Crime and the Supreme Court

The Impact of the War on Drugs on Judicial Review of Police Investigatory Practices

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INTRODUCTION

The United States has been engaged in a “war on drugs” since the mid-1980s. Federal and local police agencies have devoted increasing amounts of time and resources to fighting this war. More than $39 billion was spent on drug-related police criminal justice activities in 1998, a fourfold increase from the amount spent in 1981 (Kappeler, Blumberg, & Potter, 2000). As a result of the increased attention by the police to drug law violations, the number of persons arrested and incarcerated for drug-related crimes has increased exponentially. Between 1973 and 1996, the number of arrests for drug law violations increased from 328,670 to 1,506,200, a fourfold increase. In 1980, 8 percent of all inmates were incarcerated for drug law violations; by 1997, the percentage had increased to 23 percent of all inmates (Beckett & Sasseen, 2000).

Part of the war on drugs has included calls to “get tough” on offenders and to place greater focus on protecting society and less emphasis on the individual rights of criminal suspects who are, in the minds of many, probably guilty anyway. Police agencies have responded to public demands to get tough on crime in part by developing and utilizing new investigatory practices, such as civilly enforcement, community caretaking, order maintenance, and zero tolerance (Livingston, 1998). These activities, while effective in ferreting out some criminal activity and maintaining order, are also more intrusive than old-style reactive policing techniques, and allow the exercise of more discretion by individual police officers (Kahan & Meares, 1998; Meares & Kahan, 1998; Sklansky, 1998; Storzer, 1998).
among public officials, which makes it easier for many to rationalize police activities that may impinge on civil liberties. Referring to the use of the drug war as an excuse to limit civil liberties, Yale Kamisar said: "Through history, the government has said we're in an unprecedented crisis and that we must live without civil liberties until the crisis is over... it's a hoax" (Morganthau, 1990, p. 23).

Those arrested on drug-related charges receive little sympathy from the public, police, or community leaders. In 1990, Los Angeles Police Department chief Darryl Gates told the Senate Judiciary Committee that casual drug users "ought to be taken out and shot" (Rowley, 1992, p. 605). Drug czar William Bennett suggested that beheading drug dealers was morally acceptable (Rowley, 1992). Comments of this sort, made by respected political leaders, indicate the tremendous sense of outrage and urgency to stem the tide of illegal drug use felt by many in this country. Such statements can be expected to have an impact on police departments attempting to prioritize operations with limited resources. Fyfe (1998) argues that research on police behavior indicates that the major determinant of the behavior of officers in the streets is the philosophy and policy of their chiefs.

Police officers on the street may become so convinced of the moral righteousness of their actions that they are willing to sidestep legal requirements, such as the provisions of the Fourth Amendment, to get drugs off the streets. An American Bar Association committee on criminal justice found "evidence that... disregard for the Fourth Amendment, specifically in drug cases, may be an unavoidable by-product of a drug problem so pervasive that the police feel they sometimes must violate constitutional restraints in order to regain control of the streets" (Rowley, 1992, p. 605).

Related to the war on drugs is the endorsement and adoption of "zero tolerance" policing techniques. Under a zero tolerance approach, officers seek to prevent crime through order maintenance. This may take the form of enforcing vagrancy and curfew statutes and other laws or municipal ordinances intended to keep the streets clean and safe.

As standard investigative techniques fail to significantly reduce the drug problem and drug-related crime, police are employing new methods of detecting drugs. These methods have been largely endorsed by the Supreme Court. The Court has permitted the use of police sobriety checkpoints [Michigan Department of State Police v. Sitz (1990)], drug courier profiles [Ornelas v. United States (1996)], and random drug testing of adults [National Treasury Employees Union v. von Raub (1989)] and children [Vernonia School District 471 v. Acton (1995)]. The government may also examine telephone numbers called, check deposition slips, a person's fenced backyard, and garbage placed on the curb for collection (Katz, 1990). All of this may occur without the protection of the Fourth Amendment because the Supreme Court has defined each of these activities as beyond the scope of the Amendment (Burkoff, 1984; Sundry, 1994).

Together, the public hue and cry to get tough on crime, the war on drugs, and the adoption of order maintenance strategies such as zero tolerance policing, have resulted in police officers across the country pushing the envelope on the protections of the Fourth Amendment; and these actions have largely been sanctioned by the Supreme Court. The next section examines recent Supreme Court decisions involving police investigatory practices affecting persons in their home and in public.

Recent Supreme Court Decisions Involving Police Investigatory Practices

RECENT SUPREME COURT DECISIONS INVOLVING POLICE INVESTIGATORY PRACTICES

The Fourth Amendment bars "unreasonable" searches and seizures by police. This seemingly simple statement provides tremendous room for maneuvering, however, as the courts attempt to determine what is and is not reasonable. In recent years, the Supreme Court has examined several aspects of police work that implicate the Fourth Amendment. In this chapter, the focus is on two: "knock and announce," and the activities of police officers during traffic stops.

