

# SUSPECT SEARCHES: ASSESSING POLICE BEHAVIOR UNDER THE U.S. CONSTITUTION\*

JON B. GOULD  
STEPHEN D. MASTROFSKI  
George Mason University

## **Research Summary:**

*This study examines police conformity to the law by evaluating direct observations of police searches in a medium-sized American city against the applicable constitutional standards. Other researchers have investigated police misconduct, but the present study uses direct observations of police behavior. The research asks three questions: How frequently do patrol officers engage in searches? How often do their searches meet constitutional standards? What explains the proclivity to search unconstitutionally? The results paint a disquieting picture, with nearly one-third of searches performed unconstitutionally and almost none visible to the courts. The research links police misconduct to the municipality's "war on drugs," but surprisingly, the majority of constitutional violations was concentrated in a small number of otherwise model officers engaged in community policing.*

## **Policy Implications:**

*Based on researchers' direct field observations, this analysis suggests that studies of constitutional violations based on secondary or official records touch only the exposed tip of the population of police searches, and far more importantly, they may vastly understate the extent of constitutional violations. This is not the picture offered by Wilson and Kelling (1982), who claimed that the police previously had been constrained by legal restrictions. If anything, the data support Kelling's (1999) more recent contention that police officers are "pushing the Fourth Amendment" to the verge of or beyond what is legally permissible. There are substantial costs when the police search unconstitutionally, not only to the rights of individuals but also to the legitimacy of law enforcement. The present observations were conducted in the midst of a war on drugs, which raises the question of what a replication*

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*would show now that the nation's local law enforcement agencies have been enlisted in a war against terrorism.*

**KEYWORDS:** Police, Search and Seizure, Constitutional Law, Drug War.

Democratic societies create a tension between the latitude granted law enforcement officials to intrude into citizens' affairs and the rights of those citizens to be free from state interference. This dilemma is especially poignant in the United States, where the Constitution frames the limits on state encroachment. Although case law defines the scope of rights to which citizens are entitled, both scholars and courts recognize that law on the books is not "what law is" (Brigham, 1996:6), and that police are known to deviate from extant constitutional law while carrying out their jobs (Skolnick, 1994). These deviations portend serious consequences for citizens and officers alike. Representing a gap between what law promises in theory and what the state delivers in practice, police misbehavior undermines citizens' confidence in the legal system and reduces their inclination to obey laws and support government authorities (Tyler, 1997).

For several decades, police researchers have tried to determine the extent and causes of police activities that fail to conform to the requirements of law. Originally focused on police searches in response to *Mapp v. Ohio* (1961) and the creation of the exclusionary rule, the research has expanded to address stops, interrogations, and use of force. Most of the research has been limited to secondary, indirect data sources, making it difficult to ascertain the true scope of the problem. Considering that searches are among the most intrusive aspects of police activity, we need to know to what extent officers are exercising this authority legitimately under the Constitution.

In this study, we evaluate direct observations of police searches against the applicable constitutional standards. We ask three questions: How frequently do patrol officers engage in searches? How often do their searches meet constitutional standards? What accounts for the occurrence of unconstitutional searches? These are crucial questions for civil libertarians and justice officials alike, and given the recent scrutiny of police profiling (Gross and Barnes, 2002; Gross and Livingston, 2002; Montgomery, 2001), they represent an opportunity to evaluate the propriety of police practices. In addition, the study extends earlier analysis of police searches by examining what actually happens in the field rather than relying on official, and perhaps biased, accounts of police behavior.

The results paint a disquieting picture of police misconduct. Nearly one-third of observed searches were unconstitutional, and almost none were visible to the courts. Studies of constitutional violations based on secondary or official records touch only the exposed tip of the population

of police searches, and far more importantly, they vastly understate the extent of constitutional violations. Moreover, this study links much of the observed police misconduct to a “war on drugs,” with the majority of constitutional violations concentrated in a small number of otherwise model officers engaged in community policing. This is not the image offered by Wilson and Kelling (1982), who claimed that the police previously had been constrained by legal restrictions. If anything, the data support Kelling’s (1999:13–14) more recent contention that police officers are “pushing the Fourth Amendment” to the verge of or beyond what is legally permissible. The research shows that there are substantial costs to be paid when the police search unconstitutionally, not only to the rights of individuals but also to the legitimacy of law enforcement.

The article is divided into seven sections. Part One describes the changing focus in assessing police behavior and discusses earlier research that evaluated the legality of police searches. Part Two offers a framework for explaining why some searches comply with constitutional requirements and some do not. Part Three describes our research method. Part Four analyzes direct observations of police behavior in a metropolitan police department. Parts Five and Six explore empirical explanations for such misconduct. In the concluding section, we address the implications of the findings on police practices and suggest an avenue for further research.

## POLICE SEARCHES AND THE LAW

The police, usually the first agents of the justice system to deal with “something-that-ought-not-to-be-happening-about-which-something-ought-to-be-done-NOW!,” play a crucial role in determining the quality and quantity of justice Americans receive (Bittner, 1974:30). Much of the twentieth century was devoted to reforming the police so that they would render justice by becoming more effective crime fighters, but doing so in close conformance with the requirements of law (Fogelson, 1977; Klockars, 1988; Reiss, 1992; Skolnick, 1994; Walker, 1977). Reformers attempted to limit abuses of heightened crime fighting efforts by simultaneously strengthening legal constraints. Appellate court rulings on various aspects of police authority played an important role in reformers’ efforts to curb abuses (Leo, 1992).

In the last two decades, a new reform wave has altered attitudes toward the role of legal institutions in establishing criteria for police performance. Community- and problem-oriented policing advocates have encouraged police to focus on the consequences of their efforts, not for law but for the community: the amount of safety, the sense of security, the sense of community, and the general quality of life (Goldstein, 1990; Sparrow et al., 1990; Trojanowicz and Bucqueroux, 1990). Indeed, the current reform

ethos emphasizes the limits of legal criteria for advancing this broader vision of policing (Goldstein, 1990; Wilson and Kelling, 1982). That is perhaps because, at best, legal standards are nowadays viewed as specifying the minimum required of police—that is, demarcating the boundary between what is and is not permissible (Bittner, 1974; Klockars, 1988; Wilson, 1968).

Reform trends notwithstanding, recent events raise questions about whether police officers are meeting these “minimum” legal standards. Several jurisdictions have been challenged on the inappropriate use of race in police stops (e.g., *New Jersey v. Soto*, 1996; *Whitfield v. Eagle County*, 1993; *Wilkins v. Maryland*, 1993; Powell, 2003;), whereas other departments have been sued over excessive use of force (e.g., Grunwald, 1999). The resulting public outcry should give pause to those who place crime-fighting over legality, for police conformance to the law in the execution of their authority does matter in fundamental ways. First, police legitimacy rests heavily on the perception that officers act according to the law (Reiss and Bordua, 1967; Skolnick and Fyfe, 1993). Where support for the police is low, it is often due to perceptions of police unfairness and illegality, a view that is disproportionately found among racial minorities (Skogan, 1994; Walker et al., 1996). Not only have studies shown that police adherence to fair procedures exerts a significant influence on citizens’ willingness to obey the law (Mastrofski et al., 1996; Paternoster et al., 1997; Sherman, 1997; Tyler, 1990), but also the aftermath of highly publicized cases of police misconduct—such as Rodney King, Abner Louima, and Amadou Diallo—illustrates the influence of police illegality (or the appearance of illegality) in generating criticism of police and pressure for policy or legal change.

Second, as community policing has encouraged police to become more (pro)active than ever in the private affairs of citizens, the evolving tactics increasingly implicate suspects’ procedural rights. Aggressive order maintenance has become a staple among the problem-solving interventions police employ, resulting in more suspect and traffic stops, and more searches for drugs, firearms, and other contraband (Kelling and Coles, 1996). Since the 1980s, the police have spearheaded the war on drug crime and violence, largely by employing tactics about which the Bill of Rights is particularly sensitive: arrest, interrogation, search and seizure, and use of force (Skolnick, 1994). Even those who heartily approve of “broken windows” policing also note the risk of zealotry that produces constitutional violations (Kelling, 1999). Indeed, to the extent that police become more intrusive into citizens’ private lives to secure public safety, it is all the more important to exercise vigilance in the protection of these fundamental legal rights.

Since the 1960s, researchers have examined the legality of police practices. Investigators have addressed arrests, use of force, interrogations, and lately, stops. Prominent among these studies have been evaluations of police searches. The reasons are at least twofold. First, searches intrude on the privacy of citizens, with officers invading the most personal space of an individual, his person, and his effects. Second, a citizen's interest in this privacy right is protected by a constitutional guarantee—the Fourth Amendment—and enforced by the exclusionary rule, which is designed to deter police misconduct (*U.S. v. Calandra*, 1978). Regardless of whether the exclusionary rule is effective, the legality of police searches raises serious questions about the rights of individuals against the state and the legitimacy of law enforcement in effecting procedural justice.

With a few exceptions (NIJ, 1982; Comment, 1968), the majority of past research suggests that police officers conform to the law when searching suspects and making arrests (Canon, 1974; Comptroller General, 1979; Davies, 1983; Nardulli, 1983; Uchida and Bynum, 1991; Wasby, 1976). Examining the results of suppression motions across multiple jurisdictions, researchers in several studies have found that only a minimal number of cases are lost because of illegal police stops or searches (Comptroller General, 1979; Davies, 1983; Nardulli, 1983; Uchida and Bynum, 1991). Although the rate may be higher for drug cases (Davies, 1983; Oaks, 1970; Spiotto, 1973), the highest rate recorded for illegal searches was 2% of arrests.<sup>1</sup>

At the same time, a separate track of contemporary research suggests that police officers have only a rudimentary knowledge of search and seizure law.<sup>2</sup> One study of officers nationwide concluded, "A significant percentage of line uniformed officers in states with law on warrantless searches and seizures no more restrictive than United States Supreme Court decisions have practically no working knowledge of that law" (Memory, 1988:34). These findings have been replicated in another study of patrol officers, in which almost half of the officers who participated in a questionnaire and simulation were disposed to carry out an illegal intrusion in hypothetical search scenarios (Heffernan and Lovely, 1991). In-service training seemed to reduce officer error, but even extensively trained officers were "mistaken about a quarter of the time about the lawfulness of intrusions governed by specific rules of search and seizure" (Heffernan and Lovely, 1991:369).

If these lines of research suggest divergent conclusions, the confusion

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1. A 1982 study in California found a much higher rate (NIJ, 1982), but it has been reanalyzed and criticized as methodologically flawed (Davies, 1983).

