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Policing the Prosecutor: Race, the Fourth Amendment, and the Prosecution of Criminal Cases

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FEATURE

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By Renée McDonald Hutchins

Two events have collided to give prosecutors enormous power. The first is an inveterate retreat from robust enforcement of police conduct under the Fourth Amendment. The second is a now-dominant use of negotiated pleas to resolve criminal cases. The combination has meant a significant increase in the already substantial power of prosecutors—power that is being deployed in a way that disadvantages black and brown defendants. Put somewhat more directly, a straight line can be drawn from the expanded power of the police over black and brown bodies in the streets to the expanded power of prosecutors over black and brown lives in the courtroom.

As this article explores, while the Fourth Amendment is commonly criticized for the discretion it affords *police officers*, an overlooked result of the amendment's lax regulation of the police is the enhanced power it affords *prosecutors*. Though for a time a warrant was the notional measure of reasonableness, over the last century the Court has crafted several exceptions to that measure to give the police greater leeway during on-the-street encounters. The Court has concurrently retreated from robust application of the exclusionary rule to remedy constitutional violations. These shifts have meant far more predictable wins for the prosecution at the suppression hearing stage. And suppression hearing wins matter.

Though jury trials are popularly touted as indispensable, in reality the American criminal justice system is a system of negotiated pleas. A finding of guilt is arrived at through concession and compromise, not adversarial wrangling for truth. In this system, the predictability of suppression hearing wins strengthens the prosecution's already strong hand. And while studies suggest that people of color may be somewhat less likely to plead, when they do they receive a worse deal (on average) than their similarly situated white counterparts. Much ink has been devoted to the Fourth Amendment's failure to police the police. The amendment is failing too, though, at policing the prosecution.

Downgrading the Fourth Amendment's Warrant Requirement

The text of the Fourth Amendment announces a right to be free from unreasonable searches and seizures. For many years, reasonableness was equated with a warrant. If the police got one, their conduct was, for the most part, lawful. If they didn't, they ran the risk of acting unconstitutionally. However, the warrant "requirement" has been substantially downgraded by the judicial creation of numerous exceptions that grant the police wide latitude to forcibly search and seize without first obtaining pre-authorization. In all, the Court has named six such exceptions.

Search Incident to a Lawful Arrest, Plain View, Automobile, Consent, Exigency, and Special Needs are all areas in which exceptions to the warrant requirement have been carved out by the Court. In each of these areas, police officers armed with adequate antecedent knowledge or the proper set of precursor facts can engage members of the public without first justifying the encounter to a neutral and detached magistrate. Perhaps more significant than the sheer number of exceptions created is the expansive authority granted by each.

For example, under Plain View, a law enforcement officer can observe and seize an item without implicating the Fourth Amendment if (1) the observation is made from a lawful vantage point, (2) the officer has lawful access to the item, and (3) the contraband nature of the item is immediately apparent to the officer. (*See* Texas v. Brown, 460 U.S. 730 (1983).) Moreover, the exception does not apply just to visual observation. It includes a police officer's sense of touch, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), and (in some jurisdictions) the officer's sense of smell, *see*, *e.g.*, *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).

The police enjoy similarly broad latitude under the Exigency exception. Under this exception, if the police have an objectively reasonable basis for believing immediate action must be taken to avoid injury to people or evidence, officers can lawfully engage in warrantless conduct for the purpose of addressing the emergency. While the exception does require some sense of urgency, it does not require headlong breathless flight or a general "hue and cry" in the streets. Indeed, the Court long ago held that a suspect's simple decision to step back into her home upon seeing the police was sufficiently "exigent" to trigger application of the exception. (United States v. Santana, 427 U.S. 38 (1976).) Even police-manufactured exigencies (like banging loudly on the door of a home, causing the people inside to panic) can trigger the exception so long as the officers' exigency-creating conduct is lawful. (Kentucky v. King, 563 U.S. 452 (2011).) Plain View and Exigency are not unique in their breadth. The other named exceptions offer the police similar freedom.

