

University of South Dakota School of Law

From the Selected Works of Christine Hutton

2006

The Landscape of Search and Seizure: Observations on Recent Decisions from the United States Court of Appeals for the Eighth Circuit

Christine Hutton, *University of South Dakota School of Law*



Available at: https://works.bepress.com/christine_hutton/1/

THE LANDSCAPE OF SEARCH AND SEIZURE: OBSERVATIONS ON RECENT DECISIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHRIS HUTTON[†]

I. INTRODUCTION

The landscape of the Eighth Circuit¹ encompasses the urban sophistication of St. Louis and Minneapolis; the rugged beauty of the Badlands and Ozarks; and ranches, farms, and tiny towns. The population includes “Norwegian bachelor farmers,”² the tribes of the Great Sioux Nation, the Hmong community of the Twin Cities, college students at institutions of higher learning, and cities rich with diverse populations. Despite the varying landscape and interests, the people within the geographic area of the Eighth Circuit have much in common. They share the ideals of just and fair enforcement of the laws,³ even as they seek to preserve their privacy and freedom from government interference.⁴ In the search and seizure context,⁵ they may experience the relatively unusual search of a home authorized by a warrant. Or they may be subjected to the much more common traffic stop on the highway leading to a search which often yields nothing, but occasionally, produces marijuana, methamphetamine, or other drugs.⁶ The landscape of search and seizure encompasses more than geography, however. It is a complex picture of individual privacy expectations, national and international concerns which

[†] Professor, The University of South Dakota School of Law. Thanks to Jenna Howell, Natalie Turnquist, and Mary Ann Hart for their assistance. An earlier version of this article was presented at the Eighth Circuit Judicial Conference in July 2004.

1. The Eighth Circuit is comprised of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

2. E.g., Garrison Keillor, *A Prairie Home Companion*, (National Public Radio broadcast, Sept. 4, 2004), available at <http://prairiehome.publicradio.org/programs/2004/09/04>.

3. See generally Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133 (2003); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003).

4. See generally Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002) (discussing many of the competing strands of American ideology and how they have been influenced by the “drug war”). See also Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

5. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. See generally Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

6. See generally Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341 (2004); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

implicate privacy, and technological advances over time.⁷ Individual privacy expectations were given effect in *Katz v. United States*,⁸ the landmark case recognizing the importance of both subjectively and objectively reasonable expectations of privacy. But to read *Katz* today is to enter a time warp of sorts: in a country replete with cell phones, the privacy of a closed phone booth is an anachronism. Reality TV, the Internet, and the thermal imaging devices addressed in *Kyllo v. United States*⁹ have displaced the phone booth, and the cultural and contextual leap from *Katz* to *Kyllo* is a great one.

What of the legal landscape of search and seizure law? The diversity of search and seizure issues makes all-embracing statements unwise, but certain generalizations can be made about contemporary search and seizure decisions of the United States Supreme Court: frequently the Court states that it seeks to create “bright line” rules, easier for law enforcement officers to administer than ad hoc determinations.¹⁰ On the other hand, and in stark contrast, in approving police execution of these rules, the Court has embraced the concept of “totality of the circumstances.” Vague, unencumbered by standards articulated in advance, and requiring deference to the judgment of the law enforcement officer on the scene, “totality of the circumstances” serves as a mantra requiring judicial approval of myriad searches and seizures.¹¹ To illustrate — recent examples of the Supreme Court’s “bright-line law-making” in the search and seizure realm include authorizing search incident to arrest of a car which the defendant has left at the time of arrest,¹² and upholding a state statute which requires a detained person to identify himself/herself.¹³ Recent examples of “law-application,” where a “totality” analysis displaces precise tests, include reasonable suspicion for a stop to find drugs,¹⁴ and the amount of time police must wait after a knock and announce to enter the premises.¹⁵

While all of the Supreme Court’s search and seizure cases are significant, the law-application cases, in particular, are important in serving as vehicles for the Supreme Court to instruct the lower courts, by dictating a method of analysis or correcting the erroneous choice of a method employed by a lower court. Part III, following, discusses several landmark Supreme Court decisions which

7. See generally William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002).

8. 389 U.S. 347 (1967). See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727 (1993).

9. 533 U.S. 27 (2001). See generally Symposium, *The Effect of Technology on Fourth Amendment Analysis and Individual Rights*, 72 MISS. L.J. 5 (2002); George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005).

10. Saltzburg, *supra* note 3, at 134. See generally Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Thomas K. Clancy, *Symposium Foreword*, 74 MISS. L.J. 273, 277 (2004).

11. See generally Dripps, *supra* note 6. For a comprehensive and helpful treatment of standards of review which appellate courts employ, see STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* (3d ed. 1999 & Cum. Supp.).

12. Thornton v. United States, 541 U.S. 615, 622 (2004). See *United States v. Poggemiller*, 375 F.3d 686, 687 (8th Cir. 2004). See also Dripps, *supra* note 6, at 413-14.

13. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177 (2004).

14. *United States v. Arvizu*, 534 U.S. 266 (2002).

15. *United States v. Banks*, 540 U.S. 31, 38 (2003).

illustrate how the Supreme Court has set the parameters for analysis in search and seizure cases. Part III surveys recent decisions of the United States Court of Appeals for the Eighth Circuit which endeavor to implement the directives from the Supreme Court. Part IV concludes with observations about the impact of these cases. That section will suggest that there has been an effort to supplant judicial control over search and seizure issues with control by the political branches, which in turn may have led to an important diminution in the ability to address institutional failings. It also will suggest that both the perceptions and behavior of the public have been affected by search and seizure law, but not necessarily in a favorable manner.

II. INFLUENTIAL SEARCH AND SEIZURE CASES

In selecting the principal United States Supreme Court cases on search and seizure, a likely starting point would be the venerable standards, *Boyd v. United States*¹⁶ and *Weeks v. United States*.¹⁷ Fast forward to the “criminal procedure revolution” of the 1960s to include *Mapp v. Ohio*¹⁸ and *Terry v. Ohio*,¹⁹ then the retrenchment²⁰ of sorts, exemplified by *Stone v. Powell*,²¹ *United States v. Leon*,²² *Nix v. Williams*²³ and others. The topics and contexts are so diverse that attempting to winnow them down results in an incomplete portrait of search and seizure law.²⁴ Despite the complexity and number of cases, however, there are a few which have been particularly influential. These include *Illinois v. Gates*,²⁵ approving the use of a “totality of the circumstances” analysis in certain search warrant cases; the notion of objective reasonableness to justify a traffic stop, even if that masks some other basis for an officer’s action,

16. 116 U.S. 616 (1886). In *Boyd*, the Supreme Court ruled that papers implicating the defendant in violations of customs laws were improperly seized, and therefore, could not be used against him. *Id.* at 637-38. Violations of both the Fourth and Fifth Amendments were at issue. *Id.* at 621.

17. 232 U.S. 383 (1914). *Weeks* was prosecuted using papers that had been seized from his home by federal officers without a warrant. *Id.* at 388-89. The Court declared that the courts could not be the forum for the admission of evidence unlawfully seized because that would, in essence, approve the illegality. *Id.* at 398. *Weeks* thus employed the “exclusionary rule” without denominating it as such.

18. 367 U.S. 643 (1961). *Mapp* applied the exclusionary rule to state prosecutions. It overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), which had decreed that although the Fourth Amendment created a fundamental right to be free of unreasonable searches and seizures, exclusion of unlawfully seized evidence was not a necessary aspect of the right. *Id.* at 645-46. In revisiting the issue in *Mapp*, the Court emphasized the need for a remedy to prevent the Fourth Amendment from being reduced to an empty platitude. *Id.* at 661-62.

19. 392 U.S. 1 (1968) (approving stop and frisk based on reasonable suspicion).

20. The expansion of the exclusionary rule to embrace state cases had the immediate effect of an overwhelming increase in the number of search and seizure cases requiring suppression of improperly seized evidence. Once the pendulum swung to include more cases affected by the exclusionary rule, it swung in the other direction to redefine the parameters of reasonableness under the Fourth Amendment. See *infra* notes 21-23.

21. 428 U.S. 465 (1976) (excluding from federal habeas review state cases raising Fourth Amendment issues where the applicant had a full and fair opportunity to litigate the issue in state court).

22. 468 U.S. 897 (1984) (adopting the “good faith exception” to the exclusionary rule).

23. 467 U.S. 431 (1984) (approving the “inevitable discovery” doctrine allowing admission of evidence seized unlawfully).

24. See Dubber, *supra* note 4, at 887-89 (providing lists of search and seizure cases in several contexts).

25. 462 U.S. 213 (1983).

as in *Whren v. United States*;²⁶ and, from *Schneekloth v. Bustamonte*, the reliance on consent to justify police searches.²⁷ It is informative to see how these cases have come to be applied over time.

A. ILLINOIS V. GATES

Prior to the decision in *Illinois v. Gates*,²⁸ courts used a two-pronged test to evaluate whether probable cause had been established in cases dealing with search warrants based on tips from anonymous informants. The test was gleaned from *Aguilar v. Texas*²⁹ and *Spinelli v. United States*³⁰ and forced a court to evaluate the reliability and basis of knowledge of the person supplying the information, as well as any corroboration developed by the police in following up on the tip. In *Gates*, the Court directed that lower courts abandon this test in favor of a looser, ad hoc, "totality of the circumstances" approach.³¹

Gates involved a search warrant issued by a state judge based on an anonymous tip, corroborated in certain respects by police investigation.³² The state courts suppressed the evidence, with the state supreme court reasoning that neither the veracity nor basis of knowledge prong of the two-part test was fulfilled by the anonymous tip.³³ Therefore, the tip could not be used at all in the probable cause determination, and the police investigation was insufficient on its own to establish probable cause.³⁴ The Supreme Court reversed and directed lower courts to stop treating the *Aguilar-Spinelli* test as consisting of "independent" prongs applied "rigidly" in each case.³⁵ Rather, according to Justice Rehnquist, these concepts are intertwined and "may usefully illuminate the common-sense, practical question" whether probable cause exists.³⁶ The Justice explained that probable cause is a "fluid concept,"³⁷ grounded in "particular factual contexts,"³⁸ which are "not readily, or even usefully, reduced to a neat set of legal rules."³⁹ The two part test must be abandoned in favor of a

26. 517 U.S. 806 (1996).

27. 412 U.S. 218 (1973).

28. 462 U.S. 213 (1983).

29. 378 U.S. 108 (1964). In *Aguilar*, the Supreme Court determined that an affidavit supplied by the police in a search warrant case involving an informant did not establish probable cause. *Id.* at 115-16. The affidavit was defective in failing to provide information so the magistrate could assess the reliability/credibility of the informant and the basis of his or her knowledge. *Id.* at 114-15.

30. 393 U.S. 410 (1969) (permitting the police to supplement the anonymous informant's information with their own investigation in an effort to establish probable cause).

31. *Gates*, 462 U.S. at 230.

32. *Id.* at 225-26. The tip was an anonymous letter asserting the defendants were heavily involved in dealing drugs. *Id.* at 213. The letter also provided information about an upcoming drug run to Florida. *Id.* The police investigation furnished additional details and all of the information was placed into an application for search warrant for the defendants' car and home. *Id.* When the police executed the warrant at the conclusion of the defendants' trip to Florida, they discovered a substantial amount of marijuana. *Id.* at 225-27.

33. *Id.* at 229.

34. *Id.* at 230.

35. *Id.*

36. *Id.*

37. *Id.* at 232.

38. *Id.*

39. *Id.*

“practical, common sense decision” characterized by its “flexible” nature.⁴⁰

Although *Gates* addressed a magistrate’s issuance of a search warrant, the “totality of the circumstances” approach appears in many settings. The totality method was used long ago in assessing probable cause for a warrantless arrest⁴¹ and is well entrenched in evaluating whether reasonable suspicion for a stop exists.⁴² *Gates* was neither the first nor the last case to employ the totality of the circumstances analysis, but it has had a significant role in setting a direction for the federal and state courts charged with the responsibility of assessing the validity of police conduct.⁴³ A court using a totality approach need not — and cannot — rely on a set of standards articulated in advance. It must judge both proposed and completed police conduct on a case-by-case basis through the eyes of the law enforcement officer. A court might find itself grasping for a set of rules to apply, but would quickly find that an officer’s experience in adding up the facts to establish probable cause to a magistrate’s satisfaction requires deference.⁴⁴ That a court might view the facts differently is not dispositive. And that a court finds a test such as that in *Aguilar-Spinelli* superior to less precision also is irrelevant. The process of a court’s judging the facts by applying a pre-ordained formula was displaced in *Gates* by a system in which, most typically, a judge ratifies executive branch judgment about a haze of facts, and the appellate court defers to the trial court.