2. Some earlier research—all of it nearly 40 years old—concluded that police officers were knowledgeable about constitutional standards and acted strategically in how and when they searched (ABF, 1957; Tiffany et al., 1967).

may be explained by their different research methods. Each examines police practices from at least one layer of distance. Suppression motions, for example, only address those searches that both lead to arrest and are challenged in court by a defendant. There is a selection effect, for researchers are not examining the full set of police searches conducted in the field. By contrast, interviews with officers may raise concerns of external validity and reactivity effects. An officer's knowledge of the law in a calm, deliberative setting may—or more likely, may not—replicate his split-second decision making on the street. Moreover, officers may shade their responses to portray themselves in a flattering light to researchers, even when anonymity is guaranteed.

Perhaps the most valid approach to studying police practices is direct observation. Although there are still reactivity effects—officers adjusting their behavior because of the presence of an observer—“[o]bservation of relevant behavior provides the most reliable impact data” of police practices (Canon, 1991:446). In the 1960s, Black and Reiss (1967) observed police-citizen encounters in Boston, Chicago, and Washington, D.C. Researchers identified police searches, which they evaluated for utility and citizen objections, but they did not code the searches for constitutionality. Others, too, have observed police search practices, with Skolnick's (1994) classic study of “Eastville” and “Westville” perhaps the most cited. The study illuminated common police search practices, noting that officers frequently skirted constitutional standards; it also identified the officer mind set that motivated and justified such actions—a focus on discovering and controlling crime and applying “conventional morality” to standards of police behavior in dealing with suspects. As valuable as this groundbreaking study was, it relied on qualitative analysis that identified common patterns of behavior among narcotics officers. It was unable to systematize sampling and quantify results, making it difficult to determine just how prevalent these practices were and to measure the strength of the explanatory power of a variety of possible influences. Moreover, nearly four decades have since passed, with many changes to legal standards and arguably many changes in the nature and extent to which training and other forms of professional influence may have made inroads into the extralegal habits of police.

More recently, both the New York Attorney General's Office and the U.S. Attorney for the Southern District of New York evaluated the stop-and-frisk practices of police officers in New York City (Civil Rights Bureau, 1999; Weiser, 2000). As startling as their findings were—researchers concluded that up to one-seventh of stops failed to meet constitutional standards (Civil Rights Bureau, 1999)—the data both excluded all searches more intrusive than a frisk and relied exclusively on reports

from the officers involved. According to the New York Civilian Complaint Review Board, police officers routinely fail “to file the required paperwork after frisking or searching people” (Weiser, 2000:A1). Moreover, as the reports can be used during criminal prosecutions, there may be an incentive for officers to color the basis of their behavior to secure a conviction. When law students from Columbia University analyzed police arrest records at the time of *Mapp v. Ohio* (1961), they found that the percentage of cases in which drug evidence was discovered in plain sight rose 40% in the six months after the Supreme Court’s decision. Left with few other explanations, researchers concluded that officers were disguising arrests with false testimony (Comment, 1968:94).

### WHY ARE SOME SEARCHES CONSTITUTIONAL AND SOME NOT?

There is no well-developed theory that explains police conformance or nonconformance to the Constitution, but there are a number of theories about the behavior of law that can be adapted to this end. We start with the notion of legitimacy, that to the extent police officers respect and accept the constitutional principles of search and seizure, they will be more inclined to follow those rules (Tyler, 1990; Tyler and Huo, 2002). Such legitimacy may take two forms: (1) Officers may embrace constitutional rules about search and seizure because they believe in the rightness and value of those rules, or (2) regardless of their views about the particular rules, officers may take seriously their formal obligation to uphold those rules as laid out by the institutions charged with enforcing them, the courts (Tyler and Huo, 2002:101–105).

A second view attaches legal compliance or noncompliance to a rational calculation of personal benefits and costs associated with a set of alternative choices about how to handle a situation (Tyler, 1990; Vold et al., 2002:203–205). For example, an officer might be predisposed to follow constitutional search practices when the officer calculates the risks and costs of not doing so (detection and punishment from the department hierarchy, embarrassment in court) are sufficiently high compared with the anticipated benefits (recognition and reward for disrupting the illegal practices of the suspect and others involved). Of course, both of these perspectives presume that constitutional compliance or noncompliance are acts consciously undertaken. Sometimes officers may engage in search practices without accurate knowledge of the legal requirements. They may be unaware that certain practices are constitutionally forbidden or that others are permitted (Heffernan and Lovely, 1991; Memory, 1988). Because virtually all American police officers now receive at least a modicum of training on the law of search and seizure when they attend recruit

training, total ignorance of constitutional requirements seems a low probability. Nonetheless, standards change, some rules are more complex than others, the quality and quantity of training varies, and officers' capacity to grasp the more complex standards will also vary.

The above perspectives treat the compliance/noncompliance question generically, as if police behave without regard to the characteristics or legally irrelevant behaviors of the targeted suspect, but there are, of course, forces at work that may cause police to distribute constitutional or unconstitutional searches in a selective manner. Some persons may be more at risk than others to be targeted for punitive or intrusive police interventions. Black (1976; 1995) contends that the behavior of legal actors is driven by the "social space" occupied by the players. There are a variety of relevant social dimensions—wealth, race, gender, culture, organizational affiliation—but all are premised on a single point: those least able to wield social, political, or economic power may be at the greatest risk of improper police practices. For example, wealthy suspects, because they command greater respect and are capable of retaining a competent and motivated attorney, are less likely to experience improper police practices than are poor suspects. Similarly, suspects who show deference to police—thereby making the officer's job less onerous—reduce their risk of punitive and intrusive police behavior.<sup>3</sup>

All three sources of influence on police behavior (legitimacy, rational calculation, and social distribution) function simultaneously, and all three are influenced (intentionally or not) by the larger organizational, legal, and social environment in which police officers operate. Indeed, police departments may affect officers' commitment to the law, their rational calculations, and their predispositions to distribute unconstitutional searches among different social segments of the public. Departments do this by their policies and practices in such areas as recruitment and selection of officers, training and socialization of officers, monitoring officer performance, investigating complaints, and disciplining and rewarding officers. However, the most direct way that departments affect these processes is by targeting problems and establishing priorities. When "war" is declared on a particular problem, the mobilization of attention and resources is at

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3. A variation on the socially differentiated policing theme is that police attentions are ecologically distributed according to the distribution of the problems they are charged with handling (various crimes and disorders), and that these sorts of problems are disproportionately found among people who are at the economic, social, and cultural margins of society (Bittner, 1970). Although this may be used to justify disparate rates of some types of police intervention across racial or other socioeconomic groups (e.g., stops, searches, and arrests) (Walker, 2001), one cannot construct such a justification for the distribution of a behavior that is illegitimate, such as an improper search.

its highest state, and this can profoundly affect the moral calculus regarding which ends are most important and which can be sacrificed (Muir, 1977:ch. 11). And of course, without mobilizing for war, departments may still develop a cultural milieu that tolerates or even facilitates illegal practices, a condition that the Mollen Commission reported in its assessment of the New York City Police Department (Commission to Investigate Allegations, 1994). Interestingly, researchers have demonstrated that the cultural environment for police integrity can vary considerably among departments. It has not yet been well established what the determinants of this organizational culture are, but it is widely believed that the department environment for police integrity is responsive to organizational interventions (Committee to Review Research, 2003; Klockars et al., 2000). Where the cultural environment weakly promotes integrity and the organization is well buffered from external efforts to promote integrity, the likelihood of illicit practices, such as improper searches, is much heightened.

But the police organizational "cocoon" is not impermeable; outside forces may intrude. A relevant consideration is how and how much police adherence to constitutional standards is monitored by the "courtroom workgroup" (Eisenstein and Jacob, 1977; Eisenstein et al., 1988). Where police officers must contend with prosecutors, defense attorneys, or judges who actively monitor police practices for constitutional compliance, officers may increasingly choose to comply with the law, if only because greater risks and costs are associated with noncompliance (Canon and Johnson, 1999).<sup>4</sup> Similarly, when officers are under the purview of citizen review boards, or where citizens not only are knowledgeable of their constitutional rights but also have the will and resources to mobilize competent legal representation, strong incentives exist for officers to comply with constitutional standards. And if there are politically powerful groups seeking to protect segments of the community they think to be at risk for police abuse (by providing resources for filing grievances and lawsuits, providing defense counsel, and publicizing allegations of police wrongdoing), their efforts may alter the calculus of police decision making in some cases.

### AN EMPIRICAL EXAMINATION BY DIRECT OBSERVATION

Few studies have been able to investigate all three potential bases for

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4. An example is given in one of the searches observed in this study. A team of plainclothes patrol officers declined to arrest a drug dealing suspect on whom they had found contraband because they felt the search would not pass muster before the judge, and this would create long-term problems in court by tarnishing their professional reputation.

police conformity with the law, because available data, especially from direct observation, are often limited. Similarly, the data employed here have drawbacks: Only one jurisdiction is represented, the number of searches available for analysis is not large, and the observations lack certain information. Nonetheless, even with these limitations, we are able to offer an intriguing, and heretofore unavailable, picture of the constitutionality of searches.

In this study, we reviewed and coded reports from trained field observers who accompanied patrol officers in a metropolitan police department. Observations were conducted over a three-month period in the early 1990s. Because the observations were confidential, we cannot provide identifying details. Nevertheless, we are able to provide a general characterization of the city and the department, as well as a more detailed description of the observation method.

### THE CITY AND POLICE DEPARTMENT

Middleberg (pseudonym) is a medium-sized American city in the middle of illicit drug shipment routes. During observation, the city was experiencing high levels of violent crime, much of it drug related. Many of the city's residents were African American, and many experienced concentrated disadvantage: high levels of poverty, unemployment, female-headed households with children (see Sampson et al., 1997 for a description of concentrated disadvantage).

The police department was regarded as one of the more professional agencies in the state, with a strong commitment to providing quality training for its officers. Indeed, it ranked in the top 20% of departments nationwide (with 100 or more officers) in the number of training hours required of recruits (Reaves and Smith, 1995). Recruit training covered the basics of search and seizure law, but there was little such in-service training for patrol officers.

The police department was a few years into the implementation of community policing, and top management presented it as an important element in its high-priority efforts to reduce drug trafficking and violence in the low-income, African-American neighborhoods. The chief and his middle managers stressed doing this by strengthening bonds with the residents of these neighborhoods so that they might be enlisted in this anti-crime effort, and many of the rank-and-file officers responded positively, some with eagerness both to stop illicit drugs and to work closely with the community. Unlike the cultural isolation that the Mollen Commission (1994) observed in New York City, the department was bubbling with efforts to reach out to the community and to enlist them in the war. From newspaper reports and in-the-field observations of police-community interactions

throughout the city, it appears that Middleberg's war on drugs was widely accepted as an essential strategy to promote a decent quality of life. Civil liberties and other interest groups did not mount high-visibility efforts to curb police abuses of authority, and the press focused mostly on drugs, crime, and their consequences for civil society. Middleberg's criminal courts also offered a relatively supportive environment for the police force's search practices. Prosecutors rarely dismissed cases because of faulty searches, and defense attorneys rarely filed suppression motions. The political environment was strongly supportive of the department's priorities to take an aggressive stance against drug crime, and this support crossed racial lines. Thus, the organizational and environmental context of police searches in Middleberg placed a high value on energetic police search practices to intercept drugs and disrupt drug dealing.