Moreover, in addition to the six named exceptions, the Court has created another vast carve-out to the warrant requirement. Specifically, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court found that police, without a warrant, can engage in a forced (albeit limited) warrantless seizure whenever they reasonably suspect the person they are stopping is involved in criminal activity. The police also, pursuant to *Terry*, may engage in a forced (albeit limited) warrantless search, whenever they reasonably believe the person they have stopped is armed and presently dangerous. Since its creation, the *Terry* doctrine has been expanded in ways that increase the categories of cases to which it applies and reduce the quality of evidence needed to trigger its application. Although the Court has never deviated in theory from its declaration that a police officer's "inarticulate hunches" will not suffice, the Court has been somewhat less demanding in practice. Indeed, the Court has described reasonable suspicion—the level of suspicion required for a *Terry* stop—as a "fluid concept." (Ornelas v. United States, 517 U.S. 690, 696 (1996).) The relatively indeterminate nature of the assessment has meant that even innocent behavior at times has been used to justify police engagement. In *Illinois v. Wardlow*, for example, the Court found that William Wardlow's decision to run after seeing the police satisfied the reasonable suspicion standard because Wardlow was in a "high crime" area. (528 U.S. 119, 124 (2000); *but see* Massachusetts v. Warren, 58 N.E.3d 333 (Mass. 2016).)

Likewise, the Court has expansive notions of what officers may do during *Terry* encounters. For example, under *Terry*'s authority, officers may order any driver or passenger out of the car during a routine traffic stop, even in the absence of particular suspicion. (*See generally* Maryland v. Wilson, 519 U.S. 408 (1997).) Similarly, the *Terry* authority to frisk a person for weapons has been expanded to include the area immediately around the person stopped, including (for traffic stops) the interior of his or her car. (Michigan v. Long, 463 U.S. 1032 (1983).) As I (and others) have written elsewhere, this generous understanding of what *Terry* allows makes it the one case perhaps most responsible for the drastic (and dangerous) increase in warrantless police-citizen interactions. (*See*, *e.g.*, Renée McDonald Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, in Policing the Black Man (Angela J. Davis ed., 2017); Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125 (2017).)

Without question, the Court's above-described expansion of police power has met with some criticism. Writing in dissent to a case in the *Terry* line, the late Justice Marshall summed up his concerns as follows: "Today's decision invokes the specter of a society in which innocent citizens may be stopped, searched, and arrested at the whim of police officers who have only the slightest suspicion of improper conduct." (Adams v. Williams, 407 U.S. 143, 162 (1972) (Marshall, J., dissenting).) Voicing comparable discontent after the

Court granted officers the automatic authority to order drivers out of their cars during routine traffic stops, Justice Stevens wrote, "[T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits." (Pennsylvania v. Mimms, 434 U.S. 106, 122 (1977) (Stevens, J., dissenting).) The Justice also cautioned that the newly sanctioned discretion might be exercised in discriminatory ways: "Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely." (*Id.*) Evidence of judicial concern also can be seen in the Court's 2009 (Arizona v. Gant, 556 U.S. 332 (2009)) and 2014 (Riley v. California, 134 S. Ct. 2473 (2014)) decisions limiting somewhat the authority granted under the "search incident" exception. However, in the main, the trend has been toward affording police officers more, not less, authority under the Fourth Amendment.

Moreover, this loosening of Fourth Amendment constraints has had undeniable racial impacts. Indeed, in a very real sense, the Court has erected an official wall of Fourth Amendment indifference to racialized policing. From *Korematsu* to *Terry* to *Whren*, the Court has consistently and repeatedly permitted a role for race in police decision making. As Devon Carbado has written, "there is a direct relationship between the scope of ordinary police authority, on the one hand, and African American vulnerability to extraordinary police violence, on the other." (Carbado, *From Stopping Black People*, *supra*, at 128.) The same can be said of prosecutorial authority over black lives: A direct line can be drawn between the above understanding of police authority under the Fourth Amendment and the expanded ability of the prosecutor to secure convictions that disparately impact black Americans. But, before turning to consider the power of the prosecutor, one final link in the Fourth Amendment chain needs to be explored—the (non)exclusion of unconstitutionally obtained evidence.