Frustration with this imprecision, or a desire to curb executive branch discretion, has led some courts to establish multi-part tests to employ in calculating the totality of what has been presented to them. In a variety of contexts courts have specified in advance how factors will be judged, but the Supreme Court has intervened to halt this tactic. For example in *United States v. Arvizu*,⁴⁵ the Court of Appeals for the Ninth Circuit tried to “clearly delimit” factors the officer could consider to avoid a “troubling degree of uncertainty”⁴⁶ in making the reasonable suspicion determination. The Supreme Court rebuked the court for doing so, criticizing it for departing “sharply” from the Supreme Court’s directive to use a totality of circumstances approach, which necessitates giving due weight to the inferences drawn by the officer.⁴⁷ Similarly in the recent case of *United States v. Banks*,⁴⁸ the Court spurned the efforts of the

40. *Id.* at 238-39.

41. *Draper v. United States*, 358 U.S. 307 (1959).

42. *Terry v. Ohio*, 392 U.S. 1 (1968). *See also* *United States v. Arvizu*, 534 U.S. 266 (2002).

43. *See generally* Yale Kamisar, *Gates*, “*Probable Cause*,” *Good Faith*, and *Beyond*, 69 IOWA L. REV. 551, 552 (1984) (noting *Gates*’s “soft standard” for probable cause). For a discussion of *Gates* in the state court context, *see* James D. Johnson, Note, *State v. Reesman: Totality of the Circumstances or a Recipe for Mulligan Stew?*, 65 MONT. L. REV. 159 (2004).

44. *Gates*, 462 U.S. at 238-39. The Court added that the reviewing court should ascertain whether there was a substantial basis for the probable cause determination. *Id.* at 238. *See Ornelas v. United States*, 517 U.S. 690 (1996).

45. 534 U.S. 266 (2002). *See also* Cooper, *supra* note 6, at 891; Jennifer Pelic, *United States v. Arvizu: Investigatory Stops and the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 1033 (2003).

46. *United States v. Arvizu*, 232 F.3d 1241, 1248 (9th Cir. 2000).

47. *Arvizu*, 534 U.S. at 274.

48. 540 U.S. 31 (2003). Writing for a unanimous Court, Justice Souter reinforced the notion that reasonableness in the execution of a warrant is determined on a case-by-case basis. *Id.* at 35-36. In

Ninth Circuit to identify and categorize in advance the factors that would permit a forced entry after receiving no response to the officer's knock and announcement.⁴⁹ The *Banks* Court noted that factors and assorted tests are contrary to the "case-by-case" approach it has dictated.⁵⁰ The Court added that "no template" will likely "produce sounder results than examining the totality of circumstances in a given case"⁵¹ Inflating or underestimating the importance of a detail can skew the result.⁵²

Refusing to accept the totality analysis — by developing multi-factor tests and failing to cite the totality precedents — yields only short-term results in the courts of appeal. The Supreme Court stands ever-prepared to reinforce the notion that totality of the circumstances is the standard — whether the setting is probable cause for a search warrant as in *Gates*, reasonable suspicion for a stop as in *Arvizu*, or reasonableness of other law enforcement conduct, as *Banks* demonstrated in the context of knock and announce.

The Court's directive is to view the facts through the eye of the law enforcement officer, endorsing the judgment of the officer whenever possible. "Divide and conquer" is prohibited.⁵³ The likely result is to uphold law enforcement, which apparently is the desired outcome. The flexible totality analysis is the opposite end of the continuum from the *Aguilar-Spinelli* two-pronged test that *Gates* displaced. Courts which seek to engage in review of search and seizure endeavors from somewhere else on the continuum are hamstrung unless they can bring some facts and perspectives to bear on their totality approach. Some suggestions for doing so appear in Part IV below. Before addressing those issues, pinpointing a second doctrinal innovation is appropriate.

B. WHREN V. UNITED STATES

It is difficult to overstate the importance of *Whren v. United States*.⁵⁴

Banks, the police had waited fifteen-to-twenty seconds after knocking and announcing before they broke down the defendant's apartment door to execute a search warrant. *Id.* at 31. The defendant had been in the shower, and came out of the bathroom upon hearing the noise of the splintering door. *Id.* The Supreme Court found the police action reasonable, which is not remarkable given the context. *Id.* at 41-43. What is noteworthy about the case is that *Banks* involved the reversal of the Ninth Circuit's determination that the entry was unreasonable based on its multi-factor test for judging when the police could dispense with the knock-and-announce requirement in entering premises. *Id.* Enunciating factors in advance and discounting the importance of individual "innocent factors" in the equation yielding probable cause or reasonable suspicion is contrary to this deferential approach. *Id.* See also *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002).

This recent reinforcement of the totality-of-the-circumstances standard in *Banks* echoes the policies set forth in *Gates* and *Schneekloth* discussed above and following. The Eighth Circuit has addressed similar situations in numerous cases, with more success in adhering to the totality assessment than the Ninth Circuit. See *infra* notes 88-98 and 109-15 and accompanying text.

49. *Banks*, 540 U.S. at 34. The Ninth Circuit had established factors for an officer to consider in deciding on a forced entry, and also had categorized entries into four types. *Id.* at 34-35. See generally Loly Tor, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. REV. 853 (2003).

50. *Banks*, 540 U.S. at 31.

51. *Id.* at 36.

52. *Id.* (citing *Ohio v. Robinette*, 519 U.S. 33 (1996)).

53. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

54. 517 U.S. 806 (1996). See Dubber, *supra* note 4, at 881; LaFave, *supra* note 6, at 1852-54;

The case reaffirms the principle that a law enforcement officer may stop a person for a traffic violation if the action is objectively reasonable, *i.e.*, based on probable cause or reasonable suspicion. That the traffic stop appears to be a pretext for unacceptable conduct — racial profiling or overt racism,⁵⁵ targeting minority youths, or targeting minorities of any age — is of little or no importance in a criminal case on a motion to suppress any evidence seized in such an encounter.⁵⁶ A civil rights lawsuit is available to redress misconduct, and misapplying the exclusionary rule to deal with police abuse is improper.⁵⁷

Because of this doctrine (or in conjunction with it),⁵⁸ the “war on drugs” has moved to the nation’s highways and every driver has to deal with the new regime of traffic law enforcement. Every technical violation of traffic law is grounds for a stop unless the legislature has intervened to define offenses narrowly or a court has set limits.⁵⁹ *Whren* reinforces that improper police motivation is disregarded, or not addressed at all, if the stop is objectively reasonable.⁶⁰ Whether in federal or state court, case after case involves a dangling object on the rearview mirror,⁶¹ speeding,⁶² or just sitting on the side of

David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 820-22 (2002); Saltzburg, *supra* note 3, at 152.

55. See generally David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423 (2003); George C. Thomas, III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525 (2003).

56. LaFave, *supra* note 6, at 1870. See also Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 397-427 (2001).

57. *Whren*, 517 U.S. at 813. See *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *infra* notes 146-53 and accompanying text.

58. *Whren* was not the first case to approve of stops that are objectively reasonable, even if an improper subjective motivation exists. *Whren*, 517 U.S. at 812-13 (citing *United States v. Robinson*, 414 U.S. 218, 221, 236 (1973)). *Robinson* had established that an objectively reasonable stop (arresting the defendant based on probable cause that he was operating a vehicle without a license) was permissible as was the subsequent search incident to arrest, which included the defendant’s cigarette pack in his pocket. *Robinson*, 414 U.S. at 221 n.1, 236. Thus, the heroin capsules in the pack were admissible against him. *Id.* at 236.

59. *E.g.*, *United States v. Herrera Martinez*, 354 F.3d 932, 935 (8th Cir. 2004) (Lay, J., dissenting). Justice Lay opined:

[T]he trooper pulled the vehicle over for momentarily crossing the fog line in violation of South Dakota law. I respectfully submit that the obvious purpose of such a statute is to apprehend only those drivers who are intoxicated or otherwise incapable of controlling their vehicles; one isolated occurrence of crossing the fog line is not sufficient to constitute a violation. If it were, practically every driver of a vehicle traveling on a South Dakota roadway could be stopped. No doubt acknowledging this fact, other courts construing nearly identical traffic statutes have held that minor conduct such as that which occurred in this case is an insufficient basis upon which to stop the driver of the vehicle. See *United States v. Freeman*, 209 F.3d 464, 466 (6th Cir. 2000) (“We cannot, however, agree that one isolated incident of a large motor home partially weaving into the emergency lane for a few feet and an instant in time constitutes a failure to keep the vehicle within a single lane ‘as nearly as practicable.’”); *United States v. Gregory*, 79 F.3d 973, 978 (10th Cir. 1996) (“Any vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to a suspicion of criminal activity.”).

Id. See LaFave, *supra* note 6, at 1848. See also Barry L. Huntington, Comment, *Welcome to the Mount Rushmore State! Keep Your Arms and Legs Inside the Vehicle at All Times and Buckle Up . . . Not for Safety, but to Protect Your Constitutional Rights*, 47 S.D. L. REV. 99 (2002).

60. Professor Yeager effectively dissects the meaning of intent, as the Court describes it in *Whren*. See Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 594-608 (2004).

61. In the past, the “dangling object law” in South Dakota, S.D.C.L. section 32-15-6, was a matter

the road.⁶³ The Justice Department encourages this tactic.⁶⁴ The upshot is that because of Americans' extensive use of their cars, anyone, at almost any time, is subject to being stopped by law enforcement for virtually any reason, or for none.⁶⁵ One might ask, why use any justification at all? Why not just approve of random stops?⁶⁶

C. SCHNECKLOTH V. BUSTAMONTE

A significant application of the totality of the circumstances analysis discussed earlier⁶⁷ is the realm of consent searches.⁶⁸ Individuals need not be told of their right to refuse consent, as *Schneckloth v. Bustamonte*⁶⁹ declared. The focus is on a voluntary waiver, viewed in the totality of the circumstances.⁷⁰ A thorough understanding of the options and ramifications of consent to search is not required. The cases demonstrate a rather perfunctory analysis of an officer's request to "search" or "look around," the house, car, or other property, followed by acquiescence, or even by resistance which is ultimately overcome

for primary traffic enforcement and resulted in many stops for dangling objects. *E.g.*, *State v. Chavez*, 2003 SD 93, ¶ 2, 668 N.W.2d 89, 92; *State v. Belmontes*, 2000 SD 115, ¶ 6, 615 N.W.2d 634, 636; *State v. Hirning*, 1999 SD 53, ¶ 2, 592 N.W.2d 600, 602; *State v. Ashbrook*, 1998 SD 115, ¶ 2, 568 N.W.2d 503, 505-06; *State v. Dreps*, 1996 SD 142, ¶ 2, 558 N.W.2d 339, 340; *State v. Shearer*, 1996 SD 52, ¶ 2, 548 N.W.2d 792, 794; *State v. Ramirez*, 535 N.W.2d 847, 848 (S.D. 1995); *State v. Krebs*, 504 N.W.2d 580, 583 (S.D. 1993). *See also* *United States v. Alvarez-Gonzalez*, 319 F.3d 1070, 1070 (8th Cir. 2003) (involving a dangling rosary).

In 2004, the South Dakota legislature permitted only secondary enforcement, meaning that some other traffic violation has to exist before the police may stop the vehicle for the infraction. S.D.C.L. § 32-15-6 (2005). *But see* *Gerding v. Comm'r of Pub. Safety*, 628 N.W.2d 197 (Minn. Ct. App. 2001) (stating that Minnesota Statutes section 169.71 prohibits any dangling object, not just those which obstruct the driver's vision).

Other states, in contrast, require that the dangling object obstruct the driver's vision before such a stop is permitted. *E.g.*, 625 ILL. COMP. STAT. 5/12-503 (2005); MICH. COMP. LAWS ANN. § 257.709(1)(c) (West 2005); VA. CODE ANN. § 46.2-1054 (2005). *See also* *United States v. King*, 244 F.3d 736, 739-40 (9th Cir. 2001) (holding that the Anchorage Municipal Code requires material obstruction).

62. Recent cases include *Illinois v. Caballes*, 125 S. Ct. 834 (2005) (speeding at 71 mph in a 65 mph zone that led to dog sniff and arrest for drug possession); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004) (70 mph in 65 mph zone on I-80); *United States v. Neumann*, 183 F.3d 753 (8th Cir. 1999) (80 mph in a 75 mph zone); *State v. Lockstedt*, 2005 SD 47, 695 N.W.2d 718 (68 mph in a 65 mph zone); *State v. Akuba*, 2004 SD 94, 686 N.W.2d 406 (68 mph in a 65 mph zone).