Examining the cases in both of these areas provides background on the individual case as well as a brief recitation of the applicable law. The Supreme Court's decision is then analyzed, focusing on its rationale. In most of these cases, the Court utilized a balancing test to determine the reasonableness of the challenged police actions. Under this test, the Supreme Court does not determine what is unreasonable based solely on precedent or common sense; it also focuses on the competing public and individual interests, and whether there is a "reasonable expectation of privacy."

The Knock and Announce Rule

Police prefer to enter a structure they wish to search as quickly as possible for obvious reasons, such as to prevent suspects from escaping or destroying evidence or from harming police officers. Officers have long been required, however, to knock and announce before entering a building. The phrase "knock and announce" is shorthand for the requirement that police officers identify themselves and give notice of their purpose. Entry without notice is allowed only in certain exigent circumstances, such as danger to innocent occupants of the premises, danger to the officer seeking to enter the premises, the possibility of the destruction of evidence contained on the premises, and the possibility that the occupants will either escape from the intended arrest or search (Hemmens, 1997). Announcement is also unnecessary when it would be a useless gesture; that is, when the presence and purpose of the police is already known to the occupants. Entry by force is permissible after notice and announcement are given and refused, or if there is no response from within the dwelling.

The knock and announce rule was first reported in Semayne's Case in 1603. The earliest-known American case is Read v. Case, decided in 1822. During the twentieth century, a number of states enacted statutes dealing with the manner of warrant service. A majority of the states passed knock and announce statutes that generally required notice and announcement, but also codified common law exceptions to the general rule. Currently, at least forty states have either case law or statutes requiring police to knock and announce (Hemmens, 1997).

There have been only a handful of Supreme Court cases dealing with the knock and announce principle. In Miller v. United States (1958), the Supreme Court held that an entry and arrest by federal agents was illegal because they failed to first announce the purpose of their visit to Miller's apartment. The Court declined to expressly incorporate the knock and announce rule into the Fourth Amendment, however, preferring to decide the case on a non-constitutional ground.

In Wong Sun v. United States (1963) the Supreme Court ruled that evidence seized by federal agents who broke into a home without first identifying themselves and an-
The Supreme Court in recent years has addressed the constitutionality of a number of these new police practices, and almost without exception has upheld the challenged police activity. In so doing the Court has increasingly relied on a balancing of public protection and individual rights, and determined that the individual interest is subordinate to public safety (Strossen, 1988; Stuntz, 1997; Sundby, 1994). The Court has accepted face value assertions of danger to the police and publicly largely unsupported by social science research, while at the same time downplaying evidence that these police practices may have an effect on individual liberties. It appears that the Supreme Court, cognizant of public fear of crime and increasingly dominated by justices who stress efficiency, has relied on the "reasonableness" standard in Fourth Amendment cases. It has yet to be determined whether this change will increase police effectiveness or simply restrict individual liberties (Cole, 1999; Schulhofer, 1998; Sklansky, 1998).

This chapter reviews a number of recent Supreme Court rulings in cases involving evidence obtained by the police during the course of an investigatory technique. These rulings are in the areas of the requirement that police "knock and announce" their presence before entering a dwelling and the use of traffic stops as a means of investigating potential criminal activity. Individually, these decisions may not appear significant, but when they are taken as a whole, a clear pattern of judicial deference to the police emerges.

THE SUPREME COURT AND THE POLICE: HISTORY

Historically, the Supreme Court paid little attention to the activities of state and local police agencies. There were three primary reasons for this lack of attention: police forces remained relatively small and unorganized until the twentieth century (Walker, 1998), defendants in criminal cases rarely challenged the means by which police obtained evidence (Kennedy, 1997), and the Fourth Amendment, which today is the primary tool for controlling police conduct, did not apply to the activities of state and local police (LaFave, 1996).

The Supreme Court in Barron v. Baltimore (1833) held that the Bill of Rights, of which the Fourth Amendment is a part, did not apply to the actions of state and local governmental agencies, but instead was intended to apply only to the activities of federal agencies. As the bulk of police work was conducted by state and local agencies, the decision in Barron meant that there were relatively few instances in which the Supreme Court was called upon to interpret the meaning of the Fourth Amendment.

In Weeks v. United States (1914), the Court held that evidence illegally obtained by federal police officers must be excluded in all federal criminal prosecutions. As the Court had not at that time applied the provisions of the Fourth Amendment to the states, this decision led to a practice commonly known as the "silver platter doctrine," in which federal courts admitted evidence illegally obtained by state police officers and then turned it over to federal agents. Under this doctrine, such evidence was deemed admissible because the illegal search and seizure was committed by state agents. In 1960, in Elkins v. United States, the Court put an end to this practice, prohibiting the introduction of illegally seized evidence in federal prosecutions regardless of whether the illegality was committed by state or federal agents.

It was not until 1949, in Wolf v. Colorado, that the Supreme Court determined that the Due Process Clause of the Fourteenth Amendment "incorporated" the Fourth Amend-

ment and applied it to state action. Incorporation of the Fourth Amendment meant that the activities of state and local police agencies were now subject to the strictures of the Fourteenth Amendment. Finally, in 1961, in Mapp v. Ohio, the Court put the issue to rest and applied the exclusionary rule to the states through the due process clause of the Fourteenth Amendment.