A Retreat from Exclusion

As you just read, the Court has watered down Fourth Amendment protections on the front end by downgrading the warrant requirement to something more akin to a warrant presumption. At the same time, the Court has watered down Fourth Amendment protections on the back end by sharply tailoring the availability of its chief remedy. Though other remedies exist, the exclusionary rule long has been the primary method for redressing violations of the Fourth Amendment. (Mapp v. Ohio, 367 U.S. 643 (1961).) The Court's current understanding of the exclusionary rule, however, makes it far less available.

When the exclusionary rule was first adopted, the exclusion of unconstitutionally obtained evidence was understood to be required by two distinct, but equally robust, rationales. First, notions of judicial integrity made it inappropriate for courts to rely on evidence that had been obtained through violation of the Constitution. As the Court explained in its now-overruled decision *Weeks v. United States*, the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution." (232 U.S. 383, 392 (1914).) The second rationale for excluding evidence was that exclusion was thought to deter future police misconduct. The thinking was if the police could not profit (in the sense of admissible evidence) from their bad behavior, officers would be less inclined to break the law in the first instance. (United States v. Calandra, 414 U.S. 338 (1974).)

However, the Court has retreated entirely from "judicial integrity" as a rationale for exclusion. Currently, the deterrence of future misconduct is seen as the only justification for excluding evidence. (Davis v. United States, 564 U.S. 229 (2011).) This shift to deterrence only has meant that far less gets excluded. While judicial integrity is a broad rationale that keeps virtually all unconstitutionally obtained evidence from the fact-finder, deterrence is a much narrower rule. In cases where police conduct cannot be characterized as entirely purposefully, it may be difficult to conclude that exclusion will deter future violations. Consequently, Fourth Amendment violations occasioned by police ignorance, inattention, and even sheer incompetence all have been found not to require exclusion.

The Court also has created several exceptions where evidence will not be excluded despite deliberate police misconduct. Independent source (Murray v. United States, 487 U.S. 533 (1988)), inevitable discovery (Nix v. Williams, 467 U.S. 431 (1984)), and attenuation of the taint (Brown v. Illinois, 422 U.S. 590 (1975)), all are recognized instances in which exclusion is not required even though a Fourth Amendment violation has occurred. Exclusion is similarly not required if the illegally obtained evidence is being used only to impeach the accused. (United States v. Havens, 446 U.S. 620 (1980).) Finally, exclusion of illegally obtained evidence is not

required if the prosecution can demonstrate that police officers acted in "good faith" and did not willfully violate the Constitution. (United States v. Leon, 468 U.S. 897 (1984).) In practice, these various restrictions have meant that unconstitutionally obtained evidence is frequently deemed admissible.

But what does any of this—downgrading of the warrant requirement or limitations on exclusion—have to do with the prosecution? As noted at the outset, criticism of the Court's permissive interpretation of the Fourth Amendment focuses primarily on how much discretion it affords the police. But, as will be discussed below, a straight line can be drawn from the discussion above to an increase in prosecutorial power.

prosecutorial power and plea-based "justice"

As Angela J. Davis has explained, prosecutors are the most powerful players in the criminal justice arena. (Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 5 (2007).) Prosecutors enjoy enormous discretion in deciding who to prosecute and how harshly. The criminal law does not obligate a prosecutor to do anything. Instead, it creates an array of choices from which the prosecutor may select. (William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2549–58 (2004).) The metastasizing of criminal offenses offers a smorgasbord of options. There are so many criminal offenses on the books in most places that a prosecutor often can easily charge two or three offenses for conduct that most lay people would consider a single crime. (*See generally* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 229 (2006).) The plea-based model of criminal justice that dominates the American system enhances this power.

Though high-profile jury trials capture national attention and drive public perception of what happens in "most" cases, the reality is quite a bit different. In 2017, 97.2 percent of criminal cases were resolved by plea. That total was down from 97.3 percent of cases resolved by plea in the preceding year. (*See, e.g.*, U.S. Sentencing Comm'n, 2017 Sourcebook of Federal Sentencing Statistics, fig. C.) Bargaining can occur with regard to the charge, the sentence, or both. In a plea-based system, the prosecutor and defense attorney become the primary adjudicators of guilt. But the fact that the defense is a participant in the negotiation does not mean the bargaining power of the two sides is equal.