### OBSERVATION DATA

Data were obtained by a small team of faculty and student field researchers conducting systematic observation of patrol officers in Middleberg over a three-month period. Observations were conducted once in each of the city's patrol beats on each work shift and with members of the special patrol units in each precinct. Researchers were required to focus their observations on the officer(s) assigned to the beat or unit selected for observation on that shift, noting the actions taken by other officers who might be present during an event. The sampled officers closely paralleled the demographics of the entire patrol force.

Observers accompanied the selected officers throughout their regular work shifts, taking brief notes on their activities and encounters with the public, doing so at times and in a manner that would not distract the officer or citizens (See Mastrofski et al., 1998 for details on this methodology). After most encounters, observers were able to debrief officers to learn their perceptions and motives during the event. Debriefing was done informally by asking officers to describe what they were thinking and feeling as the encounter progressed. During the observation session, researchers were required to obtain officers' responses to a few questions (years of experience in policing, length of time assigned to the beat, views of community policing). Observers guaranteed officers that their identities would remain confidential and allowed officers to examine their (brief) field notes and ask questions if they wished. A few did so, although infrequently. At the research office, observers prepared a detailed narrative account of the ride-along and coded key items associated with these events. Researchers organized their accounts and coded items as face-to-

face “encounters” with citizens.<sup>5</sup> If an observed officer interacted significantly with a citizen during the encounter, the nature of that interaction was coded, along with characteristics of the citizen.

These data use contemporaneous, direct observations of police behavior, describing what happened in an encounter rather than relying on officers’ (potentially self-interested) interpretations of what occurred. By focusing on searches in the field, these data mitigate the problems of selection effects and the validity of observations (albeit drawn from a small sample in a single city), although there is still a risk of reactivity effects. However, observers noted only 6 instances out of 571 encounters with suspects in which officers altered their behavior because of the observer’s presence; in each case, officers appeared more inclined to get involved or make an arrest.

From the set of encounters with suspects, observers noted 148 instances in which officers searched a citizen’s person or property. We defined a search as an intrusion by a police officer into a citizen’s person or real or personal property when the officer was seeking evidence. Searches were not limited to those situations in which suspects had standing to challenge the intrusion; that is, investigations were coded as searches regardless of whether officers sought evidence to use against the suspect or in any other context. At the same time, the definition required officers to intrude with the intent of seeking potential contraband. Although practically unlikely, an officer’s mere trespass did not qualify as a search.

The data set does not identify “plain view searches.”<sup>6</sup> Of course, we could have coded plain-view searches for those cases in which police found evidence in plain sight, but this would have biased the data by ignoring the countless times that officers surveyed the suspect or area without finding any evidence. The data thus undercount the total number of police searches by systematically excluding plain-view searches. However, any time that an officer announced that he was “going to look around” and

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5. An encounter was a communication between officers and citizens that took over one minute, involved more than three verbal exchanges between an officer and citizen, or involved significant physical contact between the officer and citizen. When officers worked in teams, observers indicated which officer took the decision-making lead; called “lead officers,” these are the police whose characteristics are used later in the data analysis.

6. Plain-view searches are generally defined by three criteria: “1. The item must be within the officer’s sight; 2. The officer must be legally in the place from which the item is seen; 3. It must be immediately apparent to the officer that the item is subject to seizure” (del Carmen and Walker, 2000:148). Theoretically, any visual survey of a suspect or his surroundings could qualify as a plain-view search (*Illinois v. Andreas*, 1983); yet unless an officer affirmatively announced that he was “going to look around” or found incriminating evidence without entering another area or delving into a suspect’s personal effects, the researcher had no way of identifying a plain-view search.

made any movement to look *into*<sup>7</sup> the suspect's effects or move to an area for which he did not already have access, the instance was coded as a search.

Additionally, we narrowed the number of observed searches studied in two ways. First we included only those searches for which the sampled officers had primary decision-making responsibility. In several encounters, other officers were also present, and on a number of those occasions, the officer taking the "lead" role in the incident—usually the first to arrive—was not the officer or officers selected for observation. When the observed officer did not take the lead role, or did not share equally in the lead role, the resulting search could not be credited to his/her judgment and must be excluded from the sample. Doing so reduced the number of potential searches from 148 to 125.

Second, in a few encounters, an officer conducted more than one search of the same suspect. For example, an officer may have patted down the suspect and then searched his backpack, or searched the suspect's pockets and his car. Because we doubt an officer would distinguish the constitutionality of multiple searches of the same suspect in an encounter, we have collapsed these searches into a single case, noting whether *any* of the searches of a suspect in a given encounter were unconstitutional and, if so, selecting the most egregious search for further analysis. By contrast, searches of multiple *suspects* at a given event were coded separately. As different suspects may present varying grounds to search—and because any constitutional violations are experienced individually by suspects—we counted these searches as separate ones. Under this coding rule, the number of searches in the sample narrowed to 115, conducted by 44 lead officers.<sup>8</sup>

## CODING THE CONSTITUTIONALITY OF SEARCHES

To assess the legality of police search practices in Middleberg, we coded each of the 115 searches for constitutionality, using a three-person team including a faculty member, student assistant, and a practicing attorney. The evaluations of this team, even with careful training and practice, may raise questions of validity and reliability to which we attend below.

To evaluate the constitutionality of police searches, we created a legal matrix of seminal Fourth Amendment rulings applicable to the observed police department at the time of the ride (Greenhalgh, 1995). Among

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7. The term is used deliberately. Merely looking *at* or *around* a suspect would constitute a plain-view search. "Regular" searches, by contrast, include delving *into* an area that is blocked, hidden, camouflaged, or buried.

8. Later regressions were based on 114 searches, because certain variables were missing for one encounter.

these were decisions of the U.S. Supreme Court, the applicable federal appellate and district courts, as well as state courts from the highest level down to district judges. In so doing, we were mindful of the fact that federal constitutional law sets the floor for procedural rights, and that the state and municipality in question might well have offered additional procedural protections to suspects. In virtually every relevant area, however, state law tracked federal constitutional standards.

Coding had two parts: an examination of any seizure that preceded a search, and an evaluation of the search itself. Our coding rules for seizures closely tracked those used by the New York Attorney General's Office in its evaluation of stop-and-frisk practices (Civil Rights Bureau, 1999).<sup>9</sup> Searches were measured against the warrant requirement or any of the judicially recognized exceptions.<sup>10</sup> We began by distinguishing the easier, or more obvious cases. For example, consensual searches were coded as constitutional unless there was an indication that an officer had unreasonably pressured the suspect to agree. Similarly, a pat down search after a traffic stop was coded as unconstitutional when there was no reasonable suspicion that a citizen was armed or dangerous. Nearly 80% of the searches could be coded using these rules. In these cases, two of the three researchers coded the police searches independently, producing the same results.

When the researchers did not agree on the constitutionality of a search from a first read—and, especially, when either of the first two researchers did not believe the coding rules supplied an obvious answer—the researchers brought in the third coder (a practicing attorney) to discuss the cases together. If the researchers reached complete consensus, a case was coded at this point. Approximately 15% of the sample was coded this way. When consensus was not reached, at least one of the three researchers undertook additional legal research to investigate the constitutionality of the case. Sharing their findings with the other team members, researchers then considered the cases again and voted on the constitutionality of a search. A two-thirds vote was required to code a case. About 5% of the sample was coded this way.

These codes examine searches the way a court would, labeling them as either constitutional or unconstitutional. As social scientists, however, we recognize that some of our judgments about constitutionality are more

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9. Taking a slightly more conservative approach, we coded loitering and observed drug use as constitutionally acceptable bases for a stop or seizure. Both behaviors were illegal under Middleberg ordinance and/or state law, and officers would have been within their right to cite a suspect for either infraction.

10. These comprised consent, exigent circumstances (including "hot pursuit"), special needs, arrest/citation, *Terry* frisk, vehicle and containers, and open fields (Ferdico, 1999). None of the searches in the data set involved open fields.

certain than others. There is, of course, error in any panel of legal experts in predicting what the assigned judge in a given case would actually do—and whether that would be upheld if appealed to higher courts. Some legal judgments are more ambiguous (determining reasonable suspicion for some pat downs) than others (searches incident to a lawful arrest), and some narratives had more relevant factual detail than others. Consequently, we have attempted to incorporate our degree of certainty about constitutional judgments into the measure of the searches. The coders of these data assessed each search on a five-point certainty scale. Merging this with our previous either-or judgment of constitutionality yielded a ten-point ordinal scale of the probability that the search was constitutional or unconstitutional. The data are reported both dichotomously as well as across the ten-step range.

There may be questions about this unusual method of data coding. That we allowed discussion or additional research by the coders acknowledges that no two researchers were likely to evaluate all of the data the same. Here we thought it more important to establish the validity of the codes than to prohibit the researchers from discussing the cases among themselves. Our intent was to estimate how prevailing legal norms would apply to each of the searches, an evaluation that could hardly be relegated to the judgment of a single individual. Moreover, the process of comparing and discussing evaluations simulates the method by which appellate courts establish constitutional norms, whereby judges not only discuss the case among themselves but frequently commission their law clerks to undertake independent legal research (Lazarus, 1998). As there, we sacrificed the reliability of individual coding on a portion of the cases (the nearly 20% in which researchers did not reach identical results on the first read) so that the eventual coding rules would represent how an average, competent court in the jurisdiction covering these cases would have ruled at the time of the police searches.

We were also careful to read both factual and legal inferences in favor of the police officers when coding the cases for constitutionality. We wish to minimize the risk of overstating the police misuse of authority, so this study may actually *underestimate* the number of constitutional violations because we gave officers the benefit of the doubt when coding their actions. For example, in one encounter, an officer rushed to search a suspect when he claimed to have witnessed “furtive gestures” by the suspect in stashing belongings under a car seat. The observer, however, did not see the same gesture and reported it as such. Evaluating this search after the fact, we were left with the task of weighing the relative credibility of the officer and observer. Did the observer miss a momentary movement that a trained police officer would recognize, or might the officer have

invented the “furtive gesture” to justify the stop and search? In this situation, as in all other close questions, we read the inference in favor of the officer. We credited his explanation and coded the search as constitutional because, given other factors of the encounter (loitering in a known drug area), the officer may well have had reasonable suspicion to stop and search the suspect. Similarly, when the reliability of a source was in question, or the law was in flux, we erred on the side of the officers and coded searches as constitutional. For this reason, any “search incident to citation” was marked as constitutional even though the U.S. Supreme Court later invalidated the practice in 1998 (*Knowles v. Iowa*).

