentives, might focus police resources in poor neighborhoods because there are more readily visible code violations that can be ticketed there or because residents are less likely to challenge the citations.²⁸⁹ Similar logic might impel a highway patrol division to target a crime like license tag renewal violation, which is more frequently committed by low-income motorists.²⁹⁰

Because there are proportionally more “minority inputs” into the criminal justice machinery for new criminal law and traffic violations, that will contribute to their proportionally greater failures to appear, failures to pay, and failures to comply with probation conditions.²⁹¹ Non-compliance warrants are a by-product of aggressive criminal law enforcement. But substantive criminal law violations are also a by-product of aggressive warrant enforcement. An outstanding non-compliance warrant not only creates a basis for making an arrest but is a vehicle for identifying new criminal law violations. Once police make an arrest pursuant to an outstanding warrant, the Fourth Amendment permits a search incident to arrest, which will sometimes yield evidence of a new crime; in *Strieff*, it was narcotics evidence.²⁹² The Supreme Court held that such evidence is admissible in a new criminal case, even if the stop that allowed for discovery of the outstanding warrant was unconstitutional.²⁹³

287. See, e.g., DOJ FERGUSON REPORT, *supra* note 19, at 65–66 (minorities arrested at higher rate for violations than Whites).

288. See *supra* notes 258–64 and discussion; Adrienne L. Meiring, *Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks*, 54 OHIO ST. L.J. 497, 500 (1993) (describing twined use of warrant checks and stop and frisk as part of “saturation patrol” strategy in various cities).

289. See *supra* notes 258–64 and discussion.

290. Cf. Sharon LaFreniere & Andrew Lehern, *Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/A9HL-C3DA>] (discussing racial disparity in traffic stops in North Carolina).

291. Cf. John S. Goldkamp & E. Vîlcică, *Targeted Enforcement and Adverse System Side Effects: The Generation of Fugitives in Philadelphia*, 46 CRIMINOLOGY 371, 374 (2008).

292. *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2060 (2016).

293. *Id.*

This sort of dynamic, however, has the potential to shape police enforcement policy more broadly.

For any jurisdiction that has a substantial poor minority population, arrest feedback may create what Bernard Harcourt has called a “ratchet effect.”²⁹⁴ A ratchet effect occurs when police use the demographic profile of an incarcerated population to predict the identities of future offenders and direct enforcement resources accordingly.²⁹⁵ In the context of warrant enforcement, police might use demographic and geographic information on the prevalence of outstanding warrants—or their perceptions of demographic and geographic prevalence—to structure how enforcement resources are distributed. More outstanding warrants for minority suspects will support more arrest-intensive policing in minority neighborhoods. In turn, that will generate more arrests for substantive criminal law violations and more warrants. Over time, this will lead to an increasingly concentrated minority demographic in a jurisdiction’s criminal justice machinery. Judges are probably less likely to set affordable bail for those defendants who have, or have had, a warrant for an FTA. In-custody defendants are more likely to plead guilty than out-of-custody defendants. These dynamics are likely to fuel perceptions among the police of disproportionate minority criminality. That is to say that compliance warrants’ enforcement effects will generate their own, self-supporting demographic rationale.

Arrest feedback helps explain why outstanding warrants figure prominently in the experience of young men of color in America’s cities. Although that experience is not the subject of sustained sociological treatment, recent urban ethnography suggests that just the perception of having an outstanding warrant constrains a person’s quotidian life choices, like applying for a job, to monumental ones, like being present for the birth of a child.²⁹⁶ As discussed, an outstanding warrant functions as a “red flag,”²⁹⁷ leaving many in poor minority communities to navigate life with the belief that the State’s punitive eye is trained upon them. They may not even be aware of the warrant’s precise nature.²⁹⁸ For the young men of color who constitute America’s urban underclass, the perception of having “caught a warrant” amplifies the sense of vulnerability to arrest

294. BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 145 (2005).

295. *Id.* at 152–54.