For a variety of reasons, prosecutors have the upper hand in plea negotiations. First, the decision of whether to negotiate at all is one vested entirely to the discretion of the prosecutor. If the prosecutor offers nothing, the defense has no right to force a concession. In the absence of a deal, the defendant's only options are to go to trial or plead to the indictment. Upon conviction, assuming the absence of mandatory minimums, the defendant is left to the mercy of the sentencing judge. This option is of limited appeal in cases where a long list of charges may result in considerable sentencing exposure.

For prosecutors inclined to negotiate, the initial array of charges they choose to file will establish the "opening offer" around which all negotiating occurs. And, in many cases, there is no scarcity of charging options. Increasing the number of charges brought provides prosecutors with chips to bargain away during the negotiating process. "Overcharging," both vertically and horizontally, is a practice proscribed by the American Bar Association's Standards for Criminal Justice precisely because of the improper pressure it exerts. (Am. Bar Ass'n, ABA Standards for Criminal Justice, sec. 3-3.9(b)(f).) However, the breadth of the criminal law makes it nearly impossible to determine when a prosecutor is aggressively (but properly) papering a case and when a prosecutor is increasing the degree or number of charges for the sole purpose of increasing negotiating leverage. And though more empirical studies are needed, those writing in the field have found that prosecutors routinely charge offenses with little chance of success at trial or for relatively minor criminal conduct, all for the purpose of "sweetening" an inevitable plea offer. (*See, e.g.*, William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).)

Hand-in-hand with the prosecutor's discretion over charge selection is the reality that a prosecutor chooses which offenses to charge with full knowledge of the potential sentence each charge might carry following conviction at trial. At least one study of the federal system found that sentences following trial are 60 percent higher than sentences following a guilty plea. (Langer, *Rethinking Plea Bargaining*, *supra*, at 229.) This substantial sentencing discount can be a powerful incentive for the accused to plead. Indeed, even in

a case with relatively weak evidence of guilt, a prosecutor can offer a sufficiently steep sentencing discount to make pleading appear to be the only rational choice. In fact, in a perverse result, one study found that prosecutors exert the most pressure to plead, using tactics like steeply discounted sentences, in cases with the least likelihood of conviction at trial. (Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 58–64 (1968); *see also* Dean Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. Crim. Just. 253, 257 (1989).)

The prosecutor's charge selection can be particularly relevant to sentencing concerns in jurisdictions with so-called three-strikes laws. These laws impose harsh mandatory minimum sentences on third-time offenders even for relatively trivial convictions. In such jurisdictions, the prosecutor's willingness to charge an offense as (or accept a plea to) a misdemeanor instead of a felony allows the accused to avoid the severity of three-strikes sanctions. Even in non-three-strikes districts, the applicability of lengthy mandatory minimums, based on factors like threshold drug quantities or the presence of a weapon, can exert pressure to plead. In these cases, prosecutors can bargain away the counts requiring mandatories, meaning an accused who pleads will retain the possibility of shortening any sentence imposed through diminution credits and/or parole. The significant power of the prosecutor just described is further amplified by the Court's interpretation of the Fourth Amendment. This is because, not surprisingly, the prosecutor's power to negotiate is informed by the available evidence.

The Fourth Amendment's Role in Enhancing Prosecutorial Power

Unquestionably, the strength of the government's evidence increases the prosecutor's ability to extract a plea from the defendant with fewer concessions. Predictably, studies have shown that, along with the number of charges filed, the availability of physical evidence increases the probability that an accused will plead guilty. (Celesta Albonetti, *Race and the Probability of Pleading Guilty*, 6 J. Quan. Criminology 315, 317 (1990).) But, as examined in the section above, the Fourth Amendment presents a less-than-robust barrier to the prosecutor's access to even illegally obtained evidence.