To provide an additional check on our coding decisions, we assembled a panel of three experts familiar with the law governing Middleberg, each of whom independently evaluated the ten most difficult cases considered to be close calls. The experts were a state appellate judge, a former federal prosecutor, and a government attorney with previous experience as a federal prosecutor and a criminal defense lawyer. In nine of the ten cases evaluated, the expert panel agreed with our original codes; in the one case of disagreement, we had initially coded a search as constitutional but the experts believed it to be unconstitutional. Although we intentionally coded searches as “conservatively” as possible (reading all doubts in favor of the officers), we were persuaded to adopt the experts’ judgment and change the constitutional code of this one search in our data set. We also adjusted the certainty score of an additional search.

Do the narratives provide enough facts to make a good judgment about the constitutionality of a search? Most of the search narratives included a “debriefing” in which the observer often learned why the officer had performed a search, allowing us to make our evaluation based on the facts as seen by the observer as well as the officer’s own explanation. Although we acknowledge these data may still have weaknesses (observers may have missed facts; officers may have colored their motives or left out details), we submit that these data are at least as valid as many of the official records of police activity on which other researchers have relied. The Appendix provides excerpts from sample search narratives as well as more detailed explanations for our coding decisions.

## SEARCH RESULTS

### FREQUENCY OF SEARCHES

Middleberg officers appeared to search suspects relatively infrequently—at a rate of about 0.8 searches per eight hours of observation, and officers encountered suspects at a much higher rate of 4.3 per eight

hours.<sup>11</sup> Comparing Middleberg with other jurisdictions is difficult because there have been few quantitative surveys of search behavior.<sup>12</sup> However, researchers using the same methodology recently reported that St. Petersburg police in 1997 made 1.6 searches per eight hours, and Indianapolis officers in 1996 averaged 2.1. These figures are not directly comparable with ours, because they include searches conducted by any officer at the scene (whether or not the observed officer was the lead officer) (Parks et al., 1998; Parks et al., 1997). If we consider all searches observed in Middleberg to make the statistics comparable, the Middleberg figure rises to 0.9 per eight hours, a rate still well below that of St. Petersburg and Indianapolis. Although we are hesitant to draw broad implications from comparison with so few departments, Middleberg officers appear to have been less active in searching suspects than were officers in these other two jurisdictions.

#### FREQUENCY OF UNCONSTITUTIONAL SEARCHES

That searches in Middleberg were relatively infrequent should not obscure the finding about the constitutionality of those searches. Thirty percent of the 115 suspects in our sample were searched unconstitutionally. Table 1 presents these estimates across the ten-point constitutionality scale, reflecting ordinal data (with equal-appearing intervals) for those searches in which the observed officers had responsibility for the search. We were more confident about the classification of cases judged to be constitutional than those judged unconstitutional, which is but more proof of the benefit of the doubt we gave officers when assessing their behavior. Thus, if anything, our conclusions about constitutional violations are conservative estimates.

If we assume these data reflect common practice in Middleberg over a year's period based on typical staffing levels, the rates extrapolate to 12,000–14,000 unconstitutional searches per year, or roughly six to seven constitutional search violations per 100 Middleberg residents over a year's time. Again, it is difficult to compare these results with findings from other studies, because few have employed direct observation. Researchers who study suppression motions report that only a small percentage of cases are lost because of illegal searches, generally less than 5% of all arrests (Canon, 1974; Comptroller General, 1979; Davies, 1983; Nardulli, 1983; Uchida and Bynum, 1991; Wasby, 1976). By contrast, contemporary

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11. A suspect was defined as any person who at some time during the encounter was suspected of criminal wrongdoing or what was potentially a violation of the criminal, traffic, or municipal code.

12. Again, although the New York Attorney General's Office has investigated stop-and-frisk practices of New York City police, these data examine one type of search—the pat down.

TABLE 1. CONSTITUTIONALITY OF POLICE SEARCHES

| Constitutionality of Search | Rank | N  | Percentage* |
|-----------------------------|------|----|-------------|
| Absolutely Unconstitutional | 10   | 1  | .9          |
| Unconstitutional            | 9    | 10 | 8.7         |
| Likely Unconstitutional     | 8    | 14 | 12.2        |
| Probably Unconstitutional   | 7    | 1  | .9          |
| Barely Unconstitutional     | 6    | 8  | 7.0         |
| Barely Constitutional       | 5    | 3  | 2.6         |
| Probably Constitutional     | 4    | 14 | 12.2        |
| Likely Constitutional       | 3    | 11 | 9.6         |
| Constitutional              | 2    | 24 | 20.9        |
| Absolutely Constitutional   | 1    | 29 | 25.2        |
| N = 115                     |      |    |             |

\* Note: Because of rounding, percentages sum to greater than 100%.

studies of officers' knowledge suggest that up to 50% of patrol officers may be unfamiliar with search-and-seizure law (Heffernan and Lovely, 1991; Memory, 1998). Neither line of research is directly comparable with our study, but Middleberg officers applied the law more accurately than officers nationwide appear to understand it.

A search was more likely to be unconstitutional when suspects were released than when they were arrested or cited. Forty-four percent of released suspects were searched unconstitutionally, whereas only 7% of arrested/cited suspects experienced unconstitutional searches (no table shown). To be sure, some of this difference reflects the fact that many of the searches in the sample were those incident to arrest. But, as Table 2 shows, removing these searches from the analysis produces the same conclusion. Indeed, 31 of the 34 unconstitutional searches would never reach the courts' eyes because suspects were neither cited nor taken into custody. Even among the 45 defendants formally charged, only 10 generated evidence, and just 1 of these was coded unconstitutional (no table shown), meaning that only 3% of the unconstitutionally searched defendants would have had good cause to file a suppression motion. Although other researchers have noted that suppression motions are filed in a relatively small number of cases,<sup>13</sup> our data suggest that these cases miss the much wider set of unconstitutional searches.

13. The range varies, from a low of 5% of cases (Nardulli, 1983) to a high of 77% (Spotto, 1973). The latter figure, however, has been critiqued as unique to its location (Canon, 1974; Nardulli, 1987), with most estimates averaging around 15% (Comptroller General, 1979 ; Nardulli, 1983; Uchida and Bynum, 1991).

TABLE 2. CONSTITUTIONALITY OF POLICE SEARCHES BY ARREST OR CITATION (EXCLUDING SEARCHES INCIDENT TO ARREST OR CITATION)

|                  | % Arrest or Citation | % Released |
|------------------|----------------------|------------|
| Constitutional   | 81.2                 | 55.7       |
| Unconstitutional | 18.8                 | 44.3       |
| N                | 16.0                 | 70.0       |

Chi Square = 3.5,  $p < .059$

The Middleberg data contain observations of both "full" searches and frisks or pat-down searches. The latter are comparable with the searches examined by the New York Attorney General's Office. According to that study, 14% of frisks by the New York Police Department were unconstitutional when examining officers' explanations for their conduct (Civil Rights Bureau, 1999). Using direct observation, the results from Middleberg suggest a higher rate of illegality; 46% of pat-down searches were unconstitutional. These data, presented in Table 3, reflect a rate more than double that of the 20% of full searches that were illegal.

TABLE 3. CONSTITUTIONALITY OF POLICE SEARCHES BY INTRUSIVENESS OF SEARCH

|                  | % Pat Down Search | % Full Search |
|------------------|-------------------|---------------|
| Constitutional   | 54.5              | 80.3          |
| Unconstitutional | 45.5              | 19.7          |
| N                | 44.0              | 71.0          |

Chi Square = 8.6,  $p < .003$

If the rate of police deviance from constitutional standards in Middleberg seems high, it may be useful to compare it with deviation from other types of legal standards found in systematic observations of the police. Using experts, Reiss (1968) found that 84% of 44 instances of police use of physical force were excessive. Using non-expert field observers' judgments, Friedrich (1980) found that 57% of 51 instances of use of force were excessive, and Worden (1995) found that 38% of 60 instances were excessive. Thus, on the rare occasions, when physical force was used (roughly 3-4% of patrol officers' contacts with citizens), the probability of police abuse was found to be substantial. Police searches in Middleberg

occur much more frequently than physical force, but they are by comparison less likely with violate constitutional standards, albeit at a rate that is substantial.

For that matter, only a small number of the observed searches in Middleberg were so extreme that they would “shock the conscience” (*Rochin v. California*, 1952). Examining the narratives from the perspective of a plaintiff’s attorney, we found only two or three instances that would reach the level of egregiousness required for civil liability (*Brower v. County of Inyo*, 1989). Each of those cases involved an invasive body-cavity search. Thus, the good news in Middleberg is that most violations of suspects’ rights are not exceptionally invasive. The abuses are, by analogy, a steady drumbeat of droplets rather than a torrential deluge. Nevertheless, as we discuss at the end of this article, that steady stream may do more long-term damage to police legitimacy than a series of egregious cases, especially because so few of the unconstitutional searches ever reach the inside of a courtroom. Among other things, it is notable that not a single search in the sample of 115 was conducted by warrant. Although search warrants are rare in other jurisdictions (Canon, 1974; Uchida and Bynum, 1991), the pattern in Middleberg appears to be exceptional. The Middleberg courts see very few searches through suppression motions, and apparently they have little opportunity to review searches beforehand either.

## PREDICTING UNCONSTITUTIONAL SEARCHES IN MIDDLEBERG

Why are some searches constitutional and others not? Earlier we indicated that our ability to measure sources of influence on Middleberg officers’ search practices is limited. Except for anecdotal accounts from comments made to field observers, the data set offers no systematic information on the officers’ knowledge of the law of search and seizure, their views on it, or their views on the legal institutions charged with overseeing police search practices.<sup>14</sup> Although we cannot thereby estimate the effects associated with the legitimacy of constitutional guidelines, we are able to consider other factors relevant to rational calculations about search practices and the social distribution of unconstitutional searches.

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14. Occasionally officers revealed their views on these issues to observers. A field researcher reported that two strongly pro-community policing officers volunteered, “. . . that suspects and defendants had far too many protections and that innocent people didn’t need those rights. These comments were unsolicited. These were merely ways for guilty people to wriggle out of getting justice. O2 was particularly adamant about this, ranting on at some length about the current U.S. Supreme Court, which he felt was ‘communist, liberal, and pinko.’ He said that the Court wasn’t really conservative, or it would not continue to support all these defendant protections.”

## RATIONAL CALCULATION

Several available variables relate to the rational calculation of search benefits and costs. For example, the degree of search intrusiveness likely bears on the constitutionality of search practices. Because the intrusion of pat-down searches is relatively minor, officers may feel that the repercussions for themselves, as well as for the citizen, will be much less consequential for improper pat downs. A citizen is less likely to complain to higher authorities about a pat-down than a body-cavity search. Such police choices may occur without careful deliberation but may simply be structured into decision making where transgression of rules is done with less care, concern, or awareness when, as is the case with a pat down, the rules require a lower justification to search.