296. See Goffman, *supra* note 269, at 343–45, 351–52, 354.

297. See *supra* notes 147–48 and discussion.

298. See Flannery & Kretschmar, *supra* note 270, at 449 (finding that one in three warrant study participants was unaware of the nature of outstanding warrant).

and incarceration. That sense leads many to curtail encounters not just with the police, but with public actors who are thought to have a connection to the police like hospitals and courts.²⁹⁹ That is to live a cramped existence at best. It may even lead to deadly consequences if, for example, the belief that one has an outstanding warrant prompts someone to run from a police officer who then shoots.³⁰⁰

III. REGULATING NON-COMPLIANCE WARRANTS

Section II demonstrated that non-compliance warrants generate both constitutional and extra-constitutional harms. As a preliminary matter, federal, state, and local governments should systematically collect data on the number of outstanding warrants, the bases for those warrants, the number of arrests that are warrant-based, and the demographic profile of the individuals sought and arrested. As is true in other areas of criminal justice,³⁰¹ the paucity of data makes it difficult to evaluate judicial and police practices, let alone reform them. The analysis in Part II also counsels in favor of substantive reform at the federal, state, and local levels.

First, the Supreme Court should create a meaningful remedy for the constitutional harms non-compliance warrants encourage. This requires substantial revision of Fourth Amendment jurisprudence: mainly, it demands that some version of an exclusionary remedy be available for wrongfully seized persons. Such dramatic reworking of doctrine is not imminent. Thankfully, there is considerable room for state and local reform. Local courts and police generate and enforce the overwhelming majority of outstanding non-compliance warrants. Accordingly, those agencies are well positioned to ameliorate the problems created by non-compliance warrants.

A. *Excluding the Person*

The Supreme Court decided *Utah v. Strieff* incorrectly for the reasons identified by Justices Sotomayor and Kagan.³⁰² But section II.B.1 demonstrated that *Strieff* only marginally contributes to the already powerful incentives that police have to conduct unconstitutional warrant

299. See Goffman, *supra* note 269, at 343–45, 351–52, 354.

300. See *supra* note 193.

301. See, e.g., Nirej Sekhon, *Blue on Black: An Empirical Assessment of Police Shootings*, 54 AM. CRIM. L. REV. 189, 193 (2016) [hereinafter Sekhon, *Blue on Black*] (noting paucity of data regarding police shootings).

302. *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056, 2064–74 (2016).

checks. Excluding evidence seized incident to arrest would not likely alter those incentives so profoundly. If police are to be deterred from carrying out unconstitutional warrant checks, defendants must have an immediate remedy in their criminal case for the unconstitutional seizure.³⁰³

The Court should provide some form of the exclusionary remedy for unconstitutional seizures like that which occurred in *Strieff*. The remedy should not depend upon whether police happen to discover additional evidence of wrongdoing following a search incident to arrest. In many cases, this would mean releasing defendants from custody and allowing them to *run* notwithstanding valid warrants for their arrest.

Frisbie-Ker is the greatest obstacle to making some version of the exclusionary remedy available to those subject to unconstitutional warrant checks. *Frisbie-Ker* forbids a court from dismissing an indictment based on law enforcement having unlawfully obtained the defendant's presence.³⁰⁴ *Frisbie-Ker*, which developed in the context of extradition cases, makes sense where the magisterial ideal is borne out, whether in the context of extradition or warrants. Where the State has gone to the trouble of obtaining judicial approval for an enforcement action and commits a procedural error in its execution, the defendant should not receive the windfall of dismissal. *Frisbie-Ker* rejected just such a "sporting theory" of criminal procedure. But the rejection is profoundly out of tune with the account of non-compliance warrants provided in this Article.

Non-compliance warrants and their enforcement reflect the extent to which criminal justice actually has become sport. When Justice Holmes quipped that criminal enforcement is not a "fox hunt,"³⁰⁵ he could not have anticipated that a government would reward police, prosecutors, and judges for racking up high scores in a relentless competition to produce revenue.³⁰⁶ In Ferguson, issuing non-compliance warrants was just a strategic move in the broader revenue scheme. The warrants bore no relation to criminal prosecution's traditional ends: punishing or deterring crime. Enforcing the warrants amounted to playing the odds in neighborhoods where the "hit rate" is likely to be high.³⁰⁷ There were no "points" to be had by upholding the Constitution.³⁰⁸

303. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (right to be free of unconstitutional search is an "empty promise" without exclusionary remedy).