63. *United States v. Gipp*, 147 F.3d 680, 683 (8th Cir. 1998).

64. LaFave, *supra* note 6, at 1844 (citing Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 170 n.25).

65. *See* *Dripps*, *supra* note 6, at 395-98, 420-21; *Moran*, *supra* note 54, at 821.

66. *See generally* Barbara Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989) (discussing police power in traffic stops).

67. *Supra* notes 28-53 and accompanying text.

68. *See* Marissa Reich, *United States v. Drayton: The Need for Bright-line Warnings During Consensual Bus Searches*, 93 J. CRIM. L. & CRIMINOLOGY 1057 (2003).

69. 412 U.S. 218 (1973). The defendants were stopped for a traffic offense in the early hours of the morning. *Id.* at 220. Three Hispanic males were seated in the front and three in back. *Id.* The officer requested permission to search the car, and the driver opened the trunk. *Id.* Stolen checks were found. *Id.* They were used to convict the front seat passenger of fraudulent possession of checks. *Id.* The Supreme Court refused to adopt a rule requiring that the officer advise the individual of the right to refuse to cooperate in a search. *Id.* at 232-33.

70. *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (2002) (discussing "whether a citizen's grant of permission to search is voluntary").

by the officer.⁷¹ That a person mistakenly thinks refusal establishes probable cause is not dispositive.⁷² That a person refuses but is ultimately persuaded that he/she should agree is not dispositive. What matters is that the person gives some kind of assent by a nod, comment, gesture, action (opening the trunk), or failure to protest. Whether the person is cowed or intimidated into acquiescing is irrelevant.

Although the courts say that refusal does not give reasonable suspicion or probable cause,⁷³ it is factored into the officer's sense of the "totality." At the same time, the Supreme Court and lower courts anticipate that those who do not want to agree will exercise control and assert their right to refuse.⁷⁴ (Perhaps this "Catch-22" is unwitting.)

Coupled with the *Whren* holding which allows a traffic stop based on objective reasonableness, the consent to search has been adopted as a potent weapon in the "drug war."⁷⁵ The consent search is a necessary accompaniment to the initial traffic stop. It enables law enforcement to narrow the pool of people subject to further investigation to minorities, young people, or anyone else the officer feels like pursuing further. No rhyme or reason is needed.

D. THE TRIFECTA: GATES, WHREN, AND BUSTAMONTE

Highlighting *Gates's* totality of the circumstances approach to probable cause and reasonable suspicion, *Whren's* approval of objectively reasonable stops even if based on objectionable subjective motives, and *Bustamonte's* encouragement of consent searches is not meant to ignore other facets of search and seizure law.⁷⁶ But these decisions and doctrines have created an aggressive law enforcement response. Police need not meet specific tests for probable cause and reasonable suspicion — they know a more flexible "totality" is all they need to supply. They know stops based on race or other factors are permissible, as long as they can detect a trivial traffic violation as a prelude. They know they can intimidate an overwhelming number of people to acquiesce in searches, even if the targets are chosen because of race, or just because police want to assert a law enforcement presence to a young person. The doctrines require a hands-off response from the courts, because the prerogatives have been placed with law enforcement. The role of the courts is to view events through the eyes of law enforcement and uphold its actions if at all possible. The courts

71. See LaFave, *supra* note 6, at 1891. See generally *United States v. Lopez-Rodriguez*, 396 F.3d 956 (8th Cir. 2005).

72. See Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001).

73. See, e.g., *United States v. Oliver*, 363 F.3d 1061, 1066 (10th Cir. 2004) (holding that an individual need not answer police questions) (citing *United States v. Holt*, 264 F.3d 1215, 1224 (10th Cir. 2001)). See also Steinbock, *supra* note 72, at 525.

74. See *infra* notes 170-75 and accompanying text. See also Thomas, *supra* note 55, at 547.

75. See LaFave, *supra* note 6, at 1866.

76. These would include, for example, the good faith exception to the exclusionary rule, the requirement of a search warrant, and standing issues.

do so by using a totality analysis rather than specific tests, and by accommodating law enforcement's transparent use of objectively reasonable, although trivial, technicalities as gateways to intrusive law enforcement conduct.

III. SELECTED SEARCH AND SEIZURE CASES FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Part III will examine some recent search and seizure cases from the Eighth Circuit to see how the court has responded to the restrictions placed upon it by the "totality," "objective reasonableness," and "consent" doctrines. To set the scene: approximately 187 cases from the Eighth Circuit resolved search and seizure issues during the past thirty months.⁷⁷ The setting of almost half of the cases was a home,⁷⁸ with a significant number involving a vehicle,⁷⁹ and a few falling into miscellaneous categories such as a controlled delivery of a package.⁸⁰ In a number of cases, the determinative issue was the validity and/or existence of consent to search.⁸¹

Statistics aside, the cases also reveal how issues such as race and an individual's conduct during a police encounter are viewed by the courts. The following sections discuss cases involving searches based on a warrant, searches without a warrant, and several interesting issues and trends which reveal much about the current landscape of search and seizure within the Eighth Circuit.

A. SEARCH WARRANT CASES

The searches supported by warrants were relatively few in number⁸² with comparatively non-controversial resolutions. A handful of them raised questions about the good faith exception to the exclusionary rule,⁸³ and another few

77. The cases were decided January 1, 2003 – June 30, 2005. The collection of 187 was arrived at by including criminal cases raising a search and seizure issue before the Eighth Circuit Court of Appeals. Per curiam, unpublished cases are in the sample. It is unknown how many cases with Fourth Amendment issues were not appealed by the losing party. Cases raising Fourth Amendment claims under 42 U.S.C. § 1983 are not included, with the exception of one case addressing an issue of racial discrimination. See *infra* notes 146-51 and accompanying text. There are relatively few Section 1983 cases dealing with Fourth Amendment issues, and the overwhelming majority have been unsuccessful for the plaintiff.

78. Eighty-four of the 187 cases studied involved a home. *E.g.*, *United States v. Heinen*, No. 04-2283, 2005 WL 95711 (8th Cir. Jan. 19, 2005); *United States v. Janis*, 387 F.3d 682 (8th Cir. 2004).

79. Seventy-five of the 187 cases studied involved a vehicle. *E.g.*, *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005); *United States v. Smith*, 363 F.3d 811 (8th Cir. 2004); *United States v. Gerard*, 362 F.3d 484 (8th Cir. 2004); *United States v. Falodun*, No. 03-1477, 2003 WL 22998099 (8th Cir. Dec. 22, 2003); *United States v. Nichols*, 344 F.3d 793 (8th Cir. 2003).

80. Twenty-eight of the 187 cases studied involved miscellaneous searches. *E.g.*, *United States v. Morones*, 355 F.3d 1108 (8th Cir. 2004) (controlled delivery of a package); *United States v. Walker*, 324 F.3d 1032 (8th Cir. 2003) (package); *United States v. Terriques*, 319 F.3d 1051 (8th Cir. 2003) (package).

81. The validity or existence of consent was at issue in fifty-one of the 187 cases studied. See generally *Nadler*, *supra* note 70 (examining Fourth Amendment issues in the context of bus sweeps).

82. Fifty-six of the 187 cases studied involved warrants.

83. *E.g.*, *United States v. Holt*, No. 04-3884, 2005 WL 1175139 (8th Cir. May 19, 2005); *United States v. Goody*, 377 F.3d 834 (8th Cir. 2004); *United States v. Hessman*, 369 F.3d 1016 (8th Cir. 2004); *United States v. Scroggins*, 361 F.3d 1075 (8th Cir. 2004); *United States v. White*, 356 F.3d 865 (8th Cir. 2004); *United States v. Carpenter*, 341 F.3d 666 (8th Cir. 2003).

addressed the problem of false information in affidavits.⁸⁴ The existence of probable cause⁸⁵ or of reasonable suspicion developing into probable cause⁸⁶ appeared in several. However, in the cases supported by search warrant, the overwhelming number resulted in the district court's denial of the defense motion to suppress, with that ruling affirmed by the Eighth Circuit without dissent. Of the total of five search warrant cases with a district court ruling for the defense, four were reversed by the Eighth Circuit and one was affirmed.⁸⁷

Probable cause for a search warrant is established in diverse ways, but "totality of the circumstances" is the standard. Since many of the search cases involve drugs, the investigations often include information from confidential informants.⁸⁸ Complaints from personnel who handle packages can also be relied upon,⁸⁹ as can those of neighbors.⁹⁰ Relying on these firsthand reports and adding police corroboration satisfies *Gates*.⁹¹ Police contributing controlled buys,⁹² a dog sniff,⁹³ electronic surveillance,⁹⁴ the recognition of strong chemical or other odors,⁹⁵ and the search of trash cans⁹⁶ may supply the additional information needed for probable cause. Flexibility and case-by-case determinations are the norm.

84. See *Franks v. Delaware*, 438 U.S. 154 (1978) (invalidating warrant if affidavit includes a false statement made knowingly and intentionally or with reckless disregard of the truth). See also *United States v. Rivera*, 410 F.3d 998 (8th Cir. 2005); *United States v. Gonzalez*, 365 F.3d 656 (8th Cir. 2004); *United States v. Haines*, No. 03-3079, 2004 WL 618575 (8th Cir. Mar. 30, 2004); *United States v. Ketzeback*, 358 F.3d 987 (8th Cir. 2004); *United States v. Rodriguez*, 367 F.3d 1019 (8th Cir. 2004) *vacated on other grounds*, 125 S. Ct. 1030 (2005); *United States v. Underwood*, 364 F.3d 956 (8th Cir. 2004); *United States v. Coleman*, 349 F.3d 1077 (8th Cir. 2003); *United States v. Briscoe*, 317 F.3d 906 (8th Cir. 2003); *United States v. Oropesa*, 316 F.3d 762 (8th Cir. 2003).

85. E.g., *United States v. Hill*, 386 F.3d 855 (8th Cir. 2004); *United States v. Patrick*, No. 03-3384, 2004 WL 602363 (8th Cir. Mar. 24, 2004); *Rodriguez*, 367 F.3d 1019; *United States v. Van Zee*, 380 F.3d 342 (8th Cir. 2004); *United States v. Salter*, 358 F.3d 1080 (8th Cir. 2004); *United States v. Walker*, 324 F.3d 1032 (8th Cir. 2003); *United States v. Wells*, 347 F.3d 280 (8th Cir. 2003).

86. E.g., *United States v. Morones*, 355 F.3d 1108 (8th Cir. 2004); *Walker*, 324 F.3d 1032.

87. The following cases involved a search pursuant to a warrant with the district court suppressing the evidence and the Eighth Circuit reversing: *Goody*, 377 F.3d 834; *Hessman*, 369 F.3d 1016; *Ketzeback*, 358 F.3d 987; *Scroggins*, 361 F.3d 1075. In *United States v. Villalba-Alvarado*, the district court suppressed the evidence seized pursuant to a warrant, and the Eighth Circuit affirmed; certain statements and physical evidence were admitted. 345 F.3d 1007, 1019-20 (8th Cir. 2003).

88. E.g., *United States v. Adams*, 401 F.3d 886 (8th Cir. 2005); *Haines*, 2004 WL 618575; *Hessman*, 369 F.3d 1016; *United States v. Jackson*, 114 Fed. App'x 764 (8th Cir. 2004); *Ketzeback*, 358 F.3d 987; *Goody*, 377 F.3d 834; *Patrick*, 2004 WL 602363; *Carpenter*, 341 F.3d 666; *Coleman*, 349 F.3d 1077; *United States v. Nichols*, 344 F.3d 793 (8th Cir. 2003).

89. E.g., *United States v. Hernandez*, 103 Fed. App'x 917 (8th Cir. 2004); *United States v. Smith*, 383 F.3d 700 (8th Cir. 2004); *United States v. Steele*, No. 04-3835, 2005 WL 1175119 (8th Cir. May 19, 2005).

90. E.g., *Hessman*, 369 F.3d at 1023.

91. Displacing *Aguilar-Spinelli*, *supra* notes 28-53 and accompanying text.

92. E.g., *Nichols*, 344 F.3d 793; *United States v. Oropesa*, 316 F.3d 762 (8th Cir. 2003); *Patrick*, 2004 WL 602363; *United States v. Wells*, 347 F.3d 280 (8th Cir. 2003).

93. E.g., *United States v. Hill*, 386 F.3d 855 (8th Cir. 2004); *United States v. Walker*, 324 F.3d 1032 (8th Cir. 2003).

94. E.g., *United States v. Adams*, 401 F.3d 886 (8th Cir. 2005).

95. E.g., *United States v. Smith*, 363 F.3d 811 (8th Cir. 2004); *United States v. Gerard*, 362 F.3d 484 (8th Cir. 2004) (involving marijuana); *United States v. Haines*, No. 03-3079, 2004 WL 618575 (8th Cir. Mar. 30, 2004).