We have already indicated that Middleberg's top management placed a high value on reducing illicit drug trafficking and related crimes, which at the organizational level offers a department-wide constant of incentives to search and seize drug contraband and disrupt dealing. What varies is the receptivity of individual officers to management's priorities and the opportunities presented by the circumstances. Officers may be willing to break constitutional rules to accomplish crime control objectives (Skolnick, 1994), so when officers were either assigned to "drug patrol" or had decided themselves to look for illicit drugs, the risk of constitutional violation should be greater.<sup>15</sup>

Of course, the degree to which officers transgress the Constitution to accomplish a highly valued organizational goal will vary among officers (Muir, 1977:ch. 11). We do not have a direct measure of this ends-justifies-the-means proclivity, but we can obtain a rough proxy of the officer's orientation to aggressive drug control by considering how positively disposed each officer was to community policing in Middleberg. The department "sold" community policing to officers as an assertive, innovative strategy to reduce drugs and violence. The department encouraged officers to establish closer bonds with neighborhood residents and businesses, but it also encouraged aggressive intervention to protect them from the ravages of the illicit street drug trade. Field researchers reported that many officers who supported community policing did so because they believed it would mobilize community support for the department's enforcement efforts against drugs and violence in the neighborhoods. Indeed, those

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15. Officers were coded as having a drug-focused search when they asked citizens about drugs or told observers that they had initiated an encounter out of suspicion of drugs. Our presumption was that officers assigned to drug patrol were intent on seizing drugs, but we found a few instances in which drug-patrol officers dealt with other issues, including, for example, evicting a squatter. Those searches were not coded as drug-related.

officers with the strongest commitment to community policing also reflected the greatest commitment to protect their beats from drugs and violence.<sup>16</sup> Ultimately, this leads to the expectation that in Middleberg the more positive an officer's orientation to community policing, the more committed s/he would be to the ends of reducing drug crime and violence. Hence the greater would be the officer's inclination to search suspects unconstitutionally. We note that the character of community policing programs can vary a great deal from one department to another, and this can have consequences for street-level behavior patterns (Terrill and Mastrofski, 2004). Consequently, we would not necessarily expect to see this effect in departments where community policing had been strongly tied to a very different set of goals.

A disincentive to violate constitutional standards is the presence of citizens who could testify about how the officer conducted the search. The more witnesses present, the greater the visibility of the officer's behavior, the greater the risk of testimony against the officer, and therefore the greater the incentive to adhere to constitutional standards.

A final variable concerning the officer's motivations to search constitutionally or not is the amount of policing experience (years as a police officer). This variable represents complex developmental processes. Officers develop knowledge and skill (in such things as search and seizure) over time, but they experience shifts in initiative, energy, and motivation during this period as well. Characteristically, rookies are low in knowledge and skill but high in initiative, especially crime-fighting initiative (Mastrofski et al., 2000). Many years of experience are associated with the reverse: more knowledge and skill but less energy and initiative. Indeed, veterans of many years are often characterized as prone to become cynics who "know the ropes" about how to avoid getting hassled by management, the courts, and the public (Rubinstein, 1973; Van Maanen, 1974). These influences associated with the passage of time are hardly inevitable, but they do suggest that it may be officers in the "middle" years of their career who are experienced enough to know how to conduct a legal search and sufficiently motivated to do so. We identified these officers as those with 4-9 years of experience.

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16. An example of the strength of this linkage between community policing and the drug war was given in an officer's response to a casual question from a field researcher. When asked what kind of training would be most useful to him in support of his community policing efforts, one of the officers most strongly committed to community policing responded that he desired training on search and seizure so he could be sure his enforcement efforts would stand up in court.

## SOCIAL CHARACTERISTICS OF SUSPECTS

According to Black (1995), persons of a higher or dominant social stratum are said to fare better before legal decision makers than those from a lower social stratum. We expect police to be more solicitous and protective of high-status individuals than those at the bottom or periphery of society. Black and others suggest as much when they claim that police officers are predisposed to act on cultural cues regarding race, gender, and other characteristics that order the social strata, in effect mirroring societal values about social position (Black, 1980, 1976; Martin and Jurik, 1996).

Evidence of such variability in other aspects of police authority, such as arrest and use of force, is mixed. For example, most studies of arrest find that the effects of race are greatly diminished, if not virtually eliminated when legal factors and citizen demeanor are taken into account (Mastrofski et al., 1995; Riksheim and Chermak, 1993). On the other hand, race effects have been noted in the use of physical force (Terrill, 2001; Worden, 1995). Should such factors be at play here, we would expect officers to have taken liberties against minorities or society's marginals—actions they would not have considered were a suspect more socially powerful or valued.

To test this supposition, we selected suspects by four characteristics of their social or economic status: race, gender, age, and wealth. Citizens were distinguished by race as predominantly white or black; low-income citizens were differentiated from those who were not according to their appearance and other information available at the scene<sup>17</sup>; and suspects were divided into two age groups, those who appeared to be under 30 years of age and those who appeared 30 or older.

By their behavior citizens present themselves to police in ways that locate them in the officer's normative social space. Unlike suspects' personal characteristics, past research has consistently shown that disrespectful and resistant citizens are more likely to receive a punitive police response (Worden et al., 1996). Also consistent is the strong tendency of police to punish and control citizens who are intoxicated, mentally deranged, or otherwise less capable of behaving responsibly (Mastrofski et al., 1995; Mastrofski, et al., 2000; Mastrofski et al., 2002; but cf., Engel and

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17. In the coding protocol, "low income" was defined as "without sufficient personal income or other resources to provide for the basic needs of oneself and one's dependents (food, clothing, or shelter). Of course, in most cases the citizen will not directly describe his/her income, so you will need to rely upon social cues that the ordinary person would use. These include dress (e.g., tattered clothes), appearance (unkempt), and surroundings (home or other property in disrepair, absence of basic amenities), and comments (references to being on welfare or having a low-paying job). Of course, appearances can be deceiving. If the citizen's status is not clear to you, skip this item (thus coding it [missing])."

Silver, 2001). Accordingly, we draw from variables in the data set that indicate whether suspects were resistant to police as well as whether they were intoxicated or under the influence of drugs at the time of the police encounter. The question here is slightly different from Black's (1976): It is not whether resistant or hard-to-control citizens receive more law, but whether the law they receive is improperly enacted.

### ANALYSIS OF EXPLANATORY VARIABLES

The bivariate distributions of all independent variables with the constitutionality of police searches are presented in Table 4, and most show the expected relationships with the dependent variable. The lone exception was evidence of a suspect's intoxication or drug use, which indicated that unconstitutional searches were more prevalent when suspects were not intoxicated than when they were under the influence. But only four independent variables achieved statistical significance: the type of search (pat down versus full), the object of search (drugs versus other), the suspect's age (under 30 versus 30 and older), and the officer's view of community policing. Given the relatively low number of cases in the sample, even fairly large differences (as large as 22%) between categories of the independent variable failed to achieve statistical significance.

The multivariate analysis was performed using both an OLS and a binary logistic regression. For the OLS, the ten-point scale of the certainty of the search's unconstitutionality was regressed on the independent variables, excluding the suspect's gender because of the low number of women in the sample.<sup>18</sup> For the logistic regression, the ten-point scale was collapsed into two categories: constitutional and unconstitutional. The ten-point scale represents our best estimate of the rank-order of likelihood that the search would be declared unconstitutional (a score of ten being the most likely). It captures to some degree the likelihood that a given case would be determined to be constitutional or unconstitutional based on its legal merits. However, if brought to their attention, legal authorities would be required to place a given case into one of two categories: constitutional or unconstitutional. The dichotomization of the ten-point scale reflects that reality (1 = unconstitutional, 0 = constitutional). We present

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18. The multiple levels of data in the analysis (from lowest to highest: search, citizen, encounter, and officer) may call for hierarchical linear modeling because the usual OLS regression understates the size of the standard error for higher levels of analysis (Bryk and Raudenbush, 1992). Given the small number of repeat searches with the same citizen, however, the effects are probably inconsequential at that level. The risks are greater at the officer level, but unfortunately most of the officers who conducted searches did an insufficient number to provide a stable estimate of officer-level effects (averaging fewer than three searches per officer). Consequently, hierarchical linear modeling is inappropriate for these data.

TABLE 4. BIVARIATE DISTRIBUTIONS

| <b>Variable</b>                            | <b>N</b> | <b>%<br/>Unconstitutional</b> |
|--|----------|-------------------------------|
| <i>Type of Search*</i>                     |          |                               |
| Pat-down                                   | 44       | 45.5                          |
| Full                                       | 71       | 19.7                          |
| <i>Object of Search*</i>                   |          |                               |
| Drugs                                      | 37       | 59.5                          |
| Not drugs                                  | 78       | 15.4                          |
| <i>No. of Bystanders</i>                   |          |                               |
| 0-3  | 64       | 31.3                          |
| 5-9  | 37       | 35.1                          |
| 10-107                                     | 14       | 7.1                           |
| <i>Suspect race</i>                        |          |                               |
| Black                                      | 96       | 30.2                          |
| White                                      | 18       | 22.2                          |
| <i>Suspect's wealth</i>                    |          |                               |
| Low income                                 | 60       | 35.0                          |
| Not low income                             | 54       | 22.2                          |
| <i>Suspect's sex</i>                       |          |                               |
| Male                                       | 102      | 30.4                          |
| Female                                     | 12       | 16.7                          |
| <i>Suspect's age*</i>                      |          |                               |
| <30 years old                              | 67       | 38.8                          |
| 30 years or older                          | 47       | 14.9                          |
| <i>Suspect drug use</i>                    |          |                               |
| Evidence of use                            | 27       | 18.5                          |
| No evidence of use                         | 87       | 32.2                          |
| <i>Suspect resistant</i>                   |          |                               |
| Resistant                                  | 33       | 33.3                          |
| Not resistant                              | 81       | 27.2                          |
| <i>Officer Race</i>                        |          |                               |
| Black                                      | 39       | 30.8                          |
| White                                      | 76       | 28.9                          |
| <i>Officer Years</i>                       |          |                               |
| <1-3                                       | 60       | 35.0                          |
| 4-9  | 26       | 19.2                          |
| >9   | 29       | 27.6                          |
| <i>Officer View of Community Policing*</i> |          |                               |
| Likes CP                                   | 67       | 37.3                          |
| Dislikes/neutral toward CP                 | 48       | 18.8                          |

\*p &lt; 0.05

the OLS results in Table 5 and offer a comparison with those results obtained by a log transformation of the dependent variable to compensate for the skewedness in the dependent variable's distribution. The results from the logistic regression are presented in Table 6, including two comparable tests in which we altered the threshold for constitutionality to examine greater and then lower deference to police judgment. With a few exceptions that we will discuss, there is little substantive difference in the interpretation of effects, whether within or between the OLS and logistic models.<sup>19</sup>

The direction of the effects was as predicted for all variables except for the suspect's race. Of the variables reflecting on the search decision as a process of rational calculation, we found that pat downs and those focused on drugs were by far the most powerful (as measured by the standardized coefficient, Beta) and the only significant predictors of unconstitutionality. We considered whether the interaction of looking for drugs and conducting a pat down added significantly to the explanatory power of the model and found that the R-square change, though a modest 0.02, was significant ( $p < 0.04$ ). When officers were looking for drugs and used a pat-down search, the likelihood of an unconstitutional search increased beyond what each main effect predicted separately.