During the 1960s, the Supreme Court handed down a number of decisions involving an interpretation of the meaning of the Fourth Amendment. While a complete discussion of these cases is beyond the scope of this chapter, a fair summary of these decisions is that they provided criminal suspects with a number of rights that the police were obliged to respect in their investigation of possible criminal activity (LaFave, 1996; Schwartz, 1983; Wicke, 1988). These decisions were based on the civil rights movement, which has been credited with exposing to the members of the Court the realities of racial discrimination in the United States (Schwartz, 1983). Many of the Supreme Court's decisions in the area of criminal justice can be seen as attempts to reduce the impact of racial discrimination on the criminal justice process (Cole, 1999; Maclin, 1991; Stuntz, 1998).

While many of these decisions provided criminal defendants with greater protections, several decisions provided the police with tremendous power to investigate crime. These included, in particular, Camara v. Municipal Court (1967) and Terry v. Ohio (1968).

In Camara v. Municipal Court, the Supreme Court ruled that administrative search warrants may be issued on less than probable cause. The Court justified lowering the standard of probable cause by balancing the need to search against the limited invasion of privacy that an administrative search involved. Administrative searches are not concerned with uncovering evidence of criminal activity, but are designed to allow the government to ensure compliance with various health and safety regulations (del Carmen, 1998).

In Terry v. Ohio, the Supreme Court ruled that police could stop and frisk someone on the street based on "reasonable suspicion" that a crime had occurred. Reasonable suspicion, the Court acknowledged, was less than probable cause. The Court justified relaxing the probable cause requirement by again balancing the need to investigate crime against the limited invasion of privacy that a brief detention involved (Harris, 1994, 1998b).

Taken together, these two decisions provided police officers with a great deal of flexibility in their approach to the investigation of criminal activity. As the Supreme Court has become increasingly dominated by conservative, pro-police justices and public fear of crime has risen, the Court has repeatedly approved the use of these police practices and repeatedly narrowed the protections of the Fourth Amendment. The Court has accomplished this in large part by accepting at face value police claims of social necessity and expediency, and downplaying the impact of intrusive police activities on individual citizens. This inclination to endorse police activity has been heightened by the war on drugs.

THE WAR ON DRUGS

Drugs are a pervasive problem in American society, and police departments are fighting the war on drugs in all regions of the country. The war on drugs has created a virtual panic
nouncing their purpose should be suppressed because there were no facts to make the officers "virtually certain" that the suspect was aware of their purpose. The majority opinion suggested, in dicta, that some of the common law exceptions to the knock and announce rule might be applicable in the appropriate case.

In *Ker v. California* (1964), the Supreme Court held that police failure to knock and announce was acceptable only in certain circumstances, and that these circumstances should be judged based on the reasonableness clause of the Fourth Amendment. Unfortunately for lower courts looking for guidance, the Court's decision was badly splintered. Justice Brennan's plurality opinion held that unannounced entry into a home violated the Fourth Amendment except in three limited situations: (1) where the persons within are already aware of the officers' authority and purpose, (2) where the police believe that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock on the door), are attempting to escape or destroy evidence.

Justice Clark's plurality opinion held that police could ignore the knock and announce rule whenever "exigent circumstances" existed. Clark did not specify what sort of activity would constitute exigent circumstances in general, focusing instead on the specific facts of the case. Some of the language of his opinion, however, suggested that the very nature of some contraband (such as narcotics) might create an exigency, absent any indication that the suspects were attempting to destroy it.

The Supreme Court did not hear a case involving the knock and announce rule for almost thirty years after *Ker*. In the last four years, however, the Court has rendered several decisions in cases involving challenges to the knock and announce rule. Three of these are described below.

**Wilson v. Arkansas (1995)** In 1995, in *Wilson v. Arkansas*, the Supreme Court clarified the relationship of the knock and announce rule and the Fourth Amendment. Wilson was convicted of possession after police officers, armed with a search warrant, entered her home without knocking or announcing. When the police came to the house, they found the front door open and the screen door unlatched. Looking inside, they saw a man sitting on the living room sofa. They opened the screen door and entered, announcing only after they crossed the threshold. During the subsequent search of the house, contraband was seized and Wilson was arrested.

At a pretrial suppression hearing, Wilson sought unsuccessfully to have the evidence seized by the police during the search of her house excluded from trial on the grounds that the police had failed to knock and announce. Wilson was convicted, and her conviction was upheld on appeal.

The Supreme Court reversed the decision of the state court. In doing so, the Court for the first time squarely held that the common law knock and announce rule was a part of the Fourth Amendment's prohibition on unreasonable searches and seizures. The Court held that (1) the Fourth Amendment requirement that searches be reasonable includes as a factor whether the police gave notice and announcement prior to entry, and (2) that there are exceptions to the general rule that police should knock and announce. After examining the common law at the time of the framing of the Bill of Rights, the Court concluded that

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whether the police knocked and announced before entry was a factor in determining whether a search was reasonable.