96. E.g., *United States v. Scroggins*, 361 F.3d 1075 (8th Cir. 2004); *United States v. Briscoe*, 317 F.3d 906 (8th Cir. 2003).

Delays in executing the warrant⁹⁷ or mistakes or omissions in the affidavit⁹⁸ are typically not fatal when the seized evidence is challenged by the defense. Overlooking or discounting irregularities is typical, with the totality assessment outweighing any substantive or procedural problems with a search authorized by warrant. The Supreme Court's doctrines on issues such as totality of the circumstances and the good faith exception to the exclusionary rule have resulted in the suppression of virtually no evidence seized pursuant to a warrant where the issue was raised at the Eighth Circuit in recent cases.

B. SEARCHES WITHOUT A WARRANT

More contentious were the numerous cases of searches without warrants.⁹⁹ The issues raised on appeal of these cases addressed, for example, the existence of probable cause¹⁰⁰ or reasonable suspicion,¹⁰¹ and sufficient expectation of privacy to challenge the search (standing).¹⁰² Other cases had "hot-button issues" or represented possible trends in the law; these are discussed in greater detail in Part III.C., following, and include the problems of racial profiling,¹⁰³ ruse checkpoints,¹⁰⁴ the use of innocent factors to establish grounds for a search,¹⁰⁵ and, in many cases, the existence of and validity of consent to search.¹⁰⁶ In the approximately 128 cases decided by the Eighth Circuit which did not involve a search warrant, about a dozen resulted in a district court ruling for the defense on a motion to suppress.¹⁰⁷ Where granted, most often that relief

97. *E.g.*, *United States v. Goody*, 377 F.3d 834 (8th Cir. 2004); *United States v. Morrow*, No. 03-2654, 2004 WL 385278 (8th Cir. Mar. 2, 2004); *Briscoe*, 317 F.3d 906.

98. *E.g.*, *United States v. Ketzbeck*, 358 F.3d 987 (8th Cir. 2004); *United States v. Underwood*, 364 F.3d 956 (8th Cir. 2004); *United States v. Coleman*, 349 F.3d 1077 (8th Cir. 2003). *See also* *United States v. Powell*, 379 F.3d 520 (8th Cir. 2004) (holding that a mistake in executing the warrant, such as the wrong address, does not invalidate a search).

99. Approximately 128 of 187, representing about two-thirds of the total.

100. *E.g.*, *United States v. Cotton*, No. 02-3805, 2003 WL 1192863 (8th Cir. Mar. 17, 2003); *United States v. Perez-Perez*, 337 F.3d 990 (8th Cir. 2003); *United States v. Lynch*, 322 F.3d 1016 (8th Cir. 2003).

101. *E.g.*, *United States v. Logan*, 362 F.3d 530 (8th Cir. 2004); *United States v. Morones*, 355 F.3d 1108 (8th Cir. 2004); *United States v. Rodriguez-Hernandez*, 353 F.3d 632 (8th Cir. 2003); *United States v. Stephens*, 350 F.3d 778 (8th Cir. 2003); *United States v. Brown*, 346 F.3d 808 (8th Cir. 2003); *United States v. McKinney*, 328 F.3d 993 (8th Cir. 2003); *United States v. Ameling*, 328 F.3d 443 (8th Cir. 2003); *United States v. Long*, 320 F.3d 795 (8th Cir. 2003); *United States v. Shranklen*, 315 F.3d 959 (8th Cir. 2003).

102. *E.g.*, *United States v. Brown*, 408 F.3d 1049 (8th Cir. 2005); *United States v. Boose*, No. 03-3413, 2004 WL 583636 (8th Cir. Mar. 25, 2004); *United States v. Fuller*, 374 F.3d 617 (8th Cir. 2004); *Rodriguez-Hernandez*, 353 F.3d 632; *United States v. Perez-Guerrero*, 334 F.3d 778 (8th Cir. 2003).

103. *Infra* notes 129-53 and accompanying text. *See* *United States v. Herrera Martinez*, 354 F.3d 932 (8th Cir. 2004); *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003). *See also* *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001) (reversing district court's suppression of the evidence based on officer's improper use of defendant's ethnicity).

104. *Infra* notes 189-95 and accompanying text.

105. *Infra* notes 154-69, 196-209 and accompanying text.

106. *Infra* notes 176-88, 210-17 and accompanying text.

107. The district court granted relief in the following cases: *United States v. Schmidt*, 403 F.3d 1009, 1011 (8th Cir. 2005); *United States v. Barry*, 394 F.3d 1070, 1072 (8th Cir. 2005); *United States v. Smart*, 393 F.3d 767, 769 (8th Cir. 2005); *United States v. Escobar*, 389 F.3d 781, 782 (8th Cir. 2004); *United States v. Va Lerie*, 385 F.3d 1141, 1150 (8th Cir. 2004); *United States v. Hernandez Leon*, 379 F.3d 1024, 1025 (8th Cir. 2004); *United States v. Guerrero*, 374 F.3d 584, 591 (8th Cir. 2004); *United States v. Logan*, 362 F.3d 530, 531 (8th Cir. 2004); *United States v. Adams*, 346 F.3d 1165, 1172 (8th

was reversed on appeal by the Eighth Circuit. Of the cases studied, only three resulted in the defendant's receiving relief from an unlawful search.¹⁰⁸ The issues outlined below are representative of those most commonly addressed.

The "totality of the circumstances," which governs the search warrant cases discussed above, permeates the no-warrant cases as well. The no-warrant cases implicate many additional doctrines, including but not limited to *Whren* and *Bustamonte*, also discussed above. In this context, police observation of suspicious behavior can yield them great rewards. Thus, when the police observe known drug dealers with small packages getting into a car¹⁰⁹ or leaving a drug house and getting into a car,¹¹⁰ the traffic stop involving expired plates¹¹¹ or a suspended license¹¹² is not far behind. *Whren* reinforces the flexibility of the police to stop on probable cause for a traffic violation as a prelude to an investigation of more serious misconduct.¹¹³ The police not only need not overlook minor misconduct not particularly worthy of a law enforcement response, they can and do look for such infractions to exploit in investigating serious crimes.

Articulating facts to add up to probable cause is not always the scenario in the no-warrant searches and seizures, however. Often the police identify certain facts, deem them sufficient for only "reasonable suspicion," but then these facts evolve into probable cause. Information from a neighbor,¹¹⁴ an informant,¹¹⁵ or traffic infraction can yield reasonable suspicion.¹¹⁶ Other suspicious behavior in the automobile setting can amount to reasonable suspicion as well.¹¹⁷ Lengthy stops are permissible.¹¹⁸

Cir. 2003); *United States v. Yang*, 345 F.3d 650, 652 (8th Cir. 2003); *United States v. Ameling*, 328 F.3d 443, 449 (8th Cir. 2003); *United States v. Shranklen*, 315 F.3d 959, 964 (8th Cir. 2003).

108. In *United States v. James*, the Eighth Circuit reversed the district court's denial of the motion to suppress. 353 F.3d 606, 617 (8th Cir. 2003). In *Escobar*, *Va Lerie*, and *Guerrero*, the district court granted the defendant's motion to suppress. *Escobar*, 389 F.3d at 782; *Va Lerie*, 385 F.3d at 1150; *Guerrero*, 374 F.3d at 591. The Eighth Circuit affirmed. *Id.* However, on rehearing en banc, the Eighth Circuit reversed *Va Lerie*. 424 F.3d 694 (8th Cir. 2005). In two cases where the district court had denied the motion to suppress, the Eighth Circuit remanded for additional fact finding. *United States v. Khabeer*, 410 F.3d 477, 479 (8th Cir. 2005); *United States v. Taylor*, No. 04-3260, 2005 WL 1229701, at *1 (8th Cir. May 25, 2005).

109. *E.g.*, *United States v. Lynch*, 322 F.3d 1016, 1017 (8th Cir. 2003). See also *United States v. Salone*, No. 04-3806, 2005 WL 1175140, at *1 (8th Cir. May 19, 2005).

110. *E.g.*, *United States v. Long*, 320 F.3d 795, 797 (8th Cir. 2003).

111. *Id.*

112. *E.g.*, *Lynch*, 322 F.3d at 1017. The nonexistent traffic violation may serve as well, if probable cause for arrest otherwise exists. *United States v. Jacobsen*, 391 F.3d 904, 905 (8th Cir. 2004).

113. See also *United States v. Cotton*, No. 02-3805, 2003 WL 1192863, at *1 (8th Cir. Mar. 17, 2003).

114. *E.g.*, *United States v. Terry*, 400 F.3d 575, 578 (8th Cir. 2005).

115. *E.g.*, *Jacobsen*, 391 F.3d at 905; *United States v. Rivera*, 370 F.3d 730, 732 (8th Cir. 2004).

116. *E.g.*, *United States v. Stephens*, 350 F.3d 778, 779 (8th Cir. 2003); *United States v. McKinney*, 328 F.3d 993, 994 (8th Cir. 2003).

117. *E.g.*, *United States v. Maltais*, 403 F.3d 550, 552-53 (8th Cir. 2005) (involving remote location, prior stops of vehicle, and reports of suspicious conduct); *United States v. Barnes*, 374 F.3d 601, 603 (8th Cir. 2004) (involving a heavy car door); *United States v. Shranklen*, 315 F.3d 959, 959-60 (8th Cir. 2003) (involving a passenger trying to remove a pouch from under the front seat of the car while stopped for traffic offense).

118. *E.g.*, *United States v. Barragan*, 379 F.3d 524, 528 (8th Cir. 2004); *United States v. McLenon*, 106 Fed. App'x 527, 528 (8th Cir. 2004) (involving a stop of thirty minutes in duration).

In addition, “plain view” and “exigent circumstances” appear as justifications for no-warrant searches in several cases. For example, citizen complaints,¹¹⁹ hot pursuit,¹²⁰ and firefighters responding to a fire¹²¹ authorized the police to proceed without warrants under these doctrines.¹²²

In cases where an initial police encounter with a person does not provide probable cause or reasonable suspicion authorizing further detention and investigation, the police often seek consent to search. Some of the problems associated with consent searches are discussed below,¹²³ but for the most part, consent searches have become a matter of routine. Traffic stops are prime sources of consent searches but not the only occasion for them.¹²⁴ Consent searches of houses and hotel rooms also occur.¹²⁵ Luggage is a target of police seeking consent to search as well.¹²⁶ When the defendant challenges a purported consent search, the analysis resonates of *Bustamonte*’s “totality” assessment: age, education, influence of alcohol or drugs, reading *Miranda* warnings, and prior experience in the criminal justice system.¹²⁷ It appears that any assessment of these circumstances validates the consent — the courts view people in this type of encounter with the police as knowledgeable, in control, and able to understand their options without being advised of them. They are autonomous people who need neither advice from the police about their rights nor intervention by a court after-the-fact when they have uttered “yes” to a request to search which was obviously not in their self-interest. A rare exception was found in *United States v. Guerrero*, where the Eighth Circuit agreed with the trial court that an individual being interrogated in a patrol car could not have felt free to leave, so the “consent” to search was the product of an unlawful

119. *E.g.*, *United States v. Lloyd*, 396 F.3d 948, 949 (8th Cir. 2005); *United States v. Heinen*, 125 Fed. App’x 747, 747 (8th Cir. 2005); *United States v. Gill*, 354 F.3d 963, 965 (8th Cir. 2004); *United States v. Anderson*, 339 F.3d 720, 722 (8th Cir. 2003); *United States v. Collins*, 321 F.3d 691, 693 (8th Cir. 2003).

120. *E.g.*, *United States v. Schmidt*, 403 F.3d 1009, 1011 (8th Cir. 2005).

121. *E.g.*, *United States v. Francis*, 327 F.3d 729, 731 (8th Cir. 2003).

122. *See also* *United States v. Chipps*, 410 F.3d 438, 442 (8th Cir. 2005); *United States v. Douglas*, 135 Fed. App’x 4, 5-6 (8th Cir. 2005); *United States v. Leverington*, 397 F.3d 1112, 1113-14 (8th Cir. 2005); *United States v. Van Zee*, 380 F.3d 342, 343 (8th Cir. 2004).

123. *Infra* notes 176-88 and 210-17 and accompanying text.

124. *E.g.*, *United States v. Corona-Ramirez*, No. 04-2691, 2005 WL 95710 (8th Cir. Jan. 19, 2005); *United States v. Serrano-Lopez*, 366 F.3d 628 (8th Cir. 2004); *United States v. Menteer*, 350 F.3d 767 (8th Cir. 2003). *See also infra* notes 176-88.