Of the participants' social characteristics, only the citizen's age showed a substantial and significant effect (albeit not when the OLS regression employed a logged-dependent variable). The other variables failed to achieve statistical significance. Being more difficult to control (resisting police) or being at least potentially less controllable (influenced by drugs or alcohol) did not significantly affect the likelihood that the search would be found unconstitutional. The absence of significant effects for wealth and race<sup>20</sup> deserve special note, inasmuch as other research has shown

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19. Apart from the significance of the suspects's age (which drops out in some models), the only statistical difference worth noting is that suspect's race approaches statistical significance in the logistic model but does not in the OLS. Because the cases were not completely independent of each other, we also performed a sensitivity analysis. A dummy variable was added to the model to distinguish cases that were conducted by an officer who had conducted more than one search in the sample. In addition, because multiple violations were concentrated in a small number of officers (see Table 7, *infra*), we separately tested the effects of adding a dummy variable to see if the concentration of violations in a few officers affected the pattern of effects exhibited by other variables. We successively tested a dummy variable for the seven officers with multiple violations and then another for the two officers with the most violations. The results from these tests were substantively the same as the results presented in Tables 5 and 6, indicating that the patterns found in these tables are not affected by the concentration of unconstitutional searches in a few officers.

20. Consistent with Black (1976), we examined whether the officer's social status interacted with the suspect's regarding race. Presumably, when officer and suspect share racial attributes, the police action will be less likely to be unconstitutional. Using

these variables to influence justice outcomes (Gross and Barnes, 2002; Knowles et al., 2001). One might question the reliability of a coding scheme of citizens' wealth that is based on impressions they give to observers. However, officers rely on the same sort of features that the observers were instructed to take into account.

Perhaps more puzzling to some is the absence of a significant race effect. With only 16% of a small sample of searched suspects identified as white, this is less than an ideal sample to test for race effects. Further, the pattern of race effects (or lack thereof) at later stages in the process of police-citizen encounters may obscure different underlying race effects that occur at earlier stages (Mastrofski et al., 2000). If police stop minority suspects much more frequently than whites relative to the rate at which each group engages in suspicious behavior in the general population, then the absence of racial disparity in our analysis of the search's constitutionality, or even a disparity that favors minorities, might conceal a higher exposure of minorities to unconstitutional police practice.<sup>21</sup> Or, if police are substantially more inclined to search black suspects than white suspects (and they were almost twice as likely to do so in the Middleberg sample of all police-suspect encounters), other things being equal, then the exposure to the risk of an unconstitutional search would not necessarily be accurately reflected in the contingent probabilities revealed by our analysis.

Finally, we recognize that, even with the reliability tests we employed for coding, some courts might be tempted to give officers even greater deference when evaluating the constitutionality of their searches and others less so. For this reason, we performed the logistic regression in two other forms, alternately adjusting the constitutionality scale one step in each direction to allow greater deference to officers and then suspects. As the results in Table 6 indicate, greater deference to officers intensified the predictive power of the significant variables, in most cases doubling or nearly doubling the effects of statistically significant variables on illegal police behavior. Adjusting the dependent variable to give greater deference to suspects had a marginal difference on the influence of a suspect's age; otherwise, this test had no appreciable impact on the pattern of effects.

### "ROTTEN APPLES?": A QUALITATIVE ANALYSIS

Is the problem of illegal searches widespread or concentrated among a

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a series of dummy variables, we checked for the effects of different racial pairings, finding none significantly different from the reference category (officer white, suspect white) and the R-square change from the Table 4 model minuscule and insignificant.

21. When a dispatcher or a citizen initiates an encounter, the officer is not responsible for the mobilization. Unfortunately, the Middleberg sample was not large enough to reliably test the influence of race on police-initiated encounters.

TABLE 5. OLS REGRESSIONS: PROBABILITY OF UNCONSTITUTIONAL SEARCH ON PREDICTOR VARIABLES

| Variable                                 | Unlogged DV |      |       |       |
|--|-------------|------|-------|-------|
|  | b           | S.E. | Beta  | Sig.* |
| <i>Rational calculation</i>              |             |      |       |       |
| Pat-down                                 | 1.672       | .493 | .289  | 0.001 |
| Looking for drugs                        | 2.422       | .554 | .400  | 0.000 |
| Officer positive view of comm. policing  | .421        | .493 | .074  | 0.395 |
| No. bystanders (sq. root)                | -.083       | .151 | -.046 | 0.586 |
| Officer with 4-9 years experience        | -.007       | .551 | -.001 | 0.990 |
| <i>Social characteristics of suspect</i> |             |      |       |       |
| Suspect black                            | -.221       | .667 | -.029 | 0.741 |
| Lead officer black                       | .172        | .504 | .029  | 0.734 |
| Suspect low income                       | .060        | .525 | .011  | 0.909 |
| Suspect < 30 yrs old                     | 1.101       | .515 | .192  | 0.035 |
| Suspect resistant                        | .386        | .525 | .062  | 0.464 |
| Suspect using drugs/alcohol              | .012        | .609 | .002  | 0.985 |
| Constant                                 | 1.720       | .844 | 0.044 |       |
| Adjusted R-square = 0.316                |             |      |       |       |
| Variable                                 | Logged DV   |      |       |       |
|  | b           | S.E. | Beta  | Sig.* |
| <i>Rational calculation</i>              |             |      |       |       |
| Pat-down                                 | .469        | .142 | .289  | 0.001 |
| Looking for drugs                        | .597        | .160 | .351  | 0.000 |
| Officer positive view of comm. policing  | .109        | .142 | 0.068 | 0.446 |
| No. bystanders (sq. root)                | -.012       | .044 | -.023 | 0.788 |
| Officer with 4-9 years experience        | .031        | .159 | .017  | 0.844 |
| <i>Social characteristics of suspect</i> |             |      |       |       |
| Suspect black                            | .020        | .193 | .009  | 0.916 |
| Lead officer black                       | .041        | .146 | .025  | 0.780 |
| Suspect low income                       | -.066       | .152 | -.042 | 0.666 |
| Suspect < 30 yrs old                     | .211        | .149 | .131  | 0.159 |
| Suspect resistant                        | -.038       | .152 | -.022 | 0.801 |
| Suspect using drugs/alcohol              | -.104       | .176 | -.056 | 0.556 |
| Constant                                 | .558        | .244 | 0.024 |       |
| Adjusted R-square = 0.277                |             |      |       |       |

N = 114.

Dependent variable: 10-point scale with higher values indicating greater likelihood of an unconstitutional search.

\*Two-tailed.

TABLE 6. LOGISTIC REGRESSIONS: PROBABILITY OF UNCONSTITUTIONAL SEARCH ON PREDICTOR VARIABLES

| Variable                                 | Original Coding |        | Benefit to Officers<br>(Categ. 1-4 vs. 5-10)* |        | Benefit to Suspects<br>(Categ. 1-6 vs. 7-10)* |        |
|--|-----------------|--------|---|--------|---|--------|
|  | Odds Ratio      | Sig.** | Odds Ratio                                    | Sig.** | Odds Ratio                                    | Sig.** |
| <i>Rational calculation</i>              |                 |        |   |        |   |        |
| Pat-down                                 | 6.880           | .003   | 12.539  | .002   | 6.398   | 0.005  |
| Looking for drugs                        | 7.202           | .002   | 11.840  | .001   | 7.409   | 0.001  |
| Officer positive view of comm. policing  | 1.804           | .348   | 1.149   | .864   | 2.140   | 0.224  |
| No. bystanders (sq. root)                | .562            | .180   | .684  | .249   | .507  | 0.146  |
| Officer with 4-9 years experience        | .763            | .696   | .776  | .776   | .616  | 0.490  |
| <i>Social characteristics of suspect</i> |                 |        |   |        |   |        |
| Suspect black                            | .238            | .083   | .541  | .640   | .270  | 0.110  |
| Lead officer black                       | 1.714           | .367   | 2.160   | .264   | 1.651   | 0.401  |
| Suspect low income                       | 2.325           | .203   | 1.748   | .521   | 2.743   | 0.128  |
| Suspect < 30 yrs old                     | 4.477           | .028   | 11.601  | .013   | 5.868   | 0.010  |
| Suspect resistant                        | 2.985           | .103   | 1.652   | .513   | 2.668   | 0.145  |
| Suspect using drugs/alcohol              | 1.559           | .564   | 6.152   | .078   | 1.406   | 0.657  |
| Constant                                 | .076            | .023   | .005  | .001   | .077  | 0.025  |
| R-square (Cox & Snell)                   | .316            |        | .345  |        | .348  |        |

N = 114.

\* Categories for constitutional coding are found in Table 1.

\*\*Two-tailed.

Dependent variable: 0 = constitutional, 1 = unconstitutional.

few "rotten apples?" Because most officers were observed for only one work shift, we are unable to offer a rigorous test of any individual officer's proclivity to conduct illegal searches. Nonetheless, the distribution of illegal searches shows that they were highly concentrated in a few officers. As Table 7 indicates, seven officers (16% of the officers in the sample) accounted for 24 (70%) of the illegal searches. Some of this concentration may be due to searches of multiple citizens in the same encounter, so we also present the distribution using the encounter as the unit of analysis. That too suggests a high concentration in a few officers, 14% of the officers (those with more than one encounter with an illegal search) accounting for 60% of the encounters with illegal searches.

TABLE 7. THE DISTRIBUTION OF UNCONSTITUTIONAL SEARCHES BY OFFICER

| <u>Number of<br/>Illegal Searches</u>       | <u>Number of<br/>Officers</u> | <u>Total Number Of Illegal<br/>Searches</u>              |
|---|-------------------------------|--|
| 0   | 27                            | 0  |
| 1   | 10                            | 10   |
| 2   | 5                             | 10   |
| 5   | 1                             | 5  |
| 9   | 1                             | 9  |
| <u>Encounters With<br/>Illegal Searches</u> | <u>Number of<br/>Officers</u> | <u>Total Number of Encounters<br/>w/Illegal Searches</u> |
| 0   | 27                            | 0  |
| 1   | 11                            | 11   |
| 2   | 4                             | 8  |
| 3   | 1                             | 3  |
| 6   | 1                             | 6  |

Given the fairly high concentration of illegal searches by a few officers, we performed a sensitivity analysis in the regression models to explore any differences in searches conducted by these officers compared with their peers. As mentioned earlier, the addition of these variables to the model did not alter the fundamental pattern of significant relationships in Tables 6 and 7. Similarly, a review of the officers' backgrounds and attitudes yielded few clues. We reviewed the observers' narrative descriptions of the six officers who had multiple encounters with illegal searches, looking for common features that might have been overlooked in our quantitative analysis. All of the officers could be characterized as very active officers, strongly committed to dealing with the drug and violence problems in their assigned areas. All but one expressed strong support for community

policing as a good approach. Four of the officers were either currently or previously assigned to a special patrol unit in their precinct (freed from the responsibility of responding to routine calls for service).

Perhaps surprisingly, none appeared to be angry, cynical, or the composite of a disillusioned officer with an axe to grind. That is, none fit the classic portrait of the officer predisposed to cut legal corners (Muir, 1977). By contrast, all were well regarded by their peers and supervisors and expressed a desire to establish strong bonds with neighborhood residents and to treat all citizens, including suspects, with a respectful demeanor. An observer described one such officer who had been mistreated by police as a youth:

Now, years later, O says he treats all people that he comes across with respect, even if he knows if a certain person is a drug dealer. He is kind and courteous to them, even if the courtesy is not returned. For example, rather than approaching a person he suspects is dealing drugs and coldly ordering them to lean against a wall for a "pat down," O takes the time to talk to the person first and then, almost nonchalantly, doing the pat down in the middle of a conversation. O hopes that this will relax the person, or at least allow him to see that the pat down is nothing "personal"; it's just part of O's job.

Another officer spent a great deal of time trying to get the children on his beat (a particularly troubled area with only low-income residents) to work hard in school and respect the law. He also worked diligently with his partner to secure the respect of the residents on his beat and prided himself on his hard-won good relations with most of the residents, who had initially been distrustful of the police. Another officer, who single-handedly accounted for the most illegal searches, was also one of the most articulate, low-key officers observed. He frequently made small jokes with the suspects he searched, made small talk, and was always very polite. Indeed, what makes these findings so troubling is that, but for their proclivity to search illegally, these patrolmen might be considered model officers. They were "Dudley Do-Rights" who did wrong, but in the war-against-drugs context, their unconstitutional searches were viewed as normal and necessary, virtually unchallenged by the police hierarchy, the courts, or the public.

## CONCLUSIONS AND IMPLICATIONS

Our research provides an intriguing snapshot of the constitutionality of search practices in Middleberg in the early 1990s. Applying the expert judgment available to us to evaluate this sample, we found that 30% of searches failed to pass constitutional muster. Because so few resulted in arrest or citation, only a handful would have been documented on official

records. In Middleberg, nearly all searches without warrants conducted by patrol officers remained invisible to court review. If Middleberg's experience is widespread among police agencies around the nation, studies of Fourth Amendment violations based on court records touch only the exposed tip of the population of police searches, and far more importantly, they vastly understate the extent of constitutional violations.

Our efforts to estimate a model explaining the variation in our constitutionality scale were limited by the lack of data on the legitimacy of the law and the need to use indirect measures of the rational calculation of consequences. Taking data limitations as a given, and recognizing the need for caution, we believe that the results still offer intriguing findings for future researchers and policy makers to consider. In a department that placed a high value on fighting a war against drugs, the likelihood of constitutional violations increased when officers were looking for drugs and conducting searches with a low risk of external review. Put another way, when there was an opportunity to accomplish a highly valued activity in the organization (fight illicit drug trafficking) at relatively low risk and cost, there was a substantially greater likelihood of constitutional violation. Set in the context of a "war," some might say that this hazard constitutes unfortunate but necessary collateral damage, whereas others would say that it erodes fundamental civil liberties. Either way, these results suggest that policies designed to increase the visibility of such searches (e.g., requiring officers to document pat downs and other searches, even when no arrest is made) and educating the public more thoroughly about what constitutes a legitimate search might reduce the frequency of improper searches.<sup>22</sup> Future studies of this sort that include good measures of police training and police knowledge of constitutional law on search and seizure will be especially valuable for determining where, when, and how training and education interventions might be most effective.

The absence of significant social characteristics effects, except for age, might encourage some to conclude that Middleberg officers did not distribute their improper searches in a socially biased manner, contrary to Black's theory and some prior empirical research and legal concerns (Gross and Livingston, 2002; *New Jersey v. Soto*, 1996; Terrill, 2001; Worden, 1995). However, the highly skewed social distribution of suspects in this sample, especially with regard to race, makes such a conclusion hazardous. We have already noted the limitations of the data set for making inferences about race effects, and we think it essential to test for these effects in a larger, more racially diverse sample of suspects. Indeed, the

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22. This proposition is contrasted by a finding, now over 35 years old, that even well-educated and well-informed persons tend not to exercise their civil liberty rights when confronted by police authorities (Griffiths and Ayres, 1967).

fact that race did not explain search behavior in Middleberg does not mean it is unrelated to stops or encounters between citizens and officers (Gross and Barnes, 2002; Knowles et al., 2001).

We do not have observations of search practices before Middleberg began its campaign against drugs, so we do not know whether these results represent a significant change from times when drug crime was not a high priority. Nonetheless, it is interesting to juxtapose Middleberg's situation with the perspective offered by Wilson and Kelling (1982), who claim that law enforcement in the 1960s and 1970s was increasingly constrained by legal restrictions designed to protect the rights of the individual rather than upholding the community's desire for order maintenance. Whether that is a realistic depiction of American police history is open to debate (Crank, 1994; Walker, 1984), but it would appear that this state of affairs did not pertain to Middleberg a decade after Wilson and Kelling's piece was published. If anything, our data support Kelling's more recent contention that police are "pushing the Fourth Amendment" to the verge of or beyond what is legally permissible (Kelling, 1999:13-14). Whether, as Kelling suggests, better guidelines and training will serve as adequate curbs on such practices is not tested by our analysis, and it remains a question relatively untouched by empirically rigorous research.

The available data do not distinguish between an officer's intent to hinder or break up suspected criminal activity through questionable search practices or a genuine desire to base criminal prosecutions, and convictions, on improper searches. We note that unconstitutional searches were statistically no more likely to generate contraband than were constitutional searches (no table shown), but it is also significant that a search was more likely to be unconstitutional when suspects were released than when they were arrested or cited. Perhaps officers were using pat-down searches to "send a message" to suspects, or alternatively, officers may have made "honest mistakes" that they sought to remedy by releasing suspects.

Regardless of whether officers intended to harass or arrest and prosecute suspects, we think it a significant problem when police subject 30% of searched suspects to invasions that would fail to survive a suppression motion. The situation is even graver when one considers that not a single search in the Middleberg sample was conducted pursuant to a warrant, nor were the majority of illegal searches even available for the courts' consideration by way of a suppression motion. That these searches do not lead to arrest certainly ameliorates their severity, as does the fact that few would have supported a civil suit for misconduct. But the cost of illegal searches is hardly inconsequential, especially to the police.

A recently conducted survey of contacts between police and public shows that 72% of police searches in America resulting from a traffic stop

are viewed as illegitimate by citizens who are searched (Langan et al., 2001). One might safely assume that anything that casts police in an illegitimate light detracts from their capacity to reach out to “partner” with that citizen—and perhaps his or her friends and family who receive an account of the experience. This view is reinforced by the British Crime Survey of 1992, which showed that citizen satisfaction with policing in the community was strongly and negatively affected by experiencing a search (Skogan, 1994). Thus, there is, far more often than not, a price that police pay whenever they search someone, an alienating effect that may well be higher when police conduct a search that violates a citizen’s rights. Although citizens must accurately sense that those rights have been violated, others have cautioned that the incentive to obey legal strictures is lowered when law enforcement seems to be above the law (Tyler, 1997). That is, perhaps, a contributing motivation (possibly unconscious) behind the pattern we found in the qualitative analysis of the most frequent police offenders, who stressed the importance of being polite to suspects they searched. Reversing Hamlet’s strategy with his mother, perhaps these officers were “kind only to be cruel,” a pattern noted by Kelling (1999:14) in stops designed to seize illicit guns. Whether this kinder, gentler form of constitutional violation substantially mitigates the alienation of citizens from the police is a matter for further investigation, but it is unsettling that officers most disposed to engage in community policing were disproportionately responsible for constitutional transgressions.

It is hard to judge the generalizability of these findings, because they are based on one jurisdiction, and we do not have the benefit of other studies using the same methodology. Our theoretical framework suggests that it is inappropriate to speak of what is “typical” of police agencies, because we expect that there is considerable variation in the legality of police practices from one jurisdiction to another. Clearly, there is a need for more systematic direct observation in a variety of jurisdictions, ideally selected in ways that would capture the potential range of compliance with constitutional standards. We would characterize Middleberg as a professional department in a fairly accommodative and laissez-faire court and political setting.<sup>23</sup> Whether other urban police departments would have acted similarly to Middleberg’s force is beyond reasonable speculation given the variety of internal and external controls specific to each department, but, on the face, Middleberg does not seem a candidate to have the highest rate of unconstitutional searches.

For that matter, the war on drugs and resulting court decrees may have relaxed the constitutional standards governing police behavior (Kennedy,

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23. Although the organizational context generally promoted conformance to the Constitution, the process lacked critical oversight of police activities.

1997). Over the last decade, the U.S. Supreme Court has largely expanded the powers of officers to pursue (*Illinois v. Wardlow*, 2000), stop (*Whren v. U.S.*, 1996; *Ohio v. Robinette*, 1996), and search (*Florida v. Jimeno*, 1991; *Minnesota v. Carter*, 1998) suspects.<sup>24</sup> Most of these decisions were issued after the period of observation in Middleberg, raising the possibility that some of the police searches coded as unconstitutional in this study might now be considered legal. Nevertheless, a review of the searches in light of evolving precedent suggests that the results would change only slightly (because substantial deference was given to the officers in coding). Moreover, there remains the question of whether citizens would accept the searches as legitimate encroachments upon their privacy.

Although necessarily cautious about what we have found in our study, we also note that it is one of the first to bring direct and systematic observation to the constitutional evaluation of police searches. Nor can the results from Middleberg easily be ignored. The fact that those sworn to uphold the law regularly and repeatedly transgressed constitutional boundaries puts the legitimacy of police work at risk. It also damages the larger bond between citizen and government. To the extent that American government exists with the consent of the governed—that each citizen gives up a measure of liberty to achieve public order—the social control of law is at risk when police officers act beyond its bounds. In the present case, observations were conducted in the midst of a war on drugs, but the results lead us to wonder what a replication would show now that the nation's local law enforcement agencies have been enlisted in a war against terrorism.