The Supreme Court went on to say that just as the knock and announce principle was subsumed in the reasonableness clause of the Fourth Amendment, so too were possible exceptions to the general rule of notice and announcement. The Court declined to enumerate these possible exceptions, however, and instead chose to leave to the lower courts the task of determining when it might be appropriate to make an announcement. The Court did indicate, however, that some of the more common exceptions to the knock and announce rule already existing in case law might well withstand constitutional scrutiny.

The decision in *Wilson* left lower courts in much the same position they were before the decision. In effect, all that *Wilson* did was to make explicit what many lower courts already assumed—that the "knock and announce" principle is a constitutional requirement, not just a common statutory provision or a common law principle, and that there are some exceptions to the general rule.

**Richards v. Wisconsin (1997)** *Richards v. Wisconsin* (1997) involved an attempt by police officers to execute a search warrant for a hotel room occupied by Richards. After Richards refused entry to a police officer disguised as a hotel employee and a wait of "four to five seconds," the officers kicked in the door and searched the room, finding a large amount of cash and cocaine in two plastic bags hidden above the ceiling tiles of the bathroom.

Richards was subsequently charged with two drug offenses. Richards sought to have the drugs seized during the search of his hotel room suppressed on the grounds that the police failed to knock and announce before entering his hotel room. The trial court denied his suppression motion.

On appeal the Wisconsin Supreme Court upheld the validity of the entry and search, relying on a prior state case in which it had created a blanket rule under which the police could ignore the requirement to knock and announce whenever the search involved a drug offense. The state supreme court based its endorsement of a blanket rule on two factors. First, it determined that there was a high risk of violence any time police attempt to execute search warrants involving felony drug possession, and that the public interest in officer safety outweighed what the court saw as a minimal intrusion into the privacy rights of citizens. Second, the court asserted that the nature of the evidence sought in drug possession cases also mandated abrogation of the knock and announce rule. Drugs, the court noted, are often easily disposed of, and thus fall under the destruction of the evidence exception to the knock and announce requirement. This reasoning adopted the approach apparently endorsed by Justice Clark in his *Ker* opinion.

The Supreme Court granted certiorari to decide whether the Fourth Amendment permits a blanket exception to the knock and announce rule if drugs are the object of a search warrant. The Court held that the Fourth Amendment does not permit a blanket exception to the knock and announce requirement for felony drug investigations, and struck down the Wisconsin Supreme Court's blanket rule as unconstitutional.

While this decision may at first blush seem a victory for individual liberties, closer examination of the opinion suggests otherwise. While the Supreme Court's opinion disap-
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proved of the Wisconsin court's blanket rule, it did not eliminate no-knock entries. Instead, the Court held that a no-knock entry is justified when the police "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of crime." Requiring the police to demonstrate a reasonable suspicion of such exigent circumstances, the court felt, struck the appropriate balance between the interests of police and the individual privacy interests affected by no-knock entries.

The impact of the application of this relaxed standard is reflected in the outcome of the Richards case. The Supreme Court concluded that the circumstances in the case provided the officers with reasonable suspicion that Richards might destroy evidence, and that this justified their no-knock entry. The Court created a large window of opportunity for the police when it permitted the police to disregard the knock and announce rule upon the relatively low threshold of reasonable suspicion of danger to the police or destruction of evidence. Normally, reasonableness requires meeting the probable cause standard. In some instances, however, courts only require reasonable suspicion. By requiring only reasonable suspicion, the Court ensured that police will be able to more easily avoid the knock and announce rule.

It is a narrow view of the Fourth Amendment that suggests that the privacy interest at stake in unannounced entry situations is either nonexistent or negligible. The Fourth Amendment was created largely in response to official invasions of the home, and the Supreme Court has repeatedly upheld the sanctity of an individual's residence. Unannounced entry destroys this privacy interest; consequently, such entries should be limited to the most extraordinary of circumstances.

United States v. Ramirez (1998)  Finally, in United States v. Ramirez (1998) the Supreme Court unanimously overturned a Ninth Circuit rule that police officers must possess more than a reasonable suspicion of an exigent circumstance to execute a no-knock warrant in which property damage occurs. The Court declined to adopt the Ninth Circuit's "two-tier" mode of analysis and determined that minor property damage during entry did not transform an otherwise lawful entry into an unlawful one. Requiring the police to demonstrate a reasonable suspicion of exigent circumstances, the Court felt, struck an appropriate balance between the interests of police and individual privacy interests.

The impact of Wilson, Richards, and Ramirez on police tactics is significant. While the decision in Wilson that the knock and announce rule was constitutionally mandated was a victory for privacy interests, the endorsement in Richards of the reasonable suspicion standard for when unannounced entry is acceptable and the refusal in Ramirez to permit lower courts to hold police officers accountable for their unnecessary use of force during an unannounced entry effectively guts the victory (Hemmens, 1998).

This trio of knock and announce decisions opens the door (pardon the pun) to increased police use of unannounced entry. This is a clear victory for the police. Another area in which the police have recently been the beneficiaries of a deferential Supreme Court is traffic stop practices. The following section reviews several recent decisions involving police behavior during routine traffic stops.

