Alec Kraus

The Consent Search Warning Argument: Procedural Justice and What a Warning Might Do for Police Legitimacy
Background

- Police legitimacy crisis – Black Lives Matter
- Publicized incidents of police misconduct have long lasting effects on public confidence (Weitzer, 2002)
- 2011- 62.9 million people ages 16+ came in contact with police, half of which police-initiated (Langton & Durose, 2013)
  - Higher than previous years of studies
  - If searched, thought police behaved improperly
- Consent search valid since 1946 (Zap v. U.S.; Davis v. U.S.)
- # of consent searches unknown but might be majority of searches are consent searches (Nadler, 2003)
Overview

- Explore the primary arguments within this topic that scholars and courts have often debated
  - Is a warning constitutionally required?
    - Will NOT be attempting to challenge any Supreme Court decisions
  - Is consent actually voluntary? (Voluntariness)
  - Would this type of warning prevent police from being able to do their job? (Practicality)

- Introduce a new area to the debate
  - Applying Procedural Justice concept
WHAT HAS THE SUPREME COURT DECIDED?
ARE POLICE CONSTITUTIONALLY REQUIRED
TO GIVE A WARNING?
Primary Cases

- *Schneckloth v. Bustamonte* (1973)
<table>
<thead>
<tr>
<th>Majority Opinion</th>
<th>Dissenting Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Warren:</strong></td>
<td><strong>Harlan:</strong></td>
</tr>
<tr>
<td>Custodial interrogations deprive certain freedoms</td>
<td>Creating new law</td>
</tr>
<tr>
<td>Protections are fundamental</td>
<td>“Negate all pressures”</td>
</tr>
<tr>
<td>Inherently coercive</td>
<td>Decrease confessions</td>
</tr>
<tr>
<td>Increases integrity of cases</td>
<td>“Hazardous experimentation”</td>
</tr>
<tr>
<td>No other standard will suffice</td>
<td></td>
</tr>
<tr>
<td>Majority Opinion</td>
<td>Dissenting Opinion</td>
</tr>
<tr>
<td>------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Reasonableness based on totality of circumstances</td>
<td>Can’t waive a right if they don’t know they can</td>
</tr>
<tr>
<td>Right to refuse considered, though</td>
<td>Consent means a “knowing choice”</td>
</tr>
<tr>
<td>“Thoroughly impractical”</td>
<td>A warning would prove of knowledge to waive right</td>
</tr>
<tr>
<td>Not inherently coercive</td>
<td>FBI warnings</td>
</tr>
<tr>
<td></td>
<td>Constitution eliminates some convenience for police</td>
</tr>
</tbody>
</table>
Why the difference? Comparing the 2 cases

**Miranda**
- **Majority**
  - Warren
  - Black
  - Douglas
  - Brennan
  - Fortas
- **Dissenting**
  - Clark
  - Harlan
  - Stewart
  - White

**Schneckloth**
- **Majority**
  - Burger
  - Stewart
  - White
  - Blackmun
  - Powell
  - Rehnquist
- **Dissenting**
  - Douglas
  - Brennan
  - Marshall
<table>
<thead>
<tr>
<th>Majority Opinion</th>
<th>Dissenting Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Freedom to terminate encounter, not free to leave</td>
<td>• Freedom to terminate encounter if not reminded of rights?</td>
</tr>
<tr>
<td>• No inclination that he could refuse to cooperate</td>
<td>• Not with show of authority by officers</td>
</tr>
<tr>
<td></td>
<td>□ Positioning on bus, guns and badges</td>
</tr>
<tr>
<td>Majority Opinion</td>
<td>Dissenting Opinion</td>
</tr>
<tr>
<td>-------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Reasonableness based on totality of circumstances</td>
<td>Would not have felt free to go</td>
</tr>
<tr>
<td>Impractical to warn people of their rights</td>
<td></td>
</tr>
<tr>
<td></td>
<td>□ Answer to question needed before they could leave</td>
</tr>
<tr>
<td></td>
<td>Warnings not constitutionally mandatory, but not prohibited either</td>
</tr>
</tbody>
</table>
### Dickerson v. U.S.

<table>
<thead>
<tr>
<th>Majority Opinion</th>
<th>Dissenting Opinion</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Miranda rights are constitutional, Congress cannot override them</td>
<td>• Miranda rights not constitutionally based</td>
</tr>
<tr>
<td>• Rooted in national culture</td>
<td>• Court can’t overrule Congress if it doesn’t have constitutional backing</td>
</tr>
<tr>
<td>• No compelling reason to overturn decision</td>
<td></td>
</tr>
</tbody>
</table>
## Majority Opinion
- Applying *Bostick* framework
- Police didn’t take any action to imply they couldn’t cooperate
- Presence of an officer, their badges or gun, are not coercive
- Just because one person is seized does not make entire bus seized
- Brown being arrested should have made Drayton more aware of consequences

## Dissenting Opinion
- Would not have felt free to terminate encounter
  - Bus driver had tickets and was off bus
  - One officer stood in back of bus, one sat in driver’s seat, one walked down aisle
The Voluntariness Debate

When people consent to a search is it truly voluntary? What does voluntary actually mean?
Voluntariness

- Can’t be viewed in “utopian” sense
  - “But-for” cause is inadequate
- Are there factors in a consent search situation that constrain a decision?
Compliance with Authority