304. See *supra* section II.C.1.

305. See *supra* note 216 and accompanying discussion.

306. See DOJ FERGUSON REPORT, *supra* note 19, at 10 (noting that police officers were more concerned with generating revenue than public safety or welfare).

307. See *supra* section II.C.3.

308. See *supra* section II.C.1.

Denying an exclusionary remedy to unconstitutionally seized defendants is not to abjure a sporting theory of criminal procedure, but rather to embrace one whose rules are stacked against defendants. Where a defendant is unconstitutionally stopped and arrested on an outstanding warrant for a minor traffic violation, being released is no windfall. Doing so simply denies the state the ill-gotten gains of its unconstitutional conduct. This is entirely consistent with the traditional understanding of how the exclusionary rule is supposed to deter police officers from engaging in unconstitutional misconduct.³⁰⁹ But extending the exclusionary remedy to unconstitutional seizures in this way would raise procedural difficulties separate and apart from *Frisbie-Ker*.

First, courts would have to construct a typology of warrants that distinguishes between those which could be the basis for exclusion and those which could not. An unconstitutional seizure should, in other words, compel release in some cases, but not others.³¹⁰ As suggested by the example above, the case for release is strongest with regard to non-compliance warrants for outstanding traffic infractions.³¹¹ In these cases, courts would have to develop rules specifying some amount of time during which the police would be barred from re-serving the warrant. This would prevent the exclusionary remedy from collapsing into risible formalism: a judge sets a defendant free just for the few moments it takes the sheriff to re-arrest based on the valid warrant.³¹²

In contrast to traffic infractions are serious felonies involving harm to others. The logic of *Frisbie-Ker* is most convincing in cases where an investigatory warrant is outstanding in connection with a serious case like this. A sporting theory of criminal procedure is least satisfactory in this context. Letting a suspected murderer free for an unconstitutional warrant check defies any ordinary conception of justice. The cost-benefit analysis

309. See Stuntz, *supra* note 74, at 895–96.

310. This will not sit comfortably with the Court's insistence that the Fourth Amendment is trans-substantive and applies in exactly the same way regardless of the underlying criminal offense at issue. William Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 870 (2001). The simple rejoinder is that the proposal here does not implicate substantive Fourth Amendment principles, but only whether the exclusionary rule is available—an inquiry that requires cost-benefit analysis. See *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2051, 2061 (2016) (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

311. In traffic cases and other comparably minor criminal cases, quashing the warrant and dismissing underlying case would seem fair. Such a remedy would be appropriate if the jurisdiction considering exclusion were the very one that had issued the warrant. But that would not always be the case. If an individual were unconstitutionally seized by the police in a jurisdiction other than that which issued the warrant, the court considering exclusion would not have authority to quash the outstanding warrant or dismiss the underlying case.

312. See *Kelly v. Griffin*, 241 U.S. 6, 13 (1916).

that exclusionary rule jurisprudence calls for³¹³ clearly would not weigh in favor of release in such a case. There is, of course, a vast swath of cases between the traffic FTA and the wanted murder suspect. Courts would have to decide how to treat warrants stemming from these intermediate cases over time, and principles would accordingly develop.

Second, there would have to be an opportunity to litigate the Fourth Amendment violation soon after arrest. Suppression is typically litigated in advance of trial. But for those who are unconstitutionally seized and subsequently held on an outstanding warrant, trial may be too late for exclusion to be useful. Defendants should have an opportunity to litigate exclusion in the immediate wake of arrest. While someone held pursuant to a warrant is not constitutionally entitled to a *Gerstein* hearing,³¹⁴ some functional equivalent is necessary in order to guarantee that exclusion is of practical use. This, however, raises a third and less tractable problem.