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Traffic Stop Practices

Travel by automobile is a fact of life in contemporary America. Almost as ubiquitous as the automobile are traffic laws and regulations. Traffic stops are routine occurrences. For many citizens, a traffic stop is the only time they will interact with a police officer. In recent years, some police officers have begun using otherwise valid traffic stops as a means of investigating possible criminal activity. As a result, courts have attempted to define the constitutional parameters of such encounters.

A seizure occurs when a police officer, by means of physical force or show of authority, restrains the liberty of a citizen (Florida v. Bostick (1991)). Seizures come in several forms, from "Terry stops" to full arrest. To arrest someone, police must have probable cause that a crime has been committed. To conduct an investigative detention, or "Terry stop," the police must have an articulable, reasonable suspicion that a person has committed or is about to commit a crime (Terry v. Ohio (1968)).

A police officer who observes a motorist commit a traffic infraction has probable cause to conduct a traffic stop. During this stop, the officer may investigate the traffic violation and, if he or she so chooses, issue a traffic citation. Absent a reasonable, articulable suspicion of further criminal activity, the scope of the detention may not lawfully be expanded beyond the purpose of the initial stop. In addition, police officers may make an investigatory stop of a vehicle based on specific and articulable facts that create a reasonable suspicion of criminal activity on the part of the occupants of the vehicle. This "investigatory stop" is analogous to a "Terry stop" of a pedestrian.

A police officer may not conduct a full search of a vehicle or its occupants based on a traffic stop or an investigatory stop unless there exists probable cause to search. This is because the investigatory stop is based on less than probable cause, which is required to conduct a full search, and because a traffic infraction does not create probable cause to investigate for possible criminal activity. Only if the officer has probable cause as a result of the stop (for example, by discovering evidence in plain view) may a full search ensue (Del Carmen, 1998).

To be considered reasonable, traffic stops and investigative stops must also be limited in duration. The Supreme Court has not provided a precise time limit, but has indicated that an investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop. The permissible length of a traffic stop is that which is necessary to investigate the infraction and issue the ticket. Once the reason for the traffic stop has been dealt with, either via issuance of a ticket or a warning, it is unreasonable to detain the driver to investigate possible criminal activity unless the police officer possesses specific and articulable facts to support the detention, or the driver voluntarily consents to further questioning.

As more than one commentator has noted, it is virtually impossible to travel by car for any appreciable length of time without committing a traffic infraction (Harris, 1998a; Maclan, 1998; Sklansky, 1998). The significance of this fact lies not in the small fine that may accompany a citation for a minor traffic violation, but in the use of traffic regulations by individual police officers as a pretext to conduct an investigation of criminal activity; an investigation not based on probable cause or even reasonable suspicion.

The Supreme Court has recently decided several cases involving traffic stops and the authority of police during these encounters, and has generally allowed the police to
use the traffic stop as a means of investigating for possible unlawful activity. These recent cases are briefly described below.

Ohio v. Robinette (1996)  An increasingly popular investigative technique involves a police officer making a lawful traffic stop and then requesting permission to conduct a search of the vehicle (Harris, 1997). This request is made routinely, and is not based on any particularized suspicion of drug-related activity by the person being cited for a traffic infraction. Specialized drug interdiction patrols utilize this tactic, as do officers on routine patrol. In Ohio v. Robinette (1996), the Supreme Court upheld this practice, and did not require that police officers inform motorists of their Fourth Amendment right to refuse consent.

Citizens may waive their rights, including their Fourth Amendment rights. Generally, however, for consent to be considered valid it must be voluntary. There is no formula or "bright-line" rule for determining when consent is voluntary. Instead, courts look to the "totality of the circumstances" (LaFave, 1996).

While consent must be voluntary, it need not be "intelligent." That is, there is no requirement that the state show those who waive their Fourth Amendment rights and consent to a search be aware that they have a right to refuse consent. In Schneckloth v. Bustamonte (1973), the Supreme Court expressly rejected imposing a bright-line rule requiring knowledge of the right to refuse consent. In Miranda v. Arizona (1966) the Court determined that for a criminal suspect to validly waive the right to counsel and the privilege against self-incrimination, the waiver must not only be voluntary, but also intelligent—meaning that the police must inform the suspect of these rights before asking the suspect to waive them. The defendant in Schneckloth asked the Court to extend this requirement of "intelligent" waiver to the Fourth Amendment right to be free of unreasonable searches and seizures. The Court declined to extend the protections accorded the Fifth and Sixth Amendments to the Fourth Amendment.

While the Supreme Court made it clear in Schneckloth that the "totality of the circumstances" was the appropriate standard by which to determine voluntariness, it did not clarify the meaning of "voluntary." Subsequent cases have provided some guidance. In United States v. Mendenhall (1980) the Court determined that a seizure occurs when a reasonable person would not have felt free to leave. In Florida v. Bostick (1991), the Court held that a seizure occurs only when an officer, by means of physical force or show of authority, restrains the liberty of a citizen.