- Social roles create scripts
- Can help make split-second decisions efficiently
  - Driving
- Stanley Milgram’s experiment
  - Shows people often comply with an authority figure even if it’s against their best interests
- Kassin and Kiechel (1996)
  - Pressing “ALT” key will ruin experiment
  - 69% confessed, 28% internalized, 9% confabulated story
  - Fast-paced group with confederate witness most likely to comply
Social Validation

- “Monkey see, monkey do”
  - But doesn’t actually have to see it done
- Asch conformity experiment
  - Vast majority conformed to group answer
  - People falsely predict they won’t fall victim
- *Drayton* case
Actor-Observer Bias

- Observers overlook situational factors to actor
  - Recorded interrogations through different perspectives
  - Hearing beeps in laboratory, outsiders think they wouldn’t fall victim to others’ answers
  - Essay writing

- Kagehiro (1988)
  - Reading situations of police asking for consent
    - Actor or observer
  - Worded specifically, nonspecifically, declaratively, interrogatively
  - If worded specifically and interrogatively, actors most likely to refuse consent or ask more information
  - Observers overestimated if actors ask for more information, felt they could refuse
Other Factors

- Physical distance
  - Authority figures

- Time
  - Cuts-off cognitive process
  - New Jersey consent forms
    - 20/2,700 returned and signed

- Many factors present that constrain a decision and courts often overlook these factors
  - Could be perceived an non-voluntary by reasonable, innocent person even if seen as voluntary by police or courts
The Debate Over Practicability

Do warnings significantly prevent police from being able to do their jobs?
Would this be the end to the consent search?
Drawing from Miranda’s Impact

- Hazardous experiment?
- 1960’s: Yale Law School, Washington, D.C., Los Angeles, Pittsburg
- 1970’s: Denver, Knoxville, Los Angeles
- 2000’s: Virginia Police Chiefs during Dickerson

No significant changes found

The Court held in an opinion written by Chief Justice Earl Warren, that the police must warn a suspect of his right to remain silent, must warn him that anything he says may be used against him in court, must advise him of his right to counsel, and must inform him that he may drop to 15.2 per cent.

Mr. Pituchberg said his officers had been doing together but that, however, he said, would have a lawyer present. The Miranda decision was not always made in response to the defense’s rights to effective counsel and they asked that Mr. Pituchberg was one of several authorities on criminal law who spoke at the session, which was attended by lawyers and law enforcement officers with the effects of the Miranda decision and other recent Supreme Court decisions.

The Miranda decision, which was released last June 13, placed rigid restrictions on interrogation of suspects in police custody. The Court held that the police have of proving that a suspect invoked his rights either by not significantly decreased since the Miranda decision. Therefore, police have interrogated the poisonous tree.

Professor Ramist, also of the National District and University of Michigan, Attorney Association Foundation, used reports by police departments that confessions have

Danae Nader, executive director of the National District and University of Michigan, Attorney Association Foundation, recently instead that the Court clearly indicated it would not allow such evidence.

"If the Court means to follow the decision. Where police have interrogated suspects in police custody."

No significant changes found

The New York Times
Published: August 27, 1966
Copyright The New York Times
Examples of Consent Search Warnings

- New Jersey
- St. Paul, Minnesota
- Austin, Dallas – no data
- Durham
  - Drop in consent searches, rise in probable cause searches
- Fayetteville
  - Drop in consent searches and crime rate
- Ohio after *State v. Robinette*
  - No significant changes – slight increase in amount of times asked
  - People admitted to feeling like they “had to”
- NOT impractical
So....what? Why create a warning?

- Recap:
  - Inherent compulsion to comply – YES
  - Impractical – NO

- Other impacts:
  - Leo
    - Professionalization of police and interrogations
      - Moved from “third degree” to psychological tricks
      - Deception and manipulation to “work *Miranda*”
      - Remained effected, shifted power, became more professional while symbolically showing they care about rights
      - More efficient, more fair
WHAT OTHER BENEFIT COULD A WARNING HAVE?
MIGHT A WARNING ACTUALLY BENEFIT THE POLICE?
Procedural Justice

- Legitimacy – obligation to obey, trust in police
- Helps define how we view situations
- Instrumental Justice (favorable outcomes)
- Normative Justice (perceptions of fairness)
  - Procedural Justice (fair procedures)
    - Strongest indicator
  - Distributive Justice (fair outcomes)
- Other factors still matter, but procedural justice matters most
  - Collective efficacy
  - Frequency of stops, intrusion of stops
How it Applies to Consent Searches

- Gau (2012) traffic stops
  - Most likely encounter with police
  - Requesting consent meant situations perceived as less fair, less legitimate
  - Lessens procedural justice

- Consent Search Warning
  - Whether or not search takes place doesn’t matter as much
  - Whether or not situation is actually more voluntary doesn’t matter as much
  - What matters is the perceived fairness
  - Warnings slow pace of encounter, empower decision-making process
  - Could increase procedural justice, public trust and police legitimacy
Conclusions

• INHERENT COMPULSION? – YES
• IMPractical? – NO
• CONSTITUTIONAL? – COURTS HAVE DECided NOT NECESSARY
• PROCEDURAL JUSTICE – INCREASE WITH WARNINGS
Sources

- See paper for full source citations