125. *E.g.*, *United States v. Clark*, 409 F.3d 1039 (8th Cir. 2005) (involving consent search of an apartment); *United States v. Brett*, No. 04-2697, 2005 WL 1076665 (8th Cir. May 9, 2005) (house); *United States v. Leverington*, 394 F.3d 1112 (8th Cir. 2005) (hotel suite); *United States v. Lopez-Rodriguez*, 396 F.3d 956 (8th Cir. 2005) (apartment); *United States v. Meza-Gonzalez*, 394 F.3d 587 (8th Cir. 2005) (house); *United States v. Hines*, 387 F.3d 690 (8th Cir. 2004) (house); *United States v. Williams*, 346 F.3d 796 (8th Cir. 2003) (motel); *United States v. Adams*, 346 F.3d 1165 (8th Cir. 2003) (house).

126. *E.g.*, *United States v. Escobar*, 389 F.3d 781 (8th Cir. 2004); *United States v. Va Lerie*, 385 F.3d 1141 (8th Cir. 2004); *United States v. Hawkins*, 116 Fed. App’x 776 (8th Cir. 2004); *United States v. Winborn*, 344 F.3d 766 (8th Cir. 2003).

127. *E.g.*, *United States v. Hanlon*, 401 F.3d 926 (8th Cir. 2005); *United States v. Curnett*, No. 04-1912, 2005 WL 293089 (8th Cir. Feb. 9, 2005); *United States v. Morreno*, 373 F.3d 905 (8th Cir. 2004), *vacated by* 125 S. Ct. 1053 (2005); *United States v. Contreras*, 372 F.3d 974 (8th Cir. 2004); *United States v. Luna*, 368 F.3d 876 (8th Cir. 2004); *United States v. Mancias*, 350 F.3d 800 (8th Cir. 2003).

seizure.¹²⁸

It would be unfair and inaccurate to characterize the analysis in the cases upholding police action of this type as cursory, because it is clear from the opinions that the judges on the Eighth Circuit Court are conscientious and careful. Those judges have little room to disagree with the police, perhaps a magistrate, and a district court judge who have evaluated the facts and decided the case, however. As is evident in the cases where there is disagreement between the district court and executive branch, most often a reversal in favor of the executive results.

C. TRENDS AND ISSUES OF INTEREST

The routine handling of warrant and no-warrant cases should not be overshadowed by the anomalous in search and seizure practice. But following is a discussion of several cases and situations which potentially challenge the smooth surface of search and seizure law described above. The issue of race (articulated or not) factors into many cases, and merits careful scrutiny so the courts can be vigilant in guarding against enforcement of the law where race plays an improper role. Issues surrounding consent, innocent conduct, and police techniques for “pushing the envelope” of search law also deserve attention. A few of the most recent developments and issues are discussed below.

1. Race

Two of the most disturbing recent cases involve situations that appear to use race as the basis of a traffic stop.¹²⁹ In *United States v. Herrera Martinez*,¹³⁰

128. *United States v. Guerrero*, 374 F.3d 584, 588-89 (8th Cir. 2004).

129. See generally Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827 (2003); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1997); Lenese C. Herbert, *Bete Noire: How Race-Based Policing Threatens National Security*, 9 MICH. J. RACE & L. 149 (2003); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999). See also Cooper, *supra* note 6, at 876. A recent study addressing race in the context of searches and seizures in traffic stops considered citizen reports, as contrasted with police-reported data, and concluded as follows:

The results are clear. Controlling for legal and other extralegal explanatory measures, citizens report that police are significantly more likely to search vehicles driven by African American and Hispanic drivers. At the same time, citizens report that these targeted vehicle searches are not more likely to uncover illegal evidence than searches of vehicles driven by whites. Moreover, most of what police find when they use their enormous power to search vehicles involves open containers of alcohol, according to citizens.

The results are not just clear, the implications are profoundly important. Not only are police making race-based traffic stops, citizens report that police are making race and ethnically targeted vehicle searches as well. Police, though, gain absolutely nothing positive by using race, ethnicity, and gender as bases for searches because, according to citizens, targeted searches are no more likely to yield evidence of contraband than vehicle searches of whites.

Richard J. Lundman, *Driver Race, Ethnicity, and Gender and Citizen Reports of Vehicle Searches by Police and Vehicle Search Hits: Toward a Triangulated Scholarly Understanding*, 94 J. CRIM. L. & CRIMINOLOGY 309, 337-38 (2004). See also Eric Lichtblau, *Profiling Report Leads to a Demotion*, N.Y. TIMES, Aug. 24, 2005, available at <http://www.nytimes.com/2005/08/24/politics/24profiling.html>.

a South Dakota trooper patrolling I-90 saw a car with apparently Hispanic occupants and a California license plate. The trooper testified that this caused him to do a “180” so he could follow them.¹³¹ He observed the car briefly cross the fog line, and made the stop.¹³² The officer walked the drug dog around the car but found nothing.¹³³ The officer then asked questions about the occupants’ immigration status and eventually, they were arrested for an immigration violation.¹³⁴ Later, drugs were found in the car during an inventory search.¹³⁵ The defendants were convicted of both the immigration and drug offenses after the district judge denied the motion to suppress.¹³⁶

Over the dissent of Judge Lay, the Eighth Circuit ruled the stop permissible.¹³⁷ The court applied *Whren*’s dictate that a stop be objectively reasonable, and once that is established, the subjective motivation of the officer will not be examined.¹³⁸ The court noted that the traffic violation — the relatively trivial infraction of crossing the fog line — was sufficient to justify the stop.¹³⁹ The questions about immigration status which were unrelated to the stop were not so intrusive (or offensive?) to be viewed as an improper extension of a valid stop.¹⁴⁰ The dissent disagreed, castigating the majority for permitting the use of race in this manner.¹⁴¹ There are several noteworthy aspects to this case. First, the officer apparently had no compunction about admitting that the occupants’ ethnicity caused him to follow them.¹⁴² He apparently was not even embarrassed by this.¹⁴³ Further, he seemed to understand precisely how *Whren* works: it validates virtually any stop, so underlying improper motives are irrelevant. The Eighth Circuit has condemned the use of race as the basis for stops,¹⁴⁴ but that appears to be hortatory. The reality is that the stop will be

Lichtblau reported on the suppression of figures from the Bureau of Justice Statistics study in 2002 indicating that Blacks, Hispanics, and Whites are stopped at roughly the same rate (9%); however, once the stop is made, the rates for searches differ considerably:

Hispanics	11.4%
Blacks	10.2%
Whites	3.5%

Id.

130. 354 F.3d 932 (8th Cir. 2004).

131. *Id.* at 935 n.4 (Lay, J., dissenting).

132. *Id.* at 933.

133. *Id.* at 934.

134. *Id.* at 937 n.4 (Lay, J., dissenting).

135. *Id.* at 934.

136. *Id.* at 933.

137. *Id.* at 935.

138. *Id.* at 934.

139. *Id.*

140. See *United States v. \$404, 905.00 in U. S. Currency*, 182 F.3d 643 (8th Cir. 1999). See also Bill Lawrence, Note, *The Scope of Police Questioning During a Routine Traffic Stop: Do Questions Outside the Scope of the Original Justification for the Stop Create Impermissible Seizures if They Do Not Prolong the Stop?*, 30 FORDHAM URB. L.J. 1919 (2003). See generally *United States v. Wheat*, 278 F.3d 722 (8th Cir. 2001).

141. *Herrera Martinez*, 354 F.3d at 935 (Lay, J., dissenting).

142. See *Luna*, *supra* note 4, at 765-68.

143. *Herrera Martinez*, 354 F.3d at 935 (Lay, J., dissenting).

144. *Infra* note 152.

upheld. The court's precedent¹⁴⁵ makes this clear.

In the civil context, a claim of an invalid stop based on race was the basis of a 42 U.S.C. § 1983 action. In *Johnson v. Crooks*,¹⁴⁶ the Eighth Circuit split on the issue, with Judge Lay dissenting. The district court had refused to grant summary judgment to an officer who allegedly had followed the African-American female plaintiff for eleven miles before stopping her for allegedly crossing the center line.¹⁴⁷ The Eighth Circuit reversed, stating the stop was objectively reasonable.¹⁴⁸ The dissent questioned the grant of summary judgment, alleging the court had used an improper standard.¹⁴⁹ Regardless of the civil procedure aspects of the case, the outcome is questionable in light of the officer's explanations for following the plaintiff for eleven miles. Although it was approximately 9 a.m., he asserted his interest in checking her for intoxication.¹⁵⁰ He also surmised that she could be ill or drowsy, causing her to cross the center line briefly after the eleven-mile observation.¹⁵¹ The officer's version of the facts is dubious at best.

Once the officer asserts a valid justification for a stop under *Whren*, however, very little additional inquiry is conducted. While the Eighth Circuit (fortunately) articulates the standard that race cannot be a pretext for a stop,¹⁵² the objectively reasonable stop for any trivial traffic violation overwhelms that standard.¹⁵³

2. "Innocent" Factors

Conduct that appears to be innocent can add up to reasonable suspicion or probable cause.¹⁵⁴ Context and an officer's experience can provide good reason

145. *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001). See also *United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005) (rejecting defendant's claim that the police stopped him because of his race). For additional discussion of *Frazier*, see *infra* text accompanying notes 203-07.

146. 326 F.3d 995 (8th Cir. 2003).

147. *Id.* at 997.

148. *Id.* at 996.

149. *Id.* at 1001 (Lay, J., dissenting).

150. See *id.* at 996.

151. *Id.* at 999.

152. See Yeager, *supra* note 60, at 585 (discussing pretextual actions). The Eighth Circuit cites several cases for the proposition that a pretextual arrest or stop is improper. *Warren v. City of Lincoln*, 816 F.2d 1254, 1257-58 (8th Cir. 1987); *United States v. Portwood*, 857 F.2d 1221, 1222-23 (8th Cir. 1988); *United States v. Eldridge*, 984 F.2d 943, 947-48 (8th Cir. 1993); *United States v. Pereira-Munoz*, 59 F.3d 788, 790-91 (8th Cir. 1995); *United States v. Herrera Martinez*, 354 F.3d 932, 934 (8th Cir. 2004). A court determination that a pretextual stop has occurred is very rare, however, especially given the rule that any violation is grounds for a stop. *Id.* See also *United States v. Garcia*, in which the court discounted the defendant's race and Spanish language as suspicious factors, commenting, "The state has produced no evidence that Mexican citizens are any more or less likely to transport illegal drugs than native born or naturalized citizens of the United States." 23 F.3d 1331, 1335 (8th Cir. 1994).

153. E.g., *United States v. Luna*, 368 F.3d 876, 878 (8th Cir. 2004) (noting that "[a]n officer's observation of a traffic violation, however minor, gives the officer probable cause" for a stop; this is so "even if the officer would have ignored the violation" absent a suspicion of criminal activity).

154. The Eighth Circuit affirmed the district court's rejection of defendant's argument that only innocent factors supported his detention in *United States v. Maltais*. 403 F.3d 550 (8th Cir. 2005). See also *United States v. Escobar*, 389 F.3d 781 (8th Cir. 2005) (stating that padlocks that were "too large" for suitcases raised officers' suspicions); *United States v. Va Lerie*, 385 F.3d 1141 (8th Cir. 2004) *rev'd*, 424 F.3d 694 (8th Cir. 2005) (holding that a passenger's newer garment bag on a bus, with a handwritten

for concluding such conduct is criminal or a prelude to crime, as *Terry v. Ohio*¹⁵⁵ teaches. Innocent factors in the automobile context are discussed *infra*.¹⁵⁶ Such circumstances in the non-auto setting are discussed here.

In *United States v. Logan*,¹⁵⁷ the district court suppressed cocaine seized from a package addressed for delivery to the defendant. The government relied on a tip to the LAPD¹⁵⁸ and several additional circumstances of the mailing: shipment from Los Angeles to St. Louis, second-day air shipment, use of a commercial mail receiving agency, and a handwritten address label. An experienced officer deemed this sufficiently suspicious to submit the package to a drug dog, which alerted.¹⁵⁹ Rejecting as clearly erroneous the district court's determination of a lack of reasonable suspicion, the Eighth Circuit reversed. It was persuaded that the lens of the officer's experience transformed these into suspect factors.¹⁶⁰ Dissenting, Judge Smith countered that each factor was innocent, and remained so because the officer's experience was inadequate to transform them into evidence of criminal behavior.¹⁶¹ He would have deferred to the district judge as not having committed clear error.