The cumulative effect of these decisions was that police officers began to routinely seek consent to search in more encounters with civilians, including routine traffic stops. In Ohio v. Robinette (1996), the Supreme Court, faced with an extreme example, nonetheless upheld the practice. A sheriff's deputy on drug interdiction patrol stopped Robinette for speeding, intending, he admitted later, to use the stop as an opportunity to seek consent to search Robinette's car. The deputy asked Robinette to step out of the car, examined his license, issued Robinette a verbal warning, and handed back the driver's license. At this point, the traffic stop was completed. The deputy did not stop there, however. He then asked: "Would you mind if I search your car? Make sure there's nothing in there?" Robinette gave his consent, a small amount of drugs was discovered, and he was subsequently convicted of drug possession.

Maryland v. Wilson (1987)  Wilson was a passenger in a car lawfully stopped for speeding. After ordering the driver out of the car and asking him for his driver's license and registration, the trooper noticed that the passenger, Wilson, was nervous and sweating. He then ordered Wilson out of the car. As Wilson exited the vehicle, he inadvertently dropped a package of crack cocaine. The trooper seized the drugs and arrested Wilson for drug possession. Wilson sought to have the drugs suppressed as the product of an unlawful seizure, arguing that the trooper had no authority to order Wilson, a passenger not suspected of any wrongdoing, out of the vehicle. The trial court suppressed the drugs and the Maryland Court of Special Appeals affirmed.

In Maryland v. Wilson (1997), the Supreme Court reversed the state court, and stated that a police officer who has lawfully stopped a vehicle for a traffic infraction may order passengers out of the car. This case extended the ruling of a prior case, Pennsylvania v. Minims (1977), in which the Court determined that, as a matter of officer safety, police may order a driver out of a lawfully stopped vehicle. Police officers observed Minims driving an automobile with an expired license plate and stopped him to issue a citation. The police officer approached the car and asked Minims to exit the vehicle and produce his driver's license and registration. When Minims got out of the car, the officer noticed a bulge in Minims's jacket. Fearing the bulge might be a weapon, the officer conducted a
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Terry-style frisk of Mimms, and determined that the bulge was a handgun. Mimms was then arrested for carrying a concealed weapon. Mimms challenged the admission of the handgun into evidence, claiming the officer had no right to order him out of the car, and that the handgun was only discovered as a result of this activity.

The Supreme Court decided that the probable cause to stop Mimms, based on the traffic violation, and the request to exit the automobile was an "incremental intrusion" into the liberty of a lawfully stopped driver. The Court balanced the interests of the individual and society, and determined that the intrusion into the individual's liberty was "de minimis" and "a mere inconvenience," while the weight accorded officer safety was "too plain for argument."

The Court in Mimms concluded that police officers could routinely order a driver out of a lawfully stopped vehicle, regardless of the severity of the offense. This was based on balancing the interest in police safety against the privacy interests involved in being ordered out of a car. The Court in Wilson acknowledged that ordering a passenger out of a vehicle was an intrusion on the privacy interests of the passenger, but determined that, as in Mimms, this intrusion was minimal and outweighed by the public benefit in increased officer safety.

The result of the Wilson decision is that police are now free to order any and all passengers out of a lawfully stopped vehicle. The police may do this even though they have not observed the passenger commit a crime (or even a traffic infraction). Police need not have any articulable suspicion of wrongdoing on the part of the passenger.

Whren v. United States (1996) District of Columbia police officers on drug interdiction patrol in an unmarked car observed a vehicle, driven by passenger Whren's co-defendant, stop at an intersection for approximately twenty seconds, then turn right without signaling. The police officers followed the vehicle and stopped it for the traffic violation, even though departmental regulations instructed undercover officers not to conduct traffic stops. The officers observed Whren in possession of crack cocaine in plain view during the stop, and he was arrested and subsequently convicted of drug possession.

On appeal, Whren claimed that the traffic stop was just a pretext to search for drugs, and that such pretextual stops constituted an unreasonable seizure for purposes of the Fourth Amendment. He argued that police officers used pretext stops to target members of minority groups for enforcement of drug laws, and cited a number of studies that indicated that black and Hispanic motorists were stopped more frequently for traffic offenses than white motorists (Harris, 1997, 1998a).

In Whren v. United States (1996), the Supreme Court upheld the validity of the traffic stop. In so doing, the Court resolved a conflict among lower federal and state courts and held that the subjective intent of police officers making a traffic stop is irrelevant, thus validating the use of pretext stops as a means of investigating crime. So long as police officers have a valid reason to stop a vehicle, the Court said, the fact that the officers used the violation of a traffic law as a pretext, or excuse, to stop a vehicle is irrelevant. The test is not whether an officer would have made the traffic stop, but whether an officer could have made the traffic stop. Since the traffic violation provided the police officers with an articulable and reasonable basis for making the traffic stop, priority into their subjective motive for making the traffic stop.

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The Court gave short shrift to Whren's claim that minority motorists were unfairly targeted for pretext stops, stating in an aside that if a defendant has evidence of intentional discrimination in the application of the law, he should file an equal protection claim rather than allege a violation of the Fourth Amendment. Unfortunately, this is likely to be a toothless remedy, because proof of an equal protection violation requires both a discriminatory effect and a discriminatory purpose. Proving a discriminatory purpose, in the absence of officer admission, may be impossible, since no records are kept of traffic stops to document the anecdotal evidence of targeting (Maclin, 1998).

The result of the Whren decision is that police officers are free to stop anyone who commits a traffic violation, even if the officer does so not because of concern over the traffic violation, but to use the violation as an excuse to stop the vehicle to investigate other possible crimes. Given the comprehensive scope of state traffic codes, Whren is a decision that affords the police a great deal of power vis-à-vis individual citizens.

Wyoming v. Houghton (1999) A trooper observed a car speeding, with a broken headlight. The trooper conducted a lawful traffic stop, and upon approaching the vehicle, noticed a syringe sticking out of the driver's shirt pocket. The driver was ordered out of the car and admitted to using the syringe to take drugs. Houghton, one of the passengers in the vehicle, was ordered out of the car and frisked, and the car was searched for drugs, based on the probable cause established when the driver admitted to illegal drug use and the automobile exception to the search warrant requirement. In the back seat of the vehicle, police officers found Houghton's purse and opened it. Inside they found drug paraphernalia and a syringe containing methamphetamine. Houghton was arrested and convicted of drug possession. At trial and on appeal Houghton asserted that the search of her purse violated the Fourth Amendment because the police had no probable cause to suspect her of carrying drugs, and therefore they had no probable cause to search her purse. The Wyoming Supreme Court reversed her conviction, acknowledging while that the officer had probable cause to search the car, there was no authority to examine items in the car that clearly did not belong to the driver.

In Wyoming v. Houghton (1999), the Supreme Court reversed the decision of the state court, and held that a police officer who has lawfully stopped a vehicle for a traffic violation and subsequently developed probable cause to believe the vehicle contains contraband may search the belongings of a passenger in the vehicle. After admitting that the common law at the time of the framing of the Fourth Amendment did not provide a clear answer to the lawfulness of this search, the Court turned to a reasonableness analysis, balancing the interests of the individual passenger against the interests of society. In this context, the Court held, there is no reason to limit the search of a vehicle to only those containers clearly in the possession of the driver. Passengers have a reduced expectation of privacy with regard to the property they transport in automobiles, and the degree of intrusiveness here is minimal. On the other side of the equation, society has a significant interest in permitting police officers to examine the belongings of passengers of a vehicle.
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The impact of Robinette, Wilson, Wren, and Houghton is that citizens are now afforded fewer Fourth Amendment protections while driving. This loss of individual liberties has occurred in large part because of the Supreme Court's increased reliance on the balancing of individual and police interests. The result is a significant increase in the power of the police.

DISCUSSION

As the above cases reveal, the police have become more proactive in investigating criminal activity, particularly which that is drug-related. The Supreme Court has repeatedly endorsed these police practices and shown great deference to police interests. It has done so in a variety of ways, including creating flexible exceptions to a rule, making bright-line rules vague, and limiting the opportunities for meaningful post-conviction review (Smith, 1997). The Supreme Court repeatedly endorses the existence of a constitutional right, but in a manner which effectively protects that right only for the privileged few, while as a practical matter denying it for the less privileged (Cole, 1999). This leads to a gap between rhetoric and reality in criminal procedure decisions. This so-called symbolization of rights (Smith, 1997), in essence, allows the Court to have its cake and eat it too—it is still seen as the guardian of individual rights while actually advancing pro-police preferences.

An example of how the Supreme Court has accepted as necessary more intrusive police practices is its refusal to require police officers to notify a suspect that he or she has the right to refuse consent. As the Ohio supreme court in Robinette and the dissent in Florida v. Bostick pointed out, people routinely give consent when doing so is clearly not in their best interest. The Court in Miranda v. Arizona required police to give a detailed explanation of a suspect's rights, and subsequent studies revealed that this requirement neither reduced the confession rate nor significantly impeded the investigatory process. The Court in Robinette, however, claimed that requiring a police officer to inform someone that a detention was over, or that there was a constitutional right to refuse to consent to a search, was "impractical." This in spite of the Miranda rationale and the reality that such a warning would take a few seconds at most. Clearly what the Court means by impractical is that it fears that if the police tell suspects they can refuse consent, the suspects will not feel as if they have to consent, and this will reduce the number of occasions on which consent is given. This may be true, but it is troubling that the Court would base a decision in large part on whether or not the result will make the police officer's job a little more difficult.

Additionally, the Supreme Court is refusing to recognize, legally, the inequality inherent in modern American society. An example is the Court's continued claims that warrants are preferred in all but a few limited, exigent circumstances. While continuing to maintain a preference for warrants, the Court has repeatedly held that it is permissible for police officers to seek consent to search at any time, without probable cause or even reasonable suspicion of involvement in criminal activity. This tactic is disproportionately employed against young black men (Harris, 1998). The Court rhetoric is that it protects the rights of all citizens, but the reality is that police prerogatives generally prevail over the rights of minorities and the poor (Cole, 1999). The result, again, is that the police have more freedom to conduct the war on drugs as they see fit, often supported by the courts. And the police are getting the message.