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24. There are, of course, exceptions (*Bond v. U.S.*, 2000; *Kyllo v. U.S.*, 2001), particularly where the states have entered consent agreements prohibiting particular practices (Gross and Barnes, 2002), but as a general rule, the war on drugs has motivated the courts to expand the powers available to law enforcement to uncover and punish criminal activity.

## APPENDIX: SAMPLE SEARCH NARRATIVES AND CODING

So that readers might better understand our coding scheme, this Appendix provides excerpts from sample search narratives and explains the reasoning behind the codes.

As discussed in the text, two researchers reached unanimity on 80 percent of the search codes. Two such cases involved on one extreme a consensual search and on the other an invasive search unjustified by any suspicion. Their narrative accounts supply the fact patterns:

### *Constitutional Consensual Encounter*

When the officers arrived at the designated parking lot, they saw four black male teenagers standing by the bumper of one of several cars in the lot, which was adjacent to a residential multifamily area that appeared to be better off than low income housing. The officers got out and questioned the youths, asking them what was going on, what they were doing out, and so on. Officer 1 [O1] took the lead in this. He knew Citizen 3 and Citizen 4 from previous contact.

The four teenagers were low key, casual, and joking with the officers, who were also low key. Then O1 asked if they had seen any drug dealing going on, that there had been reports of it in this area. All four said that they had seen no indications of any. Then O1 asked if they had any drugs on them. All said no. O1 asked if they minded if he searched them. All said no, they didn't mind. The officers then patted each down and asked for ID on each.

We coded this search as constitutional because the teenagers were under no compulsion to comply with the search and appear to have voluntarily agreed to be patted down. The fact that there was no legal justification for the officers to search the citizens absent their consent does not change the constitutional conclusion we reached. So long as a reasonable person believes he need not comply with the officer's request, his subsequent agreement is constitutional (*Schneckloth v. Bustamonte*, 1973). We recognize there is an inherent power disparity between police officers and teenagers, but the courts do not equate this difference with coercion (*U.S. v. Price*, 1979; *U.S. v. Gallego-Zapata*, 1986; *Tarter v. Rayback*, 1983). Moreover, at least here the officers and teenagers were engaged in a "low key, casual, and joking" conversation, which suggests that the citizens did not feel forced to submit to the search.

### *Unconstitutional Egregious Search*

Citizen 1 [C1], a black male in his late twenties, was riding a bike. Officer 1 [O1] motioned for C1 to pull over, but C1 kept riding. O1 radioed to the other police officer that O1 was going to wait for the

other officer to arrive before O1 pulled over C1. When the other officer arrived, O1 pulled in front of C1 and Officer 2 [O2], a white cop in his late twenties, pulled behind C1. C1 got off his bike and asked the officers what was the problem.

O2 said, "We received a report that said you were selling drugs." C1 said he doesn't sell drugs, and doesn't have any dealings with drugs. O2 said, "Yeah, right." O2 asked C1 if he had any drugs on his person because if C1 had some drugs and lied to them, the officers were going to be pissed. C1 said repeatedly that he had no drugs on him. O1 began to search C1. C1 had a knapsack that O2 threw to O1, and O1 began to search the knapsack. O1 found nothing and laid the knapsack on his car. While this was going on, two other officers pulled up. Officer 3 [O3], white male in his late twenties, began to check C1's pockets, while O2 was still checking the rest of C1. The officers were unable to find anything, so O2 said, "I bet you are hiding them under your balls. If you have drugs under your balls, I am going to fuck your balls up." C1 said they could check him anywhere because he didn't sell drugs.

O2 said, "You sure are nervous. I wonder why you are so nervous." O2 then told C1 to get behind the police car door, and pull his pants down to his ankles. O2 then put on some rubber gloves, and began feeling around C1's [testicles] for drugs.

Finding nothing, O2 said, "I bet you are holding them in the crack of your ass. You better not have them up your ass." C1 turned around, bent over, and spread his cheeks. O2 then put his hands up C1's rectum, and found no drugs. As C1 was putting on his clothes, O1 explained to C1 that the officers hadn't just arbitrarily picked C1 to harass. The officers had received a call, and C1 matched the description of the guy for whom they were looking.

"Besides, you are so nervous, I would bet that you have some drugs on you too. But then again, I would be nervous too if I was surrounded by 4 cops." C1 repeated that he didn't use or sell drugs, but he understood why the cops had pulled him over. C1 asked if he could leave, and O2 said yes. C1 said thank you and left. As we walked back to the car, O1 said, "I know he had some drugs." The encounter ended.

In this encounter there were two searches, one of the suspect's knapsack and the other of his person. At first blush the two searches might appear to be constitutional, since the officers claimed to be acting on a report of drug dealing. If this were the case, we might have coded some of this encounter as constitutional, giving the benefit of the doubt to the officers about the reliability of the source. But there was simply no evidence elsewhere in the report that the officers had ever received the call to which

they referred. Moreover, even if they had, an anonymous tip does not in itself justify a body cavity search (*Florida v. J.L.*, 2000). There is an argument that the suspect consented to the body search, since he did say the officers could “check him anywhere.” But in this situation not only had the suspect already been subject to an illegal search of his belongings and pockets, but the officers also threatened to “fuck up his balls” if he were breaking the law. Under such threats, the suspect’s alleged consent appears much more as a plea for mercy than a constitutionally valid invitation to search (*Florida v. Royer*, 1983).

While the vast majority of cases were coded unanimously under the matrix’s coding rules, a smaller set required further deliberations with a third researcher or even separate legal research. Among these cases, the following two are illustrative, one involving a definition of voluntariness, the other meshing the twin issues of reasonable suspicion and changing judicial precedent.

#### *Voluntariness*

Driving by a corner grocery store, the officers see a black male [in his] late teens walk out of the store with a napkin in hand. They pull over and ask him, Citizen 1, to open the napkin. He does, shaking it and telling them, “I got nothing in here. I just got something to eat.”

Officer 1 says, “Fine, just checking. Thank you. Sorry to have troubled you.” They then drove on.

Our first question in this situation was whether a seizure or a search had even occurred. The officers never ordered the citizen to stop, nor did they look into the citizen’s property on their own. Nonetheless, we coded this encounter as a search because the citizen took action to show the officers his personal effects on the officers’ initiative; but for the officers pulling over to the curb and asking the citizen to open the napkin, the citizen would never have done so (*U.S. v. Coleman*, 1980). However, while we referenced the encounter as a search, we also coded it as constitutional. In our view, since the officers *asked* and did not *order* the suspect to open the napkin, the citizen’s ultimate decision to comply was voluntary (*U.S. v. Copen*, 1976). While the officers made a show of their authority in pulling up to the citizen in a police car, they did not brandish weapons or otherwise seek to intimidate the citizen. Further, by asking the suspect to show them what was in the napkin, they left open the possibility for the suspect to refuse. Again, while we understand that few citizens would actually refuse such a request, we read the inference of voluntariness in favor of the officers.

#### *Reasonable Suspicion and Changing Legal Norms*

We drove into [XXX] Park to do some paperwork, and the officer [O] noticed a car sitting in the park with two passengers. The driver saw

O and began to pull away so O put on her lights and pulled him back over.

O approached the car and asked the driver, Citizen 1 [C1], a black male in his teens, for his license and registration. He gave her his registration but said he didn't have his license with him so she got his social security number and called it in and he came back suspended. Two other officers arrived, but they hadn't been called, and she told the driver and passenger to step out of the car. She asked the passenger, Citizen 2 [C2], a black female age 17, for her social security number and then called it in. C2 didn't have a driver's license although she was 17. One of the other officers patted C1 down and then O1 explained that they had to find a licensed driver to get the car because C1 was suspended and C2 wasn't a licensed driver. She said that C1 was getting a summons for driving with a suspended license and asked him for information for the summons, name, address, phone, etc. She suggested they could walk over a hill to a store to call for a ride and C1 said maybe his mom would come get it. O1 then gave C1 the summons and said he'd better show up for court or he would go to jail. C2 said she had just met C1 that night and they had decided to go for a drive. C1 said he had a friend who lived in the area and they could walk to his house and see if he were home. C2 said she didn't want to walk anywhere (she was very angry), but they started out walking together.

Debriefing: O said [the citizen] had probably been in the park making out and he had bad luck by being caught.

This case was particularly difficult to code. Under current law the pat down of this citizen would be unconstitutional, since the officer's only justification for frisking the suspect was because he was about to receive a citation. Although officers may search suspects incident to arrest, the Supreme Court has prohibited police searches as incident to a citation (*Knowles v. Iowa*, 1998). However, at the time of the observations, the law on such searches was in flux, meaning that a reasonable officer could have concluded that she was able to search a suspect in conjunction with a citation. Under those circumstances a search incident to citation might well be permissible.

Our analysis did not stop there. We still needed to contend with the officer's initial basis for stopping the suspect's car. As the narrative indicates, the suspect was sitting in a car within a park and moved the car when he saw the officer. There was no indication that the car was parked in a high-crime area, nor was there evidence that the citizen had broken any motor vehicle ordinances prior to the stop. For that matter, the couple did not "flee" rapidly; they merely drove away at a reasonable speed. However, given that the car was parked in a public park late at

night, it is arguable that the citizens were violating a municipal ordinance about park hours. Moreover, the fact that they left *as soon as* the officer pulled into the park suggests that even they believed they might be doing something improper.<sup>25</sup> Under these circumstances we understood how an officer might conclude there was reasonable suspicion to stop the suspect's car to investigate his and the passenger's activities. If the stop were permissible, then an officer could certainly ask for the driver's license and registration. The suspect's failure to present a license led to the citation, which under the law of the time could have permitted a search incident to citation. Although a very close question, we coded this search as constitutional.

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25. Of course, there are many valid reasons that a citizen might avoid police officers, including previous unpleasant experiences with the police. But in the coding we were trying to evaluate how a reasonable officer would interpret the citizen-suspect's behavior. Here, while the suspect did not flee at a high speed, he appeared to be avoiding the officer at a time when most public parks are closed. As such, our analysis is consistent with the "totality of the circumstances" test in which flight plus another indicia of suspicion gives grounds for a "stop and frisk" (*Illinois v. Wardlow*, 2000).

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Jon Gould is Assistant Professor of Public & International Affairs and Visiting Assistant Professor of Law at George Mason University, where he is Assistant Director of the Administration of Justice Program. Recent publications (2002) have appeared in the *Justice System Journal* and *Public Administration Review*

Stephen Mastrofski is Professor of Public & International Affairs at George Mason University, where he is Director of the Administration of Justice Program and the Center for Justice Leadership and Management. Recent publications (Mastrofski, Reising, and McCluskey, 2002; Terrill and Mastrofski, 2002) have appeared in *Criminology* and *Justice Quarterly*.