The evidentiary contest over the stop's constitutionality will pit officer testimony against the defendant's testimony, and officers are likely to have the upper hand.³¹⁵ Officers are permitted to approach citizens and ask them to consensually share identifying information, which would provide a sufficient basis for a lawful warrant check.³¹⁶ In the absence of consent, officers are permitted to seize an individual and conduct a brief investigative interview if there is "reasonable suspicion" to think that the individual has committed or is about to commit a crime.³¹⁷ Officers can obtain identifying information as part of such an interview.³¹⁸ Depending on the neighborhood, a "bulge [at the] waistband," "'furtive' movements," or holding eye contact may be sufficient to constitute "reasonable suspicion."³¹⁹ It is easy for an officer to manufacture such facts following what, in fact, was an unconstitutional stop. This, of course, is a species of "testilying."³²⁰ Whenever resolution of Fourth Amendment questions turns on a contested issue of fact regarding the basis for the stop, officers will have opportunity for strategic re-telling of the facts. And defendants,

313. *See id.*

314. *See Gerstein v. Pugh*, 420 U.S. 103, 113 (1974).

315. *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 COLO. L. REV. 1037, 1041–45 (1996).

316. *See* Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 YALE L.J. 177, 179 (2008) (describing practice).

317. *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1967)).

318. *See Hiibel v. Nevada*, 542 U.S. 177, 187–88 (2004) (holding Fourth Amendment permits state to compel suspect to disclose name in a lawful *Terry* stop).

319. *See* Sekhon, *Blue on Black*, *supra* note 301, at 198 (describing incident reports prepared by Chicago police).

320. *See* Slobogin, *supra* note 315, at 1041–45.

particularly if it is just their word, are left in the awkward and untenable position of persuading judges that officers lied on the stand. This evidentiary problem is endemic in Fourth Amendment litigation and should not prevent the creation of a remedy for unconstitutional seizures.

Even if making exclusion available for seizures is largely symbolic, that symbolism is superior to the status quo, where there is no remedy at all. The absence of a remedy signals to police agencies and officers that the practice is permissible.³²¹ Symbolically underscoring the impermissibility of unconstitutional conduct is important, even if not actionable in every case of a violation. And, of course, there will be some cases in which, for whatever reason, it is factually clear that police did conduct an unconstitutional stop before discovering a valid non-compliance warrant. *Strieff* is an example of just such a case. It is unclear why there should not be a remedy in such cases, just as there is when physical evidence is unconstitutionally discovered or seized. The Court itself elliptically recognizes the awkwardness of this disjuncture in *Strieff*.

In *Strieff*, the Court indicated that it might be appropriate for courts to exclude physical evidence seized incident to arrest if a defendant can show that police regularly and systematically make unconstitutional seizures in order to do warrant checks.³²² Practically speaking, it will be difficult for most criminal defendants to marshal the evidence required to successfully demonstrate a pattern and practice of unconstitutional policing. I have argued elsewhere that public defenders in particular should take up the Court's challenge, beginning by systematically tracking clients' reports of police misconduct.³²³ In the meantime, however, there is little leverage for challenging unconstitutional seizures where a valid warrant is discovered. Thankfully, the possibility of meaningful local reform does not turn on constitutional principles.

B. *Embracing the Magisterial Ideal*

Local police and state courts bear most of the responsibility for the problems described in this Article. Accordingly, they are well situated to contain those problems.

321. Of course, a civil remedy is theoretically available for violating the constitutional right, but the impediments to obtaining such a remedy make it impractical for the vast majority of those subject to a brief, unconstitutional warrant check. See ALLEN ET AL., *supra* note 65, at 337–41.

322. *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2015, 2064 (2016).

323. See Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 474 (2017).

Local police departments can use their considerable discretion to decline to enforce non-compliance warrants.³²⁴ As discussed above, the Minneapolis Police Department adopted such a policy.³²⁵ A department might, for example, issue a blanket policy that forbids officers from making stops based solely upon non-compliance warrants for traffic-related matters. Should record of such a warrant arise in the course of an otherwise lawful stop, officers should warn the citizen but should not arrest on the warrant alone. To discourage officers from making unconstitutional stops to carry out warrant checks, a department might refuse to process arrests that are based on such warrants alone. Many police departments will hesitate to restrain officer discretion in this way for the reasons suggested by the analysis in Part II. Even if a department were to nominally embrace such a policy, it might not apply the policy vigorously if at all. Police departments are notoriously opaque with regard to policymaking and implementation. For that and other reasons, police self-regulation has not been particularly effective—at least from a civil rights standpoint—in other contexts, and there is little reason to think that it would be different here. Judicial regulation is more promising.