Similarly in *United States v. Ameling*,¹⁶² the district court suppressed evidence based on an inadequate basis for reasonable suspicion. The defendants had entered a Target store together, then split up to purchase pseudoephedrine.¹⁶³ A security guard alerted police, who discovered the defendants had purchased a lithium battery at a grocery store.¹⁶⁴ When officers stopped them, the defendants gave conflicting stories.¹⁶⁵ The Eighth Circuit reversed, finding reasonable suspicion for the stop, and then, probable cause for the resulting search of the pick-up truck.¹⁶⁶ The apparently innocent circumstances of the cold medicine and battery purchases became suspicious when filtered through the officers' experience. Deferring to the officers' conclusion, the court found the district judge clearly erroneous in rejecting it.¹⁶⁷

Gates's influence is apparent in these cases, as conduct innocent in itself is transformed into suspicious behavior. Each innocent act is not considered in isolation — it is placed into a “totality” context. Then it is evaluated from the officer's perspective and experience. The judge's role is to ratify the officer's actions if at all possible, as *Arvizu* reinforced.¹⁶⁸ The trial court's reaching a

baggage ticket listing no phone number, and the passenger's cash payment for a ticket on the day of travel was not sufficiently suspicious).

155. 392 U.S. 1 (1968). See generally Lewis R. Katz, *Terry v. Ohio at Thirty-five: A Revisionist View*, 74 Miss. L.J. 423, 490 (2004).

156. *Infra* notes 196-209 and accompanying text.

157. 362 F.3d 530 (8th Cir. 2004).

158. *Id.* at 532-33.

159. *Id.* at 532.

160. *Id.* at 534.

161. *Id.* at 536 (Smith, J., dissenting).

162. 328 F.3d 443, 447 (8th Cir. 2003).

163. *Id.* at 445.

164. *Id.*

165. *Id.* at 446.

166. *Id.* at 449.

167. *Id.* at 448-49.

168. *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

different conclusion by making its own assessment of the circumstances results in a “clearly erroneous” determination from the reviewing court.¹⁶⁹

3. *The Assertive Suspect*

Once the police begin to search a vehicle or property, how should the subject of the search behave? Should the person cooperate, or at least remain silent? Or, should the person interpose objections to the police conduct if the person does, in fact, object to it? How would most people respond?

In several cases,¹⁷⁰ the Eighth Circuit noted that while a search was conducted, the person did not launch an objection. In fact, the court cited this as a specific factor indicating consent.¹⁷¹ Was the court inferring that failure to object is consent to the police action? The premise would be: “If an officer is searching your property you would articulate any objection or limit to the search. If you fail to articulate an objection, you did not in fact object, or, the officer could not have known you objected.”

The court’s premise must be that a reasonable person would object to police conduct if the person disagreed with it. Could the court actually have such an understanding of human behavior?¹⁷² Can such an aggressive or assertive response be expected from a population which is encouraged to cooperate with the police?¹⁷³ Perhaps the court should at least articulate its premise so people would understand how they are expected to behave. The court also should reinforce that if an individual does object, the police cannot ignore the objection.¹⁷⁴ And, the courts would have to agree that an individual’s “changing course” and withdrawing permission does not create reasonable suspicion.¹⁷⁵

4. *Consent — Refusing to Take “No” for an Answer*

Video cameras frequently are part of the equipment on law enforcement vehicles. They do not always work;¹⁷⁶ they do not always capture the events

169. See *United States v. Guerrero*, 374 F.3d 584, 591 (8th Cir. 2004) (Murphy, J., dissenting); *United States v. Logan*, 362 F.3d 530, 533-34 (8th Cir. 2004); *Ameling*, 328 F.3d at 448-49.

170. E.g., *Guerrero*, 374 F.3d 584; *United States v. Cedano-Medina*, 366 F.3d 682 (8th Cir. 2004); *United States v. Shranklen*, 315 F.3d 959 (8th Cir. 2003).

171. E.g., *United States v. Escobar*, 389 F.3d 781, 785 (8th Cir. 2004) (citing *United States v. Jones*, 254 F.3d 692 (8th Cir. 2001)).

172. Steinbock, *supra* note 72, at 527 (discussing the power imbalance between police and citizenry).

173. Nadler, *supra* note 70, at 172-77. Perhaps many people fear the police, as well. See also *United States v. Wallace*, 323 F.3d 1109, 1112 (8th Cir. 2003) (noting, “It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”).

174. E.g., *United States v. Brown*, 345 F.3d 574 (8th Cir. 2003).

175. Steinbock, *supra* note 72, at 542. See *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991) (holding that refusal to cooperate does not, without more, furnish grounds for seizure). But see *United States v. Carter*, 985 F.2d 1095 (D.C. Cir. 1993); *United States v. Jones*, 973 F.2d 928, 933 (D.C. Cir. 1992); *United States v. Green*, 52 F.3d 194 (8th Cir. 1995).

176. E.g., *United States v. Barragan*, 379 F.3d 524, 526 (8th Cir. 2004) (involving a case with no audio); *United States v. Welerford*, 356 F.3d 932 (8th Cir. 2004); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001). This apparently occurs in other circuits as well. See *United States v.*

which are occurring during a traffic stop.¹⁷⁷ However, they can give an accurate portrait of the circumstances of a stop and frequently the demeanor and conversation are of interest.¹⁷⁸ In the absence of a tape, the witness accounts are relied upon, and essentially confirm the following scenario, with some variations.

It appears that officers think “yes” is the only permissible answer to a request for consent to search.¹⁷⁹ “No” begets an inability to understand on the part of the officer, followed by additional requests for consent.¹⁸⁰ Sometimes, there is a language barrier¹⁸¹ and characterizing the individual’s responses as ambiguous is a possibility¹⁸² until a “yes” is actually uttered by the hapless detainee.¹⁸³

It is unlikely a court would authorize such behavior by the police in advance of a search. Any test fashioned in advance by a court surely would dictate that a “no” be respected. However, the courts do not participate in consent searches in this manner. By their nature, these searches do not involve judicial authorization. Further, *Schneckloth v. Bustamonte* reinforces that individuals do not have to be advised of the right to refuse consent, and that a totality-of-the-circumstances analysis is used.¹⁸⁴ The officer makes an on-the-scene judgment that consent has been given, and the court normally ratifies almost all consent searches.

Consent searches constitute a significant proportion of the non-search warrant cases. Many people — rather oddly, in light of the drugs in their possession¹⁸⁵ — state their consent to a search. It is unclear whether this is because they do not understand they have a right to refuse,¹⁸⁶ do not understand

Oliver, 363 F.3d 1061 (10th Cir. 2004).

177. *E.g.*, *United States v. Cedano-Medina*, 366 F.3d 682 (8th Cir. 2004). *See also* *State v. Chavez*, 2003 SD 93, 668 N.W.2d 89 (refusing to suppress evidence in a state prosecution which had been suppressed in the federal prosecution in a case that involved a traffic stop, drug dog, and videotape of events); *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004).

178. *E.g.*, *Cedano-Medina*, 366 F.3d 682. *See also* *United States v. Sparks*, No. 03 CR. 269 (DAB), 2004 WL 307304 (S.D.N.Y. Feb. 19, 2004) (describing police activity which appeared to contradict testimony and noting possibility of police misconduct).

179. *LaFave*, *supra* note 6, at 1898.

180. *See, e.g.*, *Cedano-Medina*, 366 F.3d 682; *United States v. Yang*, 345 F.3d 650 (8th Cir. 2003).

181. *E.g.*, *United States v. Perez-Llanes*, No. 04-2224, 2005 WL 1138507 (8th Cir. May 16, 2005); *Guerrero*, 374 F.3d 584; *United States v. Morreno*, 373 F.3d 905 (8th Cir. 2004); *United States v. Contreras*, 372 F.3d 974 (8th Cir. 2004); *Cedano-Medina*, 366 F.3d 682; *United States v. Ortiz-Monroy*, 332 F.3d 525 (8th Cir. 2003).

182. *Cedano-Medina*, 366 F.3d 682.

183. *Id.*; *Yang*, 345 F.3d 650.

184. 412 U.S. 218 (1973).

185. *See Nadler*, *supra* note 70; *Steinbock*, *supra* note 72.

186. *See United States v. Escobar*, 389 F.3d 781 (8th Cir. 2004). In this case, the district court ruled the defendants had not given consent to a search of their bags seized at a bus station. *Id.* at 784. The Eighth Circuit affirmed, relying on the police officers’ lie that a drug dog had alerted on the bags, their failure to advise of the right to refuse consent, and the location in the back room at the bus station. *Id.* at 786. The court ruled the individuals had merely acquiesced to the officers’ authority. *Id.*

A bus station was also the setting in *United States v. Va Lerie*, 385 F.3d 1141 (8th Cir. 2004). The Eighth Circuit agreed with the district judge that the defendant’s bag had been seized and he did not give consent to search. *Id.* at 1149. The bag had been taken to a back room with several officers, the defendant was not told he could refuse consent, and little time had elapsed between the seizure and “consent.” *Id.* at 1143-44. However, the en banc court reversed, ruling the removal of the defendant’s luggage from a bus was not a seizure, and that the defendant did consent to a search of the bag. *United*

that “look around your vehicle” means search it thoroughly, or foolishly feel that they “will look more guilty” if they refuse.¹⁸⁷ Regardless of the explanation, many people quickly, and apparently without reservation, do say “yes” when the officer asks to search. Others, however, do not. The response now appears to be a refusal to respect “no” as an answer, and a police technique that is something akin to, “I do not understand ‘no’ as an answer. You must mean ‘yes’ and I will keep you here as long as it takes to have you say ‘yes’.”¹⁸⁸

5. Ruse Checkpoints

According to *Indianapolis v. Edmond*,¹⁸⁹ checkpoints for general crime control are not permitted. There must be a nexus between a checkpoint for drivers and driving.¹⁹⁰ Ruse checkpoints have been developed in certain jurisdictions, and they are designed to respond to these rules. A ruse checkpoint involves signs on a highway which advise of a drug checkpoint ahead.¹⁹¹ There is no checkpoint. The signs are placed so that little-used exits provide an opportunity to avoid the checkpoint for drivers inclined to do so. That may include people in a hurry, people who use the highway exit to get to their homes, people who dislike encounters with police, and people carrying contraband, among others.

The Eighth Circuit has followed the Supreme Court’s dictate in invalidating checkpoints for general law enforcement purposes.¹⁹² Ruse checkpoints likewise yield illegal stops if an individual’s avoidance is viewed as reasonable suspicion for the stop. However, if a person commits a traffic violation while avoiding a traffic checkpoint there is no problem in making the traffic stop.¹⁹³ In this situation, *Whren* applies. With the stop, police likely will seek consent to search.¹⁹⁴ Thus, *Bustamonte* also applies. As one commentator has noted, the police term for this is “Gotcha.”¹⁹⁵

States v. Va Lerie, 424 F.3d 694 (8th Cir. 2005) (en banc).

187. See also *United States v. Sparks*, No. 03 CR. 269 (DAB), 2004 WL 307304 (S.D.N.Y. Feb. 19, 2004) (finding that search implies something more than “superficial examination” and includes “looking through,” “probing” and “rummaging”) (quoting *United States v. Snow*, 44 F.3d 133 (2d Cir. 1994)). See also *Nadler*, *supra* note 70, at 165-97 (addressing many of the pressures and perceptions of those in the consent search context in an effort to explain how and why so many people permit the police to search); *Steinbock*, *supra* note 72, at 521; *Thomas*, *supra* note 55, at 551.

188. E.g., *United States v. Guerrero*, 374 F.3d 584 (8th Cir. 2004); *Yang*, 345 F.3d 650. See also *Nadler*, *supra* note 70, at 187; *Thomas*, *supra* note 9, at 1517-18 (suggesting that consent searches are inconsistent with the Framers’ view of permissible searches).

189. 531 U.S. 32 (2000). See also *Illinois v. Lidster*, 540 U.S. 419 (2004).

190. *Edmond*, 531 U.S. at 47.

191. Dustin P. Deschamp, Note, *The Missouri Supreme Court Approves a Controversial Police Drug Enforcement Tactic Used on Missouri Highways Code Name: “Gotcha!”*, 48 ST. LOUIS U. L.J. 669 (2004). This article analyzes *State v. Mack*, 66 S.W.3d 706 (Mo. 2002).

192. *United States v. Yousif*, 308 F.3d 820 (8th Cir. 2002).

193. *United States v. Williams*, 359 F.3d 1019 (8th Cir. 2004); *United States v. Martinez*, 358 F.3d 1005 (8th Cir. 2004).