It should be noted that the police do not always win in the Supreme Court. On occasion, the Supreme Court has held that the police have exceeded the scope of their authority. An example is Knowles v. Iowa (1998). In this case, a police officer stopped Knowles for speeding. After issuing a speeding ticket, the officer ordered Knowles out of the car and searched it, finding marijuana. Knowles was then charged and convicted of drug possession. The officer searched the car under the authority of two state statutes: one that authorized police to either arrest or issue a citation for traffic offenses, and one that authorized police to conduct a search incident to an arrest even in situations where the officer chose not to actually take a person into custody but instead merely issued a traffic citation. The trial court and state supreme court upheld the search on the grounds that a search incident to arrest was appropriate in any situation where an officer was authorized to arrest, even if an arrest did not actually take place.

The Supreme Court struck down the Iowa law as violative of the Fourth Amendment. The Court acknowledged that the "search incident to an arrest" was a continuing exception to the rule requiring a warrant, but noted that the exception was created for two reasons: (1) to protect officers from a potentially armed person about to be taken into custody; and (2) to preserve evidence for later use at trial. Neither of these two justifications existed in this case. First, Knowles was not in custody. Second, it was unlikely that the search would turn up any evidence of speeding, the offense that Knowles was charged with when the search commenced.

Undecided by the Court was the situation where a state eliminated citations altogether and mandated custodial arrests for minor traffic offenses. Would the search incident rationale then be extended to these types of custodial arrests? Also unanswered was whether the court might extend the search incident to an arrest exception to other situations where there is only the issuance of a citation, such as offenses more serious than a traffic offense, where a stronger case can be made that the person might be a danger to the officer. The opinion left these issues unresolved. Thus while the Court in Knowles forbade searches incident to citations for traffic offenses, it left the door open for searches incident to other minor, traditionally non-arrestable offenses.

CONCLUSION

While the Supreme Court is the ultimate decision-making body with regard to criminal procedure, it is limited in its ability to implement its decisions (Horowitz, 1977). Courts are the interpreting population, while the police are the "implementing population" (Canon & Johnson, 1999), the group whose behavior is reinforced or sanctioned by the interpreting population. The police are receiving the message from the Supreme Court that all is fair in the drug war—most of the criminal procedure decisions of the past decade have been an endorsement of police practices, even as these practices have become increasingly intrusive. Consequently, the police continue to push the envelope in the drug war, trying new and more intrusive practices. Where this movement will end is anybody's guess.

According to the current Supreme Court, reasonableness is the "touchstone" of the Fourth Amendment [Florida v. Jimeno (1998)]. This simply means that the Amendment

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requires that police officers act rationally and pursue reasonable goals when they intrude upon individuals (Maclin, 1993). There is no requirement that police officers always have a warrant, or even probable cause in some instances. The Court determines what constitutes reasonable police behavior by weighing the individual’s privacy interest against the legitimate interests of police. Unfortunately, such a balancing test is inherently subjective, and thus tends to deprive the Fourth Amendment of its meaning and weakens it, as well as producing inconsistent results (Strossen, 1998).

The result of the Court’s increased reliance on a relaxed application of the balancing test to determine the reasonableness of police action has been a pronounced tendency by the Court to uphold most police investigatory practices, based on the necessity of fighting the drug war and expediency. This is unfortunate, as the Fourth Amendment, in the words of Justice Frankfurter, “reflects experience with police excesses” (Dennis v. United States (1944)). The Fourth Amendment makes plain, perhaps more directly than any other amendment, that the Constitution does not tolerate a police state.

The Warren Court, during the civil rights era, was concerned with the treatment of blacks in the criminal justice system. This concern with race relations served as the “unspoken subtext” (Sklanzny, 1998) of many criminal procedure decisions. Today, this concern has disappeared from Fourth Amendment jurisprudence. Current cases show little or no concern for the intangible damage of police investigatory practices (Maclin, 1998). Racial issues, as the When opinion makes clear, are essentially irrelevant to the determination of reasonableness under the Fourth Amendment. This is especially disturbing when considered in the context of several studies and much anecdotal evidence that some police misuse traffic regulations as a means of investigating crime, and when they do so, target minority drivers. Indeed, the practice has become so common that it has its own slang description, DWB, or “Driving While Black” (Cole, 1995; Harris, 1988a).

Scholarly complaints about the Supreme Court’s treatment of the Fourth Amendment have generally fallen on deaf ears outside the legal academic community. This may be because society has become so unified in its fear of crime, and has increased its trust of the police since the tumultuous 1960s. As Justice Douglas noted in dissent in Terry v. Ohio in 1968: “There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”

The war on drugs and the war on crime have contributed to the reluctance of an increasingly conservative Supreme Court to restrain police. Consequently, it appears that Justice Douglas’s fear has been largely realized. This chapter has reviewed how the Supreme Court has deferred to the wishes of the police in two areas, the knock and announce requirement and traffic stops. The cases in these two areas indicate a clear tendency on the part of the Court to let the police intrude into the privacy rights of the individual citizen. How far this intrusion will go remains to be seen.

REFERENCES