State and local courts should embrace the magisterial ideal. As detailed in Part I, this requires that they seriously consider a defendant's interests and balance them against the government's interests before issuing a warrant. Reconciling the magisterial ideal with the realities of mass justice will be tricky. Criminal court judges will, for example, face countless cases for low-level crimes and infractions in which defendants fail to appear. In the absence of the defendant or any meaningful information about the defendant, it will be difficult for a judge to be circumspect in the way that the magisterial ideal presupposes. As a bare minimum, judges should resist issuing warrants in a thoughtlessly mechanical way. A non-compliance warrant should not be a rote, default action. Non-compliance warrants all too easily become just that in low-level cases because the stakes in any particular case are low, and there is little legal or bureaucratic resistance to issuing a warrant. As this Article has endeavored to show, however, this practice has harmful consequences in the aggregate.

Courts' efforts to rein in non-compliance warrants will be greatly aided in jurisdictions where the executive and legislative branches are committed to reforming their practices with regard to low-level offenses. For example, New York City has been reconsidering its commitment to

324. *See supra* section II.C.2.

325. *See supra* notes 255–57 and discussion.

quality-of-life policing for many years. The city recently announced that it would curtail its reliance on the desk summons that have generated over a million outstanding warrants for FTAs.³²⁶ But even in the absence of such political commitment, local courts have considerable power to control non-compliance warrants' issuance.

The magisterial ideal suggests that warrants ought to issue as a matter of last resort after a judge has painstakingly reviewed a particular defendant's individual circumstances. As a practical matter, that will not be possible in most mass justice courts for obvious reasons: there are too many cases and too little information readily available about a (typically, absent) defendant's circumstances. Thus, the local judiciary should not leave it to individual judges to satisfy the magisterial ideal in individual cases. Instead, courts should address non-compliance warrants as a matter of institutional policy and craft default principles that attempt to approximate the magisterial ideal.

Basic, starting principles that courts might work from in devising policy include the following:

(1) Courts should clearly state that non-compliance warrants are a last resort where a non-compliant defendant threatens the orderly dispensation of justice, not the first line of administrative recourse.

(2) Courts should identify procedural requirements that unnecessarily generate FTAs such as requiring in-person appearance for infractions and motions practice in criminal cases. As discussed above, FTAs constitute a substantial portion of non-compliance warrants.³²⁷ Limiting the circumstances in which an individual defendant need appear in court will correspondingly limit the opportunities for FTAs to issue.³²⁸ For defendants who are represented, courts might waive personal appearance for all hearings save those where the defendant's appearance is absolutely necessary—for example, trial or a suppression motion in which she plans to testify. For unrepresented parties—including those charged with traffic offenses—courts might use technological solutions to permit defendants to appear virtually when they would like to contest a citation or make a showing that they are unable to pay.

(3) Courts might create blanket policies not to issue non-compliance warrants for specific categories of offenses. For example, non-compliance warrants may be gratuitous if state law creates an alternative, less intrusive

326. See Schwirtz, *supra* note 166.

327. See *supra* note 193.

328. DOJ FERGUSON REPORT, *supra* note 19, at 48 (noting Ferguson court's requirement that defendants appear in person for broader range of infractions and offenses than required under state law).

mechanism for ensuring the vindication of the underlying infraction. For example, in many states, outstanding traffic tickets must be paid before a driver can renew her license.³²⁹ When such a mechanism exists for an offense, courts might consider eliminating non-compliance warrants altogether.

(4) Courts might create blanket policies not to issue non-compliance warrants for specific categories of alleged offenders. For example, someone who has no history of FTAs should receive the benefit of the doubt should that individual fail to appear for a court date or allegedly fail to satisfy a probation condition. For such an alleged offender, the court's default action might be to reschedule hearings and re-send notice to the last known address.