194. E.g., *Williams*, 359 F.3d at 1020; *Martinez*, 358 F.3d at 1007.

195. Deschamp, *supra* note 191, at 669.

6. Cars, Suspicion, and Fast Food Trash

As noted above, innocent conduct can add up to reasonable suspicion when the officer's experience is factored into the equation.¹⁹⁶ In the car search context, that rule applies as well, with some startling treatment of otherwise innocent conduct. Thus, in *United States v. Welerford*, an officer made a traffic stop on I-80 for speeding and an improper pass.¹⁹⁷ The fast food wrappers, trash, and pillow in the car caught the officer's eye, and the travel destination of Chicago from Los Angeles (a drug source area) did as well.¹⁹⁸ The officer sought consent to search twice, with some dispute over whether the defendant acquiesced, and drugs and firearms were found.¹⁹⁹ Similarly, in *United States v. Yang*, the officer made a traffic stop for tinted windows, and had his suspicions aroused by food, toilet paper, an atlas, and a cell phone in the car.²⁰⁰ The defendant's having bought the car in Texas (a drug source area) over the internet, driving too slowly and having just one key on the key ring added up with other factors to constitute reasonable suspicion.²⁰¹

The ubiquitous cell phone, fast food trash, and an atlas cannot possibly count as suspicious factors in the context of interstate travel.²⁰² Of course, interstate travel itself has become suspicious considering the numbers and locations of "drug source areas" and areas to which drugs are delivered. The entire country falls into one or the other category. In the travel context, the innocent factors which amounted to reasonable suspicion in *United States v. Frazier*²⁰³ are as remarkable as those in *Welerford* and *Yang*.²⁰⁴ In *Frazier*, officers conducting "commercial interdiction" were in a fast-food drive-in.²⁰⁵ They saw a U-Haul fueling at a gas station, and "suspected drug activity based

196. *United States v. Logan*, 362 F.3d 530, 533-34 (8th Cir. 2004); *United States v. Ameling*, 328 F.3d 443, 448-49 (8th Cir. 2003). See *supra* notes 157-69 and accompanying text.

197. 356 F.3d 932, 933 (8th Cir. 2004).

198. *Id.*

199. *Id.* at 933-34.

200. 345 F.3d 650, 652 (8th Cir. 2003).

201. *Id.* at 657 (Bright, J., dissenting). The officer noted the defendant's travel plans, and after an initial search of the car, added the existence of a receipt showing the defendant had traveled from Texas to Iowa by way of California, screwdrivers, the defendant's nervousness, and his initial answers to the officer's questions about any crime problems in his neighborhood. *Id.* at 652-54. In dissent, Judge Bright acknowledged and discounted the fifteen factors the officer cited. *Id.* at 657 (Bright, J., dissenting).

Presumably, the more factors cited, the more likely the totality will result in establishing probable cause. See *id.*; *Ameling*, 328 F.3d at 448 (counting seven factors); *United States v. Arvizu*, 534 U.S. 266, 272 (2002) (involving ten factors isolated by the lower courts). Obviously, the quantity of innocent factors is not dispositive, for a qualitative judgment about their incriminating nature must be made.

202. The Eighth Circuit so held in *United States v. Beck*, reversing the district court's determination that "innocent" factors amounted to reasonable suspicion for detention. 140 F.3d 1129, 1137 (8th Cir. 1998).

Air fresheners and the defendant's nervousness were insufficient to provide reasonable suspicion in *United States v. Guerrero*. 374 F.3d 584, 590 (8th Cir. 2004). However, a cut lime on the floorboard, Mexican license plates, and the driver and passenger being bundled up in blankets, gloves, and coats during a traffic stop on I-80 in Iowa in January were reasonably suspicious in *United States v. Esparza*. 120 Fed. App'x 649, 651 (8th Cir. 2005). See also *United States v. Ortiz-Monroy*, 332 F.3d 525 (8th Cir. 2003).

203. 408 F.3d 1102 (8th Cir. 2005).

204. See *United States v. Welerford*, 356 F.3d 932, 933 (8th Cir. 2004); *Yang*, 345 F.3d at 652-54.

205. *Frazier*, 408 F.3d at 1106.

on their training and experience.”²⁰⁶ They suspected this U-Haul was traveling across the country, but since there was no accompanying vehicle and the unit was too small for that purpose, the activities were suspicious.²⁰⁷ Qualitatively, this conduct is a far cry from the “casing” of the jewelry store described in such detail in *Terry v. Ohio*.²⁰⁸ The fast food trash, cell phones, and travel do not transform these circumstances into anything approaching reasonable suspicion, yet those factors have been cited as contributing to the totality of the circumstances to justify searches.²⁰⁹

7. Third Party Consent

The police have an incentive to search based on consent, since that obviates the need for a warrant, probable cause, or reasonable suspicion. Further, the Eighth Circuit has held many times that consent can cure an arguably unlawful search or seizure which precedes it.²¹⁰ Actual consent from the party who controls the property is helpful but not a necessity — consent from a party whom the police reasonably believe has control over the property is sufficient.²¹¹ Police not only have an incentive to obtain actual consent, then, but also some reasonable facsimile of consent from one who lacks authority to give actual consent. Laziness and convenience play a role in these scenarios as police try to obtain some words or gestures that arguably can be construed as consent when the search (if it yields contraband or evidence) is reviewed by a court after the fact.

Although the cases place few restraints on third party consent, *United States v. James* is an example of police overreaching which was reined in by the Eighth Circuit.²¹² There, while the defendant was in jail, he tried to send a letter

206. *Id.*

207. *Id.* A new padlock and travel from Arizona (drug source area) added to the suspicion once the officers approached the vehicle. *Id.* The officers’ hunch proved to be correct, when pseudoephedrine was discovered during a search. *Id.* at 1107.

208. 392 U.S. 1 (1968).

209. Perhaps the courts have become somewhat desensitized to the use of innocent factors adding up to reasonable suspicion. A more skeptical attitude was evident in the pre-*Arvizu* era in *United States v. Garcia*. 23 F.3d 1331 (8th Cir. 1994). After reviewing the eight innocent factors cited by the officer as a basis for reasonable suspicion, the court commented:

[W]e find it difficult to perceive the connection between driving a rented truck full of furniture in Nebraska and drug trafficking. Both times Schenck stopped the appellants, they were driving west on I-80, an interstate that connects the Nebraska Furniture Mart (a large discount furniture retailer with a national clientele) in Omaha, Nebraska, with I-25, a four-lane interstate that proceeds south to their stated destination of El Paso, Texas. Although it may be unusual to run across people transporting furniture from Nebraska to Texas, it does not indicate any criminal motive. Furthermore, the fact that a source city for illegal drugs entering this country was on the appellants’ itinerary would provide a more rational basis for suspicion that the appellants were transporting drugs through Nebraska if they had been traveling away from El Paso, rather than toward it.

Id. at 1335. But see *Frazier*, 408 F.3d 1102.

210. *E.g.*, *United States v. Winborn*, 344 F.3d 766 (8th Cir. 2003); *United States v. Becker*, 333 F.3d 858 (8th Cir. 2003).

211. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). See also *United States v. Hines*, 387 F.3d 690 (8th Cir. 2004); *United States v. Janis*, 387 F.3d 682 (8th Cir. 2004).

212. 353 F.3d 606, 614 (8th Cir. 2003).

to someone with instructions to destroy a computer disc.²¹³ An attorney who found himself in the chain of communications reported the matter to police.²¹⁴ They went to the home of the person who had the disc, and despite its being wrapped in multiple layers of tape with a warning not to open it, the police did open it, with difficulty, only after they ran it through a specialized computer operated by an expert.²¹⁵ The Eighth Circuit refused to accept that the custodian of the disc had actual or apparent authority to consent to opening it.²¹⁶ He clearly was only a bailee; the owner clearly had done all he could to assert his privacy interest in the property, given his incarceration; the discs had not been abandoned; and the discs would not have been discovered inevitably.²¹⁷

Resisting the claim that consent to search was given can be difficult since the evidence will necessarily be suppressed. In this setting it is crucial to recall, however, that alternatives to consent do exist — probable cause and a search warrant. Particularly in the “apparent authority” setting, law enforcement’s justifying a search based on third party consent carries a twofold risk: there was no consent, and the purported consent came from one not authorized to give it. The safer alternative of a search warrant is available, particularly considering the prevalence of cell phones and fax machines to obtain warrants electronically or by telephone.

8. “Protective Sweep” Piggybacks onto “Knock and Talk”

The “knock and talk” technique involves a police officer going to a house without a search warrant, and endeavoring to engage an occupant in conversation.²¹⁸ If the occupant cooperates, the encounter can be deemed consensual. In the absence of probable cause or the desire to obtain a warrant, an officer gains access to the premises. *United States v. Hernandez-Leon*²¹⁹ illustrates the typical scenario: an aunt of the defendant answered the door, told the officer several young men lived in the basement and allowed him to enter.²²⁰ The officer’s visit was by design, since the police had received several complaints of possible drug trafficking at the house.²²¹ Once he was inside, a girl cried, “The cops are here!” and two men went back to the basement they had been leaving.²²² The officer determined he should do a “protective sweep” of the premises for his protection, and discovered methamphetamine.²²³

213. *Id.* at 610-11.

214. *Id.*

215. *Id.* at 611.

216. *Id.* at 614.

217. *Id.* at 616-17.

218. “Knock and talk” is addressed in a number of cases. *E.g.*, *United States v. Jones*, 239 F.3d 716 (5th Cir. 2001); *United States v. Tobin*, 923 F.2d 1506 (11th Cir. 1991). *See also* *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004).

219. 379 F.3d 1024 (8th Cir. 2004).

220. *Id.* at 1025.

221. *Id.*

222. *Id.*

223. *Id.* at 1025-26. *Maryland v. Buie* recognized that such a search for the officer’s protection may be appropriate under the circumstances. 494 U.S. 325 (1990). *Buie* itself involved execution of an arrest warrant for one of two alleged perpetrators of an armed robbery. *Id.* at 328. *Buie* came up from the

The noteworthy development exemplified by *Hernandez-Leon* is that the entry to the house is obtained without a search warrant, and the ensuing search likewise is warrantless.²²⁴ The police push the occupant to “consent” to their entry, and then argue they must search as a protective measure.²²⁵ The sanctity of the home, which is stressed in many cases, is breached by police assertiveness both in entering and searching.²²⁶ Probable cause is dispensed with, as is the intervention of a magistrate. Approving of the results in a case such as *Hernandez-Leon*²²⁷ will encourage the police to exploit the opportunity to enter and search.²²⁸

IV. IMPLICATIONS OF THESE DOCTRINES

Illinois v. Gates articulates very clearly how courts should view their role in assessing probable cause for a search warrant requested by law enforcement: cooperate, do not hinder. *Whren v. United States* reinforces the paramount role of police discretion. *Schneckloth v. Bustamonte* declines to obstruct police reliance on consent to search by requiring that the individual be advised of the right to refuse. These cases rest on the assumption that the courts should not be a hindrance to the execution of law enforcement operations. *Gates*, *Whren*, and *Bustamonte* have spawned assertive law enforcement practices reviewed deferentially with an imprecise totality analysis.

How does the Eighth Circuit traverse this aspect of the search and seizure landscape? Unlike the Ninth Circuit’s bucking of the system, the Eighth Circuit has implemented the rules and practices of *Gates*, *Whren*, and *Bustamonte*, apparently without much hesitation or difficulty. Thus, in search warrant cases, it is very likely the seized evidence will be admitted at the district court level in a relatively routine manner, with that decision upheld on appeal. The doctrines in place reinforce this process; once investigators think they can establish probable cause by a totality, they may seek a warrant from a magistrate. If a warrant is issued, a reviewing court will uphold it either by finding probable cause or the applicability of the good faith exception under *Leon*. Where the veracity of the

basement at the time of the arrest. *Id.* An officer checked the basement for his protection and found incriminating evidence. *Id.* The Court noted a search of a place from which an attack could be launched against the police lawfully on the premises could be reasonable, but required the articulation of a basis to justify the search. *Id.* at 337. See also *United States v. Cash*, 378 F.3d 745 (8th Cir. 2004) (approving protective sweep of apartment where arrest warrant was executed and methamphetamine was discovered); *United States v. Hughes*, 55 Fed. App’x 399 (8th Cir. 2003).

224. 379 F.3d at 1025.

225. *Supra* notes 176-88.

226. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *Payton v. New York*, 445 U.S. 573, 588 (1980).