Suppression motions are filed in a minority of cases. (Jon Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 Criminology & Pub. Pol'y 315, 332 n.13 (2004) (summarizing studies to estimate that only 15 percent of all cases involve the filing of suppression motions).) And, even when filed, the odds of suppression based upon a successful Fourth Amendment challenge are relatively low. (*See generally* Andrew Ferguson, The Rise of Big Data Policing: Surveillance, Race, and the Future of Law Enforcement 152 (2017).) The prosecutor's already strong hand in plea negotiations, thus, is strengthened further by the likely failure of any suppression request. This strengthening can be particularly striking in cases involving possessory crimes. For example, in a straightforward possession with intent to distribute case where drugs are taken off the accused during a *Terry* stop, suppression of the drugs may be determinative. However, in light of the numerous exceptions to the warrant requirement, even aggressive or unsavory police conduct often falls well within constitutional limits. And even where police conduct violates the amendment, unconstitutionally derived evidence nonetheless may be admissible as a result of the Court's constriction of the exclusion remedy.

Indeed, decades of studies show an abysmal success rate for suppression motions. A 1979 study done by the General Accounting Office found that "16% of the defendants whose cases were accepted for prosecution filed some type of suppression motion, 11% cited the fourth amendment. However, only 0.4% of declined defendants' cases were declined due to fourth amendment search or seizure problems." (Gen. Accounting Office, Report of the Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 1 (1979).) The prospect of a successful suppression motion has not improved much in the intervening years.

A 1983 study of 7,500 felony cases in Pennsylvania, Illinois, and Michigan determined that motions to suppress physical evidence were successful in less than 1 percent of the cases filed. (Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 3 Am. B. Found. Res. J. 585 (1983).) Indeed, a 1991 survey of defense attorneys in one jurisdiction asserted that judges in the area "'always upheld searches regardless of what errors or lack of probable cause were found.' As a result, members of the defense bar rarely made search and seizure an issue." (Craig Uchida & Timothy Bynum, *Search Warrants, Motions to Suppress and Lost Cases: The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. Crim. L. & Criminology 1034, 1059–60 (1990–1991).) When motions were filed, they accomplished the goal of suppression in just 0.9 percent of all the cases studied. (*Id.* at 1061.) Putting aside the question of

defense counsel's ineffectiveness for failing to file motions, the prosecution, unfettered by any significant fear of suppression, maintains the advantage in plea negotiations. An accused facing the potential of significant prison time and dismal odds of suppression may find a negotiated plea the only logical choice.

Finally, in much the same way that racial disparities exist across the criminal justice system, the enhanced pressure to plead has racial impacts as well. While studies have found that blacks are somewhat statistically less likely to plead guilty, when they do, they receive a lower-value bargain for their plea than comparable white offenders. For example, whites are 25 percent more likely than blacks to have their top charge dropped or reduced during the negotiation process. (Carlos Verdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. Rev. (forthcoming 2018) (manuscript at 3–4).) Similarly, for defendants facing felony charges, whites are 15 percent more likely than blacks to be able to resolve their cases with a misdemeanor conviction. And, in the misdemeanor space, whites are 75 percent more likely either to avoid conviction altogether or to secure a conviction that does not carry a risk of jail time. (*Id.* at 33.) The increased likelihood that blacks will be convicted or face jail time is a compounding disability: A criminal record and history of incarceration are factors that will be considered negatively during any future contacts with the criminal justice system. As Sasha Natapoff has observed, oftentimes "the misdemeanor process is the gateway to the criminal system." (Sasha Natapoff, *Misdemeanor Decriminalization*, 68 Vanderbilt L. Rev. 1055, 1068 (2015).) It is in this way that a straight line can be drawn from the expanded power of the police over black and brown bodies to the expanded power of prosecutors over black and brown lives.

Conclusion

Great attention is paid to the Fourth Amendment's failure to meaningfully police the police. But the amendment (as currently interpreted by the Court) also is failing to police the prosecution. In a criminal justice system dominated by pleas, the refusal to suppress evidence is a factor that exponentially enhances the prosecutor's relative standing. Where that prosecutorial power is already being exercised in ways that disadvantage people of color, the further increase in power is an outcome we cannot continue to overlook.

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