Courts should also create administrative policies that aim to minimize the harms generated by non-compliance warrants. Again, such policies should be conceived through the lens of the magisterial ideal, with sensitivity to local circumstances. Some rough principles from which such policies might evolve include the following:

(1) Do not allow court clerks to issue non-compliance warrants. The magisterial ideal presupposes that a neutral magistrate exercise judgment before a warrant issues. Even if the moment of "neutral decision making" is not exalted in the way that Supreme Court jurisprudence would presuppose, the symbolic significance of a judge issuing warrants should not be entirely set aside. Allowing non-judicial staff to issue warrants also increases the risk of non-compliance warrants becoming a bureaucratic default action.

(2) Allow court clerks to quash warrants issued for FTAs within some clearly specified time after the warrant has issued. Court clerks have a significant role to play in the management of non-compliance warrants. Individuals who have outstanding warrants should be incentivized to have those warrants quashed so that they do not remain outstanding indefinitely. That might be accomplished by announcing clear rules about how and when warrants may be quashed by a clerk. Allowing for an administrative employee to quickly quash a warrant should make the process less intimidating than having to appear before a judge. Clear rules as to how and when warrants may be quashed administratively will also serve to put individuals at ease that they will not be summarily arrested if they visit the courthouse with an outstanding warrant.³³⁰

(3) Make it easy for individuals to ascertain whether there is an outstanding warrant for their arrest. As suggested by the discussion in Part

329. See Rosenthal, *supra* note 143, at 16–17, 16 n.64.

330. See DOJ FERGUSON REPORT, *supra* note 19, at 4, 47–49.

II, non-compliance warrants are often issued and entered into databases unbeknownst to the named individuals. Among certain communities, this can create pervasive anxiety and mistrust of police and other public institutions.³³¹ Courts might use technology to create a non-threatening mechanism for individuals to ascertain whether there is actually an outstanding warrant for their arrest and on what grounds. The same system ought to be used to apprise defendants of whether quashing the warrant is administratively possible and what steps might be taken to accomplish that end. Courts should assemble such systems carefully to ensure that defendants' privacy interests are not compromised—for example, by making their warrant status readily accessible to everyone.

(4) Organize periodic amnesties for certain categories of outstanding warrants. This is particularly viable for warrants that are based on some failure to comply with a financial obligation to the state.³³²

A particular court might experiment with these and other proposals for reducing the number of non-compliance warrants that are issued at any given time. Far more important than embracing any particular proposal is for jurisdictions to engage the non-compliance warrants issuance as an important policy question.

CONCLUSION

This Article's account of non-compliance warrants calls not only the Fourth Amendment's "warrant preference" into question, but also the courts' efficacy as police regulators. Courts do not have a command and control relationship with the police. Courts both limit and generate police discretion. This dynamic plays out not in the course of any one case but over the life cycles of a multitude of cases. No single non-compliance warrant generates incentives for the police to violate the Constitution or measurably exacerbates the class and racial disparities that have become endemic in criminal justice. That is likely what makes it easy for judges to issue non-compliance warrants as a thoughtless, administrative act in one case after another. It is in the aggregate that these warrants amplify police discretion for the worse. If courts are to ameliorate the harms non-compliance warrants create, they must first recognize themselves as policy makers, not just arbiters of individual cases.

331. See Goffman, *supra* note 269, at 343–44, 351–52, 354.

332. The city of Decatur, Georgia, for example, recently announced such an amnesty. See *2017 Amnesty Program*, CITY OF DECATUR, <http://www.decaturga.com/city-government/city-departments/municipal-court/2016-amnesty-program> [<https://perma.cc/J2L7-83J6>].

Utah v. Strieff is a poor decision, not least because its reasoning is unpersuasive. More troublesome is the Court's continuing commitment to withdrawing the Fourth Amendment from playing a role in regulating the racial and class consequences of policing in the United States.³³³ State and local courts should not take their cues from this opinion. With or without *Strieff*, state and local courts are best positioned to craft solutions for the harms non-compliance warrants create. These courts should not forsake that opportunity just because the Supreme Court has given them permission to do so.

333. See *Utah v. Strieff*, __ U.S. __, 136 S. Ct. 2051, 2068 (2016) (Sotomayor, J., dissenting).