227. 379 F.3d 1024 (8th Cir. 2004). *Hernandez-Leon* involved the magistrate’s suppression of evidence, which was reversed and remanded by the Eighth Circuit. *Id.* at 1029. The court determined the search warrant issued after the “protective sweep” was supported by probable cause and remanded for additional consideration of exigent circumstances, which might have permitted a search of the hat that was covering the methamphetamine. *Id.*

228. *United States v. Gould*, 364 F.3d 578 (5th Cir. 2004) (approving protective sweep of home in the absence of arrest warrant; entry of home was with consent of a third party, defendant’s roommate). See also *United States v. Taylor*, 248 F.3d 506 (6th Cir. 2001); *United States v. Patrick*, 959 F.2d 991 (D.C. Cir. 1992).

officers is challenged, a *Franks* hearing can be held. In the Eighth Circuit, there appears to be very little controversy in search warrant cases. In the sample of fifty-six cases over thirty months, defense challenges in fifty-one cases were rejected by the district court and affirmed at the circuit level. Of the five cases on appeal where district courts suppressed evidence seized with a warrant, four were reversed, leaving just one with a suppression motion successful for the defense.²²⁹ Police who follow the warrant procedure are almost guaranteed to have the evidence admitted in a criminal case. And, while warrant cases do not represent a numerical majority of the search and seizure cases, they are a significant proportion of them. The analysis can be methodical — almost a checklist guaranteeing admission of the evidence.²³⁰

The warrantless search cases in the Eighth Circuit reflect a similar approach from the court: if there is a question or a close case, law enforcement prevails. It would be difficult to explain in any other way the 128 no-warrant cases, producing twelve suppression orders from the district court, resulting in nine reversals by the Eighth Circuit and only three affirmances. In addition, there was only one reversal of the district court's refusal to suppress. That only four no-warrant cases of those appealed resulted in relief for the defendant means cases such as *Whren* and *Bustamonte* are having the effect of enhancing and expanding the options for law enforcement. That expansion can also be detected in the Eighth Circuit cases discussed above under *Trends and Issues of Interest*.²³¹ Those cases reveal a good deal of inventive activity by enterprising law enforcement officers. Some is obviously improper — using race as the impetus for law enforcement action, for example. Innovative law enforcement techniques, too, can raise concerns if they are not implemented properly. Thus, creating suspicion with innocent factors, including fast food trash and cell phones, is potentially problematic. Circumventing the rules governing consent searches by obtaining questionable third-party consent or ignoring the response “No” raises questions as well. Inventing new types of warrantless searches, for example by expanding the protective sweep context, should be monitored carefully.

These are but a few ruts in an otherwise tranquil landscape, however. Are there any others which should inform our thinking about search and seizure doctrine? Three background concerns come to mind: separation of powers, institutional integrity, and individual expectations of privacy.

A. SEPARATION OF POWERS

Tension over the distribution of power in the federal-state dynamic as well as within the federal government is characteristic of our times.²³² Within

229. Villalba-Alvarado, 345 F.3d 1007 (8th Cir. 2003). As noted above, the number of cases where the defense prevailed and the government did not appeal is unknown. *Supra* note 77.

230. *Supra* notes 82-98 and accompanying text.

231. *Supra* Part III.C., notes 129-228.

232. One example of the Legislative Branch's constriction of federal courts' power over some state issues is the area of postconviction relief. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2254(d) [hereinafter AEDPA]. See generally *Williams v. Taylor*, 529 U.S. 362 (2000)

the federal realm, judicial power has been curbed while the executive power, in particular, has been buttressed. The Supreme Court has played a significant role in this drama as it has confined the lower federal courts' ability to restrict law enforcement.²³³ The totality of the circumstances approach, requiring assessment of the facts articulated by the officer and seen through his/her eyes contributes to the power of the executive branch, as the courts are hamstrung if they wish to do much other than approve the officer's discretionary acts. Courts' efforts to articulate tests to control executive action in advance have been rebuffed by the Supreme Court.²³⁴ Apparently, the judiciary should not impose such restraints and should simply ratify law enforcement's actions and their supporting rationales.²³⁵ Likewise, where an objectively reasonable basis for police action exists, the courts have no power to take their inquiry a step further to curb what they perceive as police misconduct.²³⁶ Confined to a deferential, case-by-case review, they have been forced to relinquish the role as the active check on the executive branch they had assumed in the past.²³⁷ Nowadays, they ordinarily ratify what executive actors have done.

(addressing the implementation of AEDPA).

For the most part, the state-federal power distribution is beyond the scope of this article. The focus here is on federal criminal cases and review in the first instance by the Eighth Circuit. However, when under AEDPA the federal judge can do little to control a state criminal case through interpretation of federal law, state power is enhanced at the expense of federal judicial power.

233. The state-federal power balance has been at issue in many cases. *See, e.g.,* *Stone v. Powell*, 428 U.S. 465 (1976); *Wright v. West*, 505 U.S. 277 (1992).

234. *See, e.g.,* *United States v. Banks*, 540 U.S. 31, 41 (2004); *United States v. Arvizu*, 534 U.S. 266, 275 (2002). *See generally* Alschuler, *supra* note 10 (analyzing the pros and cons of bright-line rules and criticizing their displacement of individual judging in individual cases).

235. *See, e.g.,* *United States v. Drayton*, 536 U.S. 194, 206-07 (2002); *Florida v. Bostick*, 501 U.S. 429, 439 (1991). *See also* *United States v. Angulo-Guerrero*, 328 F.3d 449, 451 (8th Cir. 2003). *See generally* Jeremy Jehangiri, Note, *United States v. Drayton: "Attention Passengers, All Carry-on Baggage and Constitutional Protections Are Checked in the Terminal,"* 48 S.D. L. REV. 104 (2003).

236. *Whren v. United States*, 517 U.S. 806, 814 (1996).

237. *See* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961). These, among other cases, represent the zenith of the modern Supreme Court's intervention in criminal cases to establish safeguards for an individual's exercise of his/her rights. *Id.* That intervention was not always welcome. For example, Former Chief Justice Burger was a champion of judicial restraint as he indicated in dissent in *Bivens v. Six Unknown Named Agents* (through his own comments and those of Professor Thayer):

I dissent from today's holding which judicially creates a damage remedy not provided for by the Constitution and not enacted by Congress. We would more surely preserve the important values of the doctrine of separation of powers — and perhaps get a better result — by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task — as we do not. Professor Thayer, speaking of the limits on judicial power, albeit in another context, had this to say:

And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on the precise locality the thunderbolt of popular condemnation. * * * For that course — the true course of judicial duty always — will powerfully help to bring the people and their representatives to a sense of their own responsibility.

403 U.S. 388, 411-12 (1971) (quoting JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 88 (1967)). This approach has apparently displaced that of the Warren Court.

B. INSTITUTIONAL INTEGRITY

There is a further concern, as Professor Anthony Amsterdam reminded us in his exposition of first principles governing the Fourth Amendment. As he noted, the role of the courts is not simply to address search and seizure issues in an atomized fashion with a myopic view.²³⁸ The judiciary itself must resist rubber-stamping executive action. It must appreciate that an individual officer and individual defendant are crucial elements in any case, but only starting points for a larger picture of government action.²³⁹ Courts should rebuff efforts to displace their close scrutiny of the facts with an imprecise totality assessment from the viewpoint of the officer.²⁴⁰ They should not lose sight of details obfuscated in the blur of a totality analysis. Misuse of power is encouraged when there is only a minimal check on it. Doctrines which force courts to defer to the executive, and to refrain from close examination of executive action, result in courts abdicating their responsibility to control the institution of the executive. Vigilance in scrutinizing the institution and not just the occasional bad apple is critical, for what the police do is dictated in large part by what courts permit.²⁴¹ Curbing the courts' prerogative to exert meaningful control over the executive leaves the executive, for the most part, to police itself.²⁴² Abuse of power through excess, ignorance, or neglect is all too possible. Courts can appreciate the larger picture of government conduct with a viewpoint informed about possible executive branch abuses. They can do more than merely ratify an officer's actions, which are initially justified by the transparent justification of an "objectively reasonable" stop, for example, of a Native American person for exceeding the posted speed limit by one mile. While many would applaud the shift in power from the judiciary to the political branches of government, others would be hesitant to dilute courts' pre-eminent role as the guarantors of individuals' liberty that they have become. Courts have been viewed as the branch of government that could force the right, although perhaps unpopular, choice.²⁴³ Diminishment of that role should be tracked carefully.

238. See Amsterdam, *supra* note 5, at 363-67.

239. *Id.*

240. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 228 (1993) (criticizing a "reasonableness model" of Fourth Amendment analysis as a "blank check" for the police).

241. Taslitz, *supra* note 3, at 28. See *Missouri v. Seibert*, 542 U.S. 600 (2004). See also Maclin, *supra* note 240, at 228, 247.

242. *Mapp*, 367 U.S. 643 (ruling evidence seized illegally under the Fourth Amendment must be excluded in state prosecutions). See also *United States v. Leon*, 468 U.S. 897 (1984) (recognizing "good faith" exception to the exclusionary rule); *Bivens*, 403 U.S. at 411 (Burger, C.J., dissenting) (proposing that for cases of police illegality Congress enact an alternative to the exclusionary rule authorizing payment of money damages as determined by a tribunal).

243. See generally RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW* 189 (2004); CHARLES FRIED, *SAYING WHAT THE LAW IS* 70 (2004); MICHAEL PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1994); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996); MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* (1991). See also Taslitz, *supra* note 3, at 28.

C. INDIVIDUAL EXPECTATIONS OF PRIVACY

A final problem in the search and seizure landscape is to pose the question of what is the impact of these developments on individuals' expectations of privacy?²⁴⁴ The doctrines emanating from the Supreme Court which reinforce the power of law enforcement do shape public perception — the consent search cases show that for the most part, people think law enforcement can gain access to their homes and property just by asking. The expectation of privacy is under assault from the private sector as well, with innovations like reality TV which demonstrate no compunctions about revealing intimate details of people's (perhaps real) lives. Just as drug testing seemed a shocking invasion of privacy when first introduced,²⁴⁵ but now has become routine, many of the invasions of privacy discussed in this article have become routine. When *Katz* directed the assessment of both objectively and subjectively reasonable expectations of privacy, the Court may not have been aware of how much those expectations would change over thirty-five years, and how the changes would have been driven in part by the Court's holdings in cases such as *Gates*, *Whren*, and *Bustamonte*. But as both Justices Stevens²⁴⁶ and Scalia²⁴⁷ have noted in differing contexts, diminishing the community's sense of privacy is a harm we can ill afford.

V. CONCLUSION

The search and seizure landscape in the Eighth Circuit is remarkably smooth on the surface. However, problems may be percolating below. One is the augmentation of executive prerogatives at the expense of the judiciary, with the executive endeavoring to relegate the courts, at times, to after-the-fact ratification of questionable executive action.²⁴⁸ Perhaps the contrast in approaches is most easily seen by hypothesizing what would happen if a judge is asked how to implement the Fourth Amendment. If asked in advance, a court would advise a police officer that a person's "no" means "no" and must be respected. Courts would advise the police that their endeavor is not to confuse or mislead people, or take advantage of their ignorance. Courts would advise that a hunch is not probable cause, nor can probable cause be manufactured from coupling innocent factors with a hunch. Yet when courts are involved in a search only after it occurs, with a restrictive standard of review, using a test which is not a test ("totality of circumstances"), the police quickly understand

244. See, e.g., *United States v. White*, 401 U.S. 745, 751 (1971). In *White*, the Court approved of electronic monitoring of conversations without a warrant and with the consent of one party to the conversation. *Id.* at 747. Justice Harlan in dissent offered the following assessment of the Court's role in such path-breaking cases: "Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society." *Id.* at 786.

245. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989).

246. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 477 (1990) (Stevens, J., dissenting).

247. *Von Raab*, 489 U.S. at 686-87 (Scalia, J., dissenting). See also Taslitz, *supra* note 3, at 53.

248. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (reaffirming the principle that executive prerogatives are not without limits and are subject to judicial review and intervention).

there is little the judiciary can or will do to restrain them. The power apparently is in the political branches, for good or ill.

Courts should use their opinions to teach and to speak the truth.²⁴⁹ If people are expected to be assertive or vocal in expressing their concern with police action, that should be made clear in a world where cooperation is encouraged. If race is used as the basis for stops under *Whren*, courts should be willing to acknowledge that. The political branches have made choices about law enforcement practices that the courts have reinforced; if those practices are creating harm as they address the harm of criminal conduct, the courts should say so. The public should be made aware of restraints on the courts' ability to protect individual rights, so any necessary institutional curbs will originate elsewhere.

The temptation for law enforcement is to be creative in apprehending law violators — “Gotcha!” The less-clever rejoinder from the courts should be, “We’re here to ensure that if they ‘getcha,’ it’s done fairly, by the rules.”

249. Saltzburg, *supra* note 3, at 157.