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Search & (and) Seizure - The Clash between the Fourth Amendment and Society's Interest in Effective Law Enforcement - State v. Welch

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SEARCH & SEIZURE—The Clash Between the Fourth Amendment and Society's Interest in Effective Law Enforcement. *State v. Welch*, 873 P.2d 601 (Wyo. 1994), *reh. denied* (1994).

The Fourth Amendment's prohibition against unreasonable searches and seizures[1] and society's interest in effective law enforcement have clashed in the courts of the United States since the amendment's adoption in 1791. The Wyoming Supreme Court's 1994 decision in *State v. Welch*[2] demonstrates that the conflict endures today.

The case involves an interlocutory appeal by the State of a trial court's order suppressing evidence in a drug prosecution.[3] Without referring to its adopted standard of review of evidentiary rulings,[4] the Wyoming Supreme Court rejected the finding by the trial judge that a Wyoming Highway Patrolman did not have reasonable suspicion to detain two travelers on Interstate 80 while he awaited the arrival of a drug-sniffing dog.[5] The court held that the trial judge erred in suppressing evidence obtained by a search of the vehicle occupied by Joseph Michener Jr. and James Welch,[6] and remanded the case for further proceedings consistent with its opinion.[7]

Patrolman Dan Dyer was traveling westbound near Laramie when he encountered a pickup, driven by Michener, traveling in the opposite

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1. The Fourth Amendment provides:

> 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.

2. State v. Welch, 873 P.2d 601 (Wyo. 1994).

3. *Id.* The authority of the court to review evidentiary rulings pursuant to a writ of certiorari was settled in City of Laramie v. Mengel, 671 P.2d 340 (Wyo. 1983). *See also* State v. Heiner, 683 P.2d 629, 632-33 (Wyo. 1984) (granting review of a trial judge's order suppressing evidence critical to the prosecution of an arson case).

4. In regard to evidentiary rulings, the court has said that the trial judge's "findings must be given great weight when considered in light of its opportunity to hear and observe the witnesses." Garcia v. State, 777 P.2d 603, 606 (Wyo. 1989). The court defers to the trial court's evidentiary rulings "absent appellant's clear showing of an abuse of that discretion." *Id.* at 607.

> The ultimate issue in determining abuse of discretion is "whether or not the court could reasonably conclude as it did. A reviewing court cannot substitute its judgment for that of the trial court, whose judgment must be sustained unless clearly erroneous, manifestly wrong, or totally against the evidence." Roberts v. Vilos, 776 P.2d 216, 217 (Wyo. 1989). *See infra* notes 128-32 and accompanying text.

5. *Welch*, 873 P.2d at 605.

6. *Id.*

7. As of Nov. 1, 1994, the Michener and Welch cases remained at pretrial stages.

direction.[8] Welch was asleep in the pickup's cargo bed, which was covered by a topper.[9] Dyer mistakenly thought the pickup was traveling in tandem with a cream-colored car without license plates.[10] Dyer turned his vehicle around in the median and began following the two vehicles.[11] He discovered the car had a temporary sticker in the back window, which alleviated his concern about the lack of license plates.[12] Nevertheless, the pickup failed to signal one hundred feet before switching lanes to pass a semi-truck and repeated the traffic code violation in returning to the right lane.[13] Dyer stopped the pickup and asked Michener for his driver's license and vehicle registration.[14] He told Michener he was going to issue him a warning ticket for an illegal lane change.[15] By the time Dyer reached his patrol car to write the ticket, he had decided to detain Michener and Welch until a canine drug detection team could arrive on the scene from Laramie.[16] Approximately six minutes after the initial stop, Dyer asked the dispatcher to send the so-called "sniffer dog" to the scene.[17] The dog arrived approximately 43 minutes after the stop began.[18] The investigatory stop stretched to approximately 50 minutes before the dog alerted the officers to 347 pounds of marijuana hidden beneath the liner in the pickup bed.[19]

Observations that raised Dyer's suspicion included:

1) The pickup had nylon webbing for a tailgate and a topper without a door—a combination that Dyer said struck him as unusual, as the topper would negate any improved gas mileage usually afforded by using nylon webbing for tailgate.[20]

2) The pickup bed was "quite clean," with no spare tire.[21]

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8. *Welch*, 873 P.2d at 602.

9. A topper is a small camper shell that covers the cargo department of a pickup. A plastic covering lined the inside of the cargo department bed of the pickup driven by Michener. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. WYO. STAT. § 31-5-217(b) (1994) provides:

A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning.

14. *Welch*, 873 P.2d at 602-03.

15. *Id.* at 603.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 603-04.

20. *Id.* at 602.

21. *Id.*

3) The cab contained a "fist-size clove of garlic" and a radar detector.[22]

4) A Miramar Naval Station sticker was on the window, though the driver did not look to Dyer like the "military type."[23]

5) The driver mispronounced Suaso, the Spanish name of the registered owner who was not present, though a traffic ticket Dyer discovered with the registration indicated that he had driven the pickup more than a month before. Dyer said he knew the correct pronunciation because he speaks Spanish.[24]

6) The pickup was registered in San Diego, and Southern California is a major drug source for narcotics coming into the United States.[25]

7) Michener appeared nervous and his nervousness increased during the stop.[26]

8) Welch, on the other hand, remained asleep, or at least feigned sleep, while continuing to lie in the bed of the pickup for a time after the stop. Dyer said most passengers awake quickly when their vehicles are stopped.[27]

10) The ceiling of the pickup topper sagged an inch or two, indicating to Dyer that narcotics might be hidden there.[28]

The Wyoming Supreme Court agreed with the trial judge's ruling that the initial stop was not pretextual, and that Michener and Welch were not free to leave and, therefore, were "seized" by Dyer throughout the encounter.[29] However, the court disagreed with the judge's ruling that Dyer lacked reasonable suspicion to justify the detention beyond the traffic stop.[30]

This casenote will examine the court's finding of reasonable suspicion in the light of precedent of the United States Supreme Court as well as other courts. It will also critique the Wyoming Supreme Court's decision to overturn the suppression order despite its standard practice of deferring to trial judges' evidentiary rulings.

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22. *Id.*
23. *Id.*
24. *Id.* at 602-03.
25. *Id.* at 603.
26. *Id.*
27. *Id.*
28. *Id.* at 602.
29. *Id.* at 604.
30. *Id.*

BACKGROUND

In *Terry v. Ohio*,[31] the United States Supreme Court first authorized police to conduct investigative detentions of individuals based on reasonable suspicion.[32] Reasonable suspicion is a lesser standard[33] than the probable cause[34] required to justify a full-blown arrest, but the Court has declined to specifically define it.[35] A *Terry* stop must be "minimally intrusive."[36] In determining the lawfulness of a *Terry* stop, a court must balance the individual's privacy interests against the state's interests in law enforcement.[37] *Terry* called for a two-fold inquiry into the reasonableness of a limited search or seizure—whether the officer's action was justified at its inception and whether it was "reasonably related in scope to the circumstances which justified" it in the first place.[38] An officer must offer more than an "inchoate and unparticularized suspicion or 'hunch.'"[39] In *United States v. Cortez*, the Court emphasized that investigative stops must be evaluated on "the totality of the circumstances—the whole picture."[40] The *Terry* doctrine has been applied to investigative detentions of vehicles and their occupants such as the one conducted by Patrolman Dyer in *Welch*.[41]

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31. Terry v. Ohio, 392 U.S. 1 (1968). The Court said police officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an investigative detention. *Id.* at 21.

32. The Court explained that *Terry* allowed police to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S 1, 7 (1989).

33. The "level of suspicion [required] is considerably less than proof of wrongdoing by a preponderance of the evidence." *Sokolow*, 490 U.S. at 7.

34. The Court has held that probable cause means "a fair probability that contraband or evidence of a crime will be found." Illinois v. Gates, 462 U.S. 213, 238 (1983).

35. Reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules." *Sokolow*, 490 U.S. at 6 (quoting *Gates*, 462 U.S. at 238.).

36. United States v. Place, 462 U.S. 696, 704 (1983).

37. *Id.* at 703. The Court said:

> The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure . . . . We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

Id.

38. *Terry*, 392 U.S. at 19-20.

39. *Id.* at 27.

40. United States v. Cortez, 449 U.S. 411, 417 (1981).

41. United States v. Sharpe, 470 U.S. 675 (1985). "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures. The authority and limits of the Amendment apply to investigative stops of vehicles such as occurred here." *Id.* at 682 (emphasis in original).

The Supreme Court has declined to establish a bright line rule regarding the permissible duration of a *Terry* stop, opting instead for a "common sense" approach.[42] The Court in *United States v. Sharpe* chose to focus on the due diligence of police rather than the length of the stop and rejected a *per se* rule that a twenty-minute detention was too long to be justified under the *Terry* doctrine.[43] The Court held that such a bright-line approach was "clearly and fundamentally at odds with our approach in this area."[44] The Court acknowledged, however, that the length of the stop is an "important factor," and that "at some point" an investigative stop can no longer be justified by reasonable suspicion as opposed to probable cause.[45] Once an investigative stop becomes "in important respects indistinguishable from traditional arrest" it must be justified by probable cause.[46] A court's evaluation of police diligence should not be swayed simply by the availability of a less intrusive alternative, but "whether the police acted reasonably in failing to recognize or to pursue it."[47]

The protection against unreasonable searches and seizures found in the Wyoming Constitution[48] is "virtually identical to that found in the federal constitution."[49] The Wyoming Supreme Court adheres closely to "federal interpretations of the Fourth Amendment" absent contrary direction from the state legislature.[50] The Wyoming court summarized its view of *Terry* stops in *Keehn v. Town of Torrington*.[51] A law enforcement officer "may temporarily

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42. In *Sharpe*, the Court held that "our cases impose no rigid time limitation on *Terry* stops . . . . Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." *Id.* at 685.

The Wyoming Supreme Court declined to adopt a "bright line" rule requiring written consent for searches following traffic stops. *Welch*, 873 P.2d at 604-05.

43. *Sharpe*, 470 U.S. at 686. The Court said:

> In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second guessing.

Id. (Citations omitted).

44. *Id.*

45. *Id.* at 685.

46. Dunaway v. New York, 442 U.S. 200, 212 (1979).

47. *Sharpe*, 470 U.S. at 687.

48. WYO. CONST. art. 1, § 4 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 warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

49. Saldana v. State, 846 P.2d 604, 611 (Wyo. 1993).

50. *Id.*

51. Keehn v. Town of Torrington, 834 P.2d 112, 116 (Wyo. 1992).

detain an individual for the purpose of investigation only when he has a reasonable suspicion, based on all the circumstances, that criminal activity 'may be afoot.'"[52] Such detentions "are limited in both scope and duration. Peace officers are encouraged, if not constitutionally obliged, to employ 'the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.'"[53]

In *State v. Wilson*, decided nine days before *Welch*, the Wyoming Supreme Court stated that a person "has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[54] The court also cited "the accepted standard" that an officer making a traffic stop may check to determine if the car has been stolen, but may not detain the motorist further for questioning about other matters without reasonable suspicion.[55] The standard is nearly identical to the standard adopted by the United States Court of Appeals for the Tenth Circuit.[56]

In summary, the Wyoming Supreme Court follows federal precedent in permitting investigative stops. The stops must be minimally intrusive and supported by reasonable suspicion based on the totality of the circumstances observed by the law enforcement officer.

PRINCIPAL CASE

The majority opinion in *Welch* reversed the trial court's order suppressing evidence obtained by Patrolman Dyer during the detention of Welch and Michener.[57] Justice Cardine filed a dissenting opinion in which Justice Gold-

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52. *Keehn*, 834 P.2d at 116 (quoting *Terry*, 392 U.S. at 30).

53. *Keehn*, 834 P.2d at 116 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

54. State v. Wilson, 874 P.2d 215, 220 (Wyo. 1994).

55. *Id.* at 224. The court said:

> The accepted standard is that an officer making a traffic stop may request a driver's license and registration, run a NCIC computer check to determine if the vehicle is stolen and the license is valid and issue a citation. After these conditions are satisfied, however, the officer must have a reasonable suspicion of illegal activity to justify further temporary detention for questioning.

Id. (citations omitted).

56. *See* United States v. Soto, 988 F.2d 1548, 1554 (10th Cir. 1993). *See also* United States v. Pena, 920 F.2d 1509, 1514 (10th Cir. 1990) (holding that if a "driver produces a valid license and proof of right to operate the vehicle, the officer must allow him to continue on his way without delay for further questioning.")

57. *Welch*, 873 P.2d at 602. Chief Justice Macy wrote the court's opinion, in which Justice Thomas joined. Justice Taylor filed a concurring opinion. Justice Macy's term as chief justice expired in July 1994 and Justice Golden succeeded him.

en joined.[58] The court held that the detention of Michener and Welch was not unreasonable in any respect.[59] First, the court concluded the initial stop "was not pretextual but was lawful in all respects."[60] It then found that the "patrolman's actions at the scene" showed that Michener and Welch were "seized" and not free to leave.[61] However, the court held that the investigatory detention itself was justified by "reasonably articulable suspicion premised upon objective facts" indicating the vehicle contained contraband.[62] The court further ruled that the detention of Welch and Michener took no longer than was necessary for law officers to complete their investigation.[63] The opinion acknowledged that each of Dyer's observations, taken individually, might be as consistent with innocence as it was with guilt.[64] However, the court embraced "the doctrine that even conduct which is wholly lawful and seemingly innocent may form the basis for a reasonable suspicion that criminal activity is afoot."[65] The Wyoming Supreme Court deferred to Patrolman Dyer's experience in drug cases.[66] Dyer had been involved in eight Operation Pipeline[67] interdiction arrests prior to his detention of Welch and Michener.[68] The court said Dyer did not attribute his suspicions to his training in drug courier profiles but he "credited his knowledge of, and experience with, similar arrests where, in fact, circumstances such as those he observed that day were correctly put together to form reasonable articulable suspicions."[69]

After finding that Dyer had reasonable suspicion to detain the passengers, the court examined "the critical question" of whether the duration of the detention violated the constitutional rights of Michener and Welch.[70] The court pointed to *Sharpe*[71] to support its ruling that the fifty-minute detention of Welch and Michener did not transform the investigative stop into a *de*

58. *Id.* at 606. Justice Cardine has since retired from the court.

59. *Id.* at 605.

60. *Id.* at 604.

61. *Id.*

62. *Id.* at 605.

63. *Id.*

64. *Welch*, 873 P.2d at 604.

65. *Id.* The court cited United States v. Sokolow, 490 U.S. 1, 6-8 (1989), as support for the doctrine. The United States Supreme Court in *Sokolow* said that "any one of [the factors considered in the case was] not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." *Id.* at 9. *Sokolow*, 490 U.S. at 9.

66. *Welch*, 873 P.2d at 604.

67. The Wyoming Highway Patrol's drug interdiction program is sometimes referred to as Operation Pipeline. Brief for Respondent Michener at 1, State v. Welch, 873 P.2d 601 (Wyo. 1994) (No. 92-192) [hereinafter Brief for Respondent Michener].

68. *Welch*, 873 P.2d at 604.

69. *Id.* at 604-05.

70. *Id.* at 605.

71. United States v. Sharpe, 470 U.S. 675 (1985).

facto arrest. The majority held that the law enforcement officers involved acted as quickly as possible to dispel their suspicions.[72] The nearest "sniffer dog" available to Dyer was at the home of an Albany County Sheriff's deputy twenty-five miles west of Laramie.[73] The court reasoned that the distance between communities in the state render it impossible for law enforcement to resolve its suspicions within a few minutes.[74]

Though the majority did not specify which of Dyer's observations it found persuasive in establishing reasonable suspicion, Justice Taylor did list in his concurring opinion the facts that he believed justified the detention. He cited the sagging ceiling of the camper shell and the unusually clean plastic liner in the pickup bed as supporting "a reasonable inference that contraband could be hidden in the vehicle."[75] Justice Taylor specifically noted that the clean liner suggested that it been recently removed, and he added that it "showed signs of having been altered."[76] Other articulable facts mentioned by Justice Taylor were Michener's nervousness, Welch's "unusual indifference" and Michener's mispronunciation of the pickup owner's name.[77] Finally, Justice Taylor concluded, "Police experience would also indicate that the average interstate traveler does not carry a fist-sized clove of garlic in a vehicle to present an aromatic challenge to prying noses, human or canine."[78]

Justice Cardine's dissent bluntly disputed the majority's finding of reasonable suspicion. He succinctly summarized what Dyer knew before deciding to detain Welch and Michener:

> He then observed a pickup with camper and net tailgate, a clove of garlic, a radar detector, a clean bed, the pickup was from San Diego, California, with a driver too nervous and a passenger too calm (asleep in the pickup bed). That is all. This scenario does not constitute a drug profile nor reasonable suspicion of criminal activity.[79]

Justice Cardine concluded that the decision "opens the door for the willy nilly use of drug courier profiles" by law enforcement officers in Wyo-

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72. *Welch*, 873 P.2d at 605.

73. *Id.* Albany County Sheriff's Deputy Rob DeBree drove 100 mph in order to reach the scene with his dog as soon as possible. *Id.* at 603. The policeman had his wife leave their home with the dog and meet him on the road to Laramie. Brief of the State at 6, State v. Welch, 873 P.2d 601 (Wyo. 1994) (Nos. 92-191, 92-192).

74. *Id.* at 605.

75. *Id.* at 612.

76. *Id.* The majority's opinion does not specifically state that the liner showed signs of tampering.

77. *Id.*

78. *Id.*

79. *Id.* at 610.

ming. He asked how many innocent travelers will be searched by a canine unit because they fit someone's idea of a drug courier. He then answered his own question: "Since it is usually the guilty who end up before us, we are unlikely to ever know."[80]

ANALYSIS

A court may rely on an officer's experience and expertise in determining when a series of otherwise innocent acts together create reasonable suspicion of criminal activity. However, if the acts in their totality are consistent with innocent behavior, then a court should not find the officer had reasonable suspicion. The specificity requirement implicit in the Fourth Amendment mandates that an officer pinpoint why his observations of otherwise innocent acts cause him to suspect criminal activity. By rejecting generalized suspicion and requiring specificity, the courts protect innocent citizens from needless searches and seizures.

Reasonable people, viewing the cold record of *Welch*, could differ as to whether the details that Dyer observed painted a picture consistent with innocent travel or drug trafficking. The close call should have prompted the Wyoming Supreme Court to defer to the trial court's finding that Patrolman Dyer lacked reasonable suspicion.[81]

A. Separating the Innocent from the Suspicious

Profiles based on an officer's experience can help establish reasonable suspicion, but courts should not blindly accept them. Instead, courts should subject profile characteristics to careful scrutiny.

Courts have generally afforded "considerable deference to the observations and conclusions of an experienced officer, reasoning that she can infer criminal activity from conduct that seems innocuous to a lay observer."[82] In *Cortez*, the U.S. Supreme Court said, "Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact finders are permitted to do the same—and so are law enforcement officers."[83]

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80. *Id.* at 611.

81. The court also rejected a "bright line" rule announced by the trial court that written consent must be obtained for searches pursuant to traffic stops. *Id.* at 610. Justice Cardine would have upheld the rule. *Id.* That debate, however, is beyond the scope of this casenote.

82. Evelyn M. Aswad et al., Project, *Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1992-1993*, 82 GEO. L.J. 622, 625-26 (1994).

83. United States v. Cortez, 449 U.S. 411, 418 (1981).

The *Welch* court followed the reasoning of *United States v. Sokolow*[84] by deferring to the experience of Patrolman Dyer, though he may have used his drug profile training in deciding whether to detain Welch and Michener.[85] The *Sokolow* court held that while a court must require an agent to articulate the factors leading to reasonable suspicion, "the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."[86]

However, the *Sokolow* Court did not halt its analysis at that point, but continued its examination to determine whether the profile characteristics cited by the officers in the case, when taken together, were inconsistent with innocent travel.[87] Thus, *Sokolow* did not endorse reflexive acceptance of suspicions based on profiles. Rather, it required courts to apply to profile-based suspicions the same careful scrutiny as in all other *Terry*-type cases. *Sokolow* plainly does not relieve courts of their responsibility to insure that generalized suspicion by police does not needlessly ensnare innocent travelers.

The Court of Appeals of New Mexico illustrated this requirement by calling for more than generalized suspicion in a recent case involving an investigative search of a gang member.[88] The New Mexico court rejected a claim of reasonable suspicion based on two officers' experience "that a gang member, at any given time, is possibly engaged in a narcotics or weapons violation, or both."[89] The officer, however, had nothing connecting the individual defendant to a particular crime or crimes, except the likelihood that he was a gang member.[90] A similar approach by the Wyoming Supreme Court might alleviate Justice Cardine's concern that innocent travelers will be searched "because they exhibit innocent conduct which fits someone's idea" of a drug courier profile.[91] The *Welch* court should have gone beyond deferring to Dyer's experience[92] and analyzed whether the drug profile characteristics drawn from his past arrests pointed with specificity to the criminal activity in this particular case.

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84. United States v. Sokolow, 490 U.S. 1, 10 (1989).

85. *Welch*, 873 P.2d at 604.

86. *Sokolow*, 490 U.S. at 10.

87. The *Sokolow* Court "held that government agents had reasonable suspicion to detain a traveler matching five characteristics common to drug couriers which, when considered together, were not consistent with innocent travel." Aswad, *supra* note 82, at 628.

88. State v. Jones, 835 P.2d 863, 867 (N.M. Ct. App. 1992).

89. *Id.*

90. *Id.*

91. *Welch*, 873 P.2d at 611.

92. *See supra* notes 66-64 and accompanying text.

Because the *Welch* court did not require such specificity, Justice Cardine was correctly concerned that innocent travelers will be needlessly subjected to canine searches as a result of the court's ruling. The number of innocent travelers subjected to searches on Wyoming highways cannot be determined because the Highway Patrol does not keep such statistics.[93] However, statistics compiled from other drug interdiction programs demonstrate that significant numbers of innocent travelers are caught in the nets when police trawl the highways and airports with generalized drug profiles.[94] Circuit Judge Pratt noted in his dissent in *United States v. Hooper*[95] that DEA agents testified that during 1989 they had detained 600 suspects at the Buffalo, N.Y., International Airport but arrested only ten.[96] In another case, agents surveilling a Buffalo bus station admitted that they stopped eighty passengers each month who fit their courier profile, but arrested only four.[97] Similarly, a study of police testimony "demonstrates that apparently only a small percentage of travelers stopped in profile investigations are arrested."[98]

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93. Telephone interview with Major Gary Marsden, the Wyoming Highway Patrol's Field Operations Officer (Aug. 30, 1994). Marsden said patrolmen are not required to include a fruitless search in their written reports unless unusual elements call for its mention. *Id.*

94. Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1429 (1993) (quoting United States v. Miller, 821 F.2d 546, 550 (11th Cir. 1987) as stating that "common sense suggests" many innocent travelers will be harassed when police use profiles).

95. United States v. Hooper, 935 F.2d 484, 499 (2d Cir. 1991) (Pratt, J., dissenting).

96. *Id.* at 500. Judge Pratt concluded his dissent: "It appears that they have sacrificed the Fourth Amendment by detaining 590 innocent people in order to arrest ten who are not—all in the name of the 'war on drugs.' When, pray tell, will it end? Where are we going?" *Id.*

97. United States v. Montilla, 733 F. Supp. 579, 580 (W.D.N.Y. 1990).

98. Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 876 (1985).

Investigations cited by Cloud include:

In one case at Chicago's O'Hare Airport, the court calculated that only 3-5 percent of the suspects stopped were arrested. United States v. Moya, 561 F. Supp. 1, 4 (N.D. Ill. 1981) *aff'd*, 704 F.2d 337 (7th Cir. 1983).

In another case, a DEA agent's testimony indicated that only 16-20 percent of the individuals involved in airport profile encounters over two and one-half years were arrested. United States v. Cantero, 551 F. Supp. 397, 398 (N.D. Ill. 1982). In contrast, a local officer involved in the *Cantero* case testified that suspects were seized in about 25-37 percent of her 200 narcotics encounters during the same period. The testimony was consistent with the agent's testimony in an earlier case that she had made 50 stops leading to 10 arrests at O'Hare airport. United States v. Black, 675 F.2d 129, 131 (7th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983) (her co-officer claimed success in two out of three seizures.) *But cf.* State v. Kennedy, 609 P.2d 438, 440-41 (Or. App. 1980), *rev'd*, 624 P.2d 99 (Or. 1981) (Portland officer successful in four out of four profile cases).

In a LaGuardia airport case, a DEA agent estimated that approximately 60 percent of the persons identified as having "profile" characteristics were found to be carrying drugs. Florida v. Royer, 460 U.S. 491, 526 n.6, (1983) (Rehnquist, J., dissenting) (citing United States v. Price, 599 F.2d 494, 501 n.8 (2d Cir. 1979)).

Cloud points out that data from a case that has twice been cited in United States Supreme Court decisions is somewhat misleading and still indicates that drug profiles do not accurately distinguish drug couriers from innocent people. In United States v. Van Lewis, 409 F. Supp. 535, 539

Courts, as Justice Cardine points out, rarely hear from these innocent subjects of drug searches. Headlines are made when a drug courier has his conviction overturned because his Fourth Amendment rights were violated. However, rarely do innocent travelers caught in the net assert their rights because they probably lack the "time and resources to return to the state to sue an officer who harassed them."[99] Therefore, courts must be even more careful to remember that the reasonable suspicion cases before them set the standards for search of "Everyman."[100] As Justice Marshall said in his dissent in *Sokolow*: "Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike."[101] The *Terry* Court's command that courts require that officers have "specific and articulable facts" was designed to insure that the innocent and their Fourth Amendment rights are not trampled in the march against crime. The Court saw the demand for specificity by police as the "central teaching of this Court's Fourth Amendment jurisprudence."[102]

(E.D. Mich. 1976), *aff'd*, 556 F.2d 385 (6th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), the government reported that 141 people were searched during 96 encounters. Drugs were found in 77 of the searches and 122 people were arrested. Cloud points out that the figures do not include people who were stopped but not searched and not all travelers fitting the profile were stopped. The sample included some cases where information was derived from other independent police work and tips, so the officers were not limited to their observations at the scene in determining whom to search. The data was cited by Justice Rehnquist in his dissent in *Royer*, 460 U.S. at 526 n.6, as indicating the "success" of the drug profile. Justice Powell favorably referred to the figures in his concurrence in United States v. Mendenhall, 446 U.S. 544, 562, (1980). Cloud, at nn. 135-37.

99. Finkelman, *supra* note 94, at 1430. The author points to the lawsuit by Joe Morgan, a former major league second baseman, member of the Baseball Hall of Fame, and Oakland, California, businessman as a rare exception. A plainclothes Los Angeles detective looking for a companion of a suspected drug courier wrestled Morgan to the floor, handcuffed him and placed his hand across Morgan's mouth as he led him away before a gathering crowd. The officer testified he was looking for a black man who was nervous and had "other characteristics of a narcotics courier." Morgan was innocent of any involvement. His lawyer argued that the incident "happened to Joe Morgan, but it really is applicable to any black person who uses Los Angeles airport . . . . If it wasn't Joe, this could have happened to me or my father or to any other black person." *Id.* at 1429-30.

100. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). Justice Jackson argued that "a search against [a suspect's] car must be regarded as a search of the car of Everyman." *Id.*

101. *Sokolow*, 490 U.S. at 11. (Marshall, J., dissenting).

102. *Terry*, 392 U.S. at 21 n.18. In the footnote, the Court cites a long history of its cases that outline the particularity requirement: Beck v. Ohio, 379 U.S. 89, 96-97 (1964); Ker v. California, 374 U.S. 23, 34-37 (1963); Wong Sun v. United States, 371 U.S. 471, 479-84 (1963); Rios v. United States, 364 U.S. 253, 261-62 (1960); Henry v. United States, 361 U.S. 98, 100-02 (1959); Draper v. United States, 358 U.S 307, 312-14 (1959); Brineger v. United States 338 U.S. 160, 175-78 (1949); Johnson v. United States, 333 U.S. 10, 15-17 (1948); United States v. Di Re, 332 U.S. 581, 593-95 (1948); Husty v. United States, 282 U.S. 694, 700-01 (1931); Dumbra v. United States, 268 U.S. 435, 441 (1925); Carroll v. United States, 267 U.S. 132, 159-62 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878).

B. Specificity and Dyer's Observations.

The observations Patrolman Dyer listed as creating the suspicion that Welch and Michener were transporting contraband must be examined in light of the Fourth Amendment's requirement that they point with specificity to criminal conduct.

The owner of the pickup was from Southern California, a known source of narcotics for the country.[103] Millions of people live in Southern California, and certainly the great majority do not deal in drugs. "Source cities," according to profiles espoused by law enforcement, include nearly every major city and many medium-size cities in the United States.[104] Therefore, this profile characteristic can point an accusatory finger at millions of Americans.

Dyer thought it "quite strange" that the liner in the pickup bed was clean and he could see no spare tire in the bed.[105] It makes less sense for someone running drugs to travel without a spare than it does for the ordinary vacationer because the drug runner would want to avoid the police contact that becoming stranded might bring. Even granting that cleanliness may be unusual when it comes to pickup beds, an officer developing reasonable suspicion must draw a connection between such cleanliness and the transportation of drugs. If Justice Taylor is correct in his assertion that the liner showed signs of having been altered, that fact might lead a reasonable person to suspect that something was hidden beneath the liner.[106] Courts have found reasonable suspicion where officers have noticed differences in the design of vehicles that suggest hidden compartments.[107]

Dyer observed that the ceiling of the topper hung down an inch or two in the center. Unlike the cases cited above that involved alterations in

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103. Welch, 873 P.2d at 602-03.

104. United States v. Glover, 957 F.2d 1004, 1017 (2d Cir. 1992). Chief Circuit Judge Oakes pointed out in his dissent:

> Any Lexis or Westlaw search would reveal that "source cities" include every city with a population of over one million, most cities with over 500,000, and numerous cities with only over 100,000 inhabitants. Thus, millions of people arrive at various points of destination from source cities, so-called, yet they can hardly be subjected to virtually random seizures from the fact of their departure therefrom.

Id.

105. *Welch*, 873 P.2d at 602.

106. *See supra* note 76 and accompanying text.

107. *See* United States v. Betancur, 24 F.3d 73, 75-76 (10th Cir. 1994). The court found the officer had reasonable suspicion to detain Betancur after the officer observed that Betancur's pickup was higher than normal for a two-wheel drive while the bed was lower than normal and the rear wheel area was bright with fresh, clean undercoating. *Id.*

vehicle design, the sagging ceiling could be simply explained by age or hard use. Justice Cardine points out in his dissent that no drugs were found in the topper's ceiling.[108]

Dyer was also struck by the fact that the pickup had a Miramar Naval Station sticker on the window though Michener did not look like the "military type."[109] This should not have raised Dyer's suspicions because he quickly learned that the vehicle did not belong to Michener.[110]

Michener mispronounced the owner's Spanish name—not particularly surprising as Michener did not speak Spanish.[111] Even if one grants that Michener's ignorance of the reportedly correct pronunciation raises suspicion, the question is: suspicion of what? It might imply that Michener had stolen the vehicle and only knew the owner's name because he read it on the registration. However, the majority's opinion does not indicate that Dyer detained Michener and Welch because he then suspected them of stealing the vehicle. In addition, Dyer did not contact Suaso to determine exactly how he pronounced his name.[112]

Driving a pickup with nylon webbing and a topper might not enhance your gas mileage,[113] but it hardly seems to indicate anything about drug running. In fact, given that Dyer based much of his suspicion on what he saw inside the bed, a drug runner would be smarter to keep a metal tailgate on his pickup. The reasons that might explain the combination of nylon webbing and a topper are too numerous to mention, but examples include that an owner no longer had the tailgate to put back on the pickup, or that he was too lazy to put the tailgate back on when he installed the topper.

Dyer was also struck by Michener's nervousness and Welch's apparent nonchalance in remaining in the pickup bed.[114] A month before *Welch*, the Tenth Circuit confronted similar circumstances in *United States v. Fernandez*.[115] In *Fernandez*, an investigating officer confronted a nervous driver. The court, however, discounted the driver's nervousness as a

108. *Welch*, 873 P.2d at 607.

109. *Id.* at 602.

110. *Id.*

111. *Id.*

112. Brief for the Respondent Michener, *supra* note 67, at 6.

113. *Welch*, 873 P.2d at 602. Dyer "testified that he had never seen both a topper with no door and nylon webbing for a tailgate used as a combination . . . ." *Id.* Dyer reasoned that the combination was out of the ordinary because the topper "would negate that normal purpose" for the webbing—increased gas mileage. *Id.*

114. *Id.* at 603.

115. United States v. Fernandez, 18 F.3d 874 (10th Cir. 1994).

factor in raising suspicion. "Nervousness," the court explained, "is of limited significance in determining reasonable suspicion" as it is "common knowledge that most citizens" are likely to exhibit nervousness when questioned by law enforcement officers.[116]

Fernandez, the nervous driver, also had a passenger, Mr. Blanch, in his vehicle when he was stopped. Blanch reacted in much the same manner as Welch—he remained asleep—for a time.[117] The arresting patrolman's suspicions were raised when Blanch suddenly awoke during the stop and appeared startled upon seeing the trooper.[118] He sat rigidly throughout the rest of the encounter.[119] A comparison of the suspicions articulated by the officers in *Welch* and *Fernandez* indicates that a passenger will be deemed suspicious whether he sleeps or rests unaffected by a traffic stop, or whether he awakens suddenly upon hearing the trooper and his startled nerves render him rigid. What, then, may an innocent passenger do to avoid suspicion?

The arresting officers in the *Welch* and *Fernandez* cases also both pointed to intuitive feelings that swept over them during their respective traffic stops. However, the courts in the two cases differed in the conclusions they drew from the feelings reported by the officers. The *Fernandez* court found it significant that the trooper making the stop testified that his "sixth sense" and the "tension in the air" made him suspect something was amiss.[120] The court found that his testimony "strongly suggests he was acting more on an unparticularized hunch than on reasonable and objective suspicion."[121]

Though the Wyoming Supreme Court did not mention it in its opinion, Patrolman Dyer testified to experiencing deja vu when he stopped Michener.[122] Michener wore a baseball cap and the vehicle had a radar detector—two elements also present in an earlier stop in which Dyer had uncovered narcotics.[123] While it might be argued that deja vu at least has the ad-

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116. *Id.* at 879. The *Welch* court's opinion does not say that Dyer tried to question Welch while he was lying in the pickup bed.

117. *Id.* at 875.

118. *Id.*

119. *Id.*

120. *Id.* at 881 n.5.

121. *Id.* at 880.

122. Dyer testified in the suppression hearing:

> A radar detector by itself doesn't mean much, but when also I had seen another traffic stop just like this, with a guy named Foot, he was coming out of Tucson, he had a ball cap on just like Mr. Michener, radar detector, I just thought I was talking to Mr. Foot again, it seemed like deja vu, I had already been there once before.

Brief for Respondent Michener, *supra* note 67, at 2. (quoting transcript of August 3, 1992, Suppression Hearing at 30).

123. *Id.*

vantage of being based on experience rather than a mere "sixth sense," deja vu still does not supply "reasonable" suspicion. Suspecting that a person is transporting drugs because he wore a baseball cap and had a radar detector seems more akin to an "inarticulate hunch." In summarizing its conclusion in *Fernandez*, the Tenth Circuit said, "At no time did [the investigating officer] attempt to justify the continued detention of Fernandez based on any specific, objective factors supporting a reasonable inference that the truck was stolen, that the defendant was trafficking in drugs or that he was committing any other criminal offense."[124] The same could be said for Dyer, except for his last observation—the garlic hanging in the cab.

Drug traffickers use a variety of substances to mask the smell of narcotics. Garlic is one such substance, albeit not a particularly common one.[125] Though Dyer testified that he recalled no garlic odor because the clove had not been crushed,[126] an innocent explanation, such as belief in the healing powers of the herb, seems implausible under the circumstances of the case. In any event, basing reasonable suspicion on the presence of the garlic poses only a small threat that an innocent traveler would be subjected to an unreasonable search or seizure. The garlic, taken together with Dyer's other observations, might suggest to the reasonable person that drugs were hidden in the vehicle. It certainly makes for a close call.

C. Courts under pressure to enlist in the war on drugs.

If the case does, in fact, present a close call, then the Wyoming Supreme Court may be criticized for failing to defer to the trial judge who had the benefit of observing the witnesses. Astonishingly, the court's opinion does not even mention the standard of review it usually applies to evidentiary rulings.[127] Evidentiary rulings of a district court

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124. *Fernandez*, 18 F.3d at 880.

125. A computer search revealed only two other narcotics cases, at the time of this writing, in which garlic was mentioned: United States v. Lee, 914 F.2d 264, 1990 WL 130703 (9th Cir. 1990) (unpublished disposition) (The court mentioned in its summary of the facts that "a bag containing garlic" was found in a metal box containing methamphetamine. The court did not speculate as to the reason garlic was there.); United States v. Olivier-Becerril, 861 F.2d 424 (5th Cir. 1988) (In discussing the issue of whether Olivier-Becerril knew that cocaine was hidden in a secret compartment in a vehicle, the court noted, "He knew that coffee was in the trunk; coffee is sometimes used to mask the odor of narcotics. A fresh garlic wreath was also there.").

126. Brief for Respondent Michener, *supra* note 67, at 7 (quoting transcript of the August 4, 1992, Suppression Hearing at 20).

127. Justice Cardine does allude to the standard in his dissent:

> The trial court, however, which held the suppression hearing, heard the evidence and observed the witnesses, determined that the suspicions observed by Officer Dyer came *after* he had summoned the canine unit. This finding is not clearly erroneous. Officer Dyer had

"are not disturbed on appeal unless a clear abuse of discretion is demonstrated."[128] Findings of fact on motions to suppress are not disturbed unless "clearly erroneous," and the reviewing court should view the evidence "in the light most favorable to the district court's determination."[129] Because the trial judge had the opportunity to observe Dyer's demeanor while testifying, the court should have viewed his testimony in the "light most favorable" to the judge's finding. The court has relied in past cases on the trial judge's opportunity to see "first hand the demeanor and expressions of the witnesses,"[130] as opposed to its own review of "the cold words of the transcript of testimony."[131] Observance of its past practice should have led the court to resolve such a close call in favor of Michener and Welch.

Instead, the court ignored its own standard of review.[132] While its reasons for doing so are not clear, it is distinctly possible the court succumbed to the temptation to ignore constitutional protections because convicted criminals were seeking the shelter of the Constitution in this case. Courts feel pressured to "provide the tools necessary to wage an effective battle in the war on drugs."[133] Courts buckling under that pressure tend to accept profiles that seem "to encompass every possible characteristic that one can observe a human being to possess or exhibit."[134] Justice Marshall

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> no reasonable articulable facts upon which he could have formed a reasonable suspicion at the time he stopped and detained respondents. This officer relied on a "drug courier profile" and a hunch, that is all. It was insufficient.

Welch, 873 P.2d at 606.

128. Wilson v. State, 874 P.2d 215, 218 (Wyo. 1994). The 10th Circuit has a similar standard of review:

> We are mindful that at a hearing on a motion to suppress, the credibility of the witnesses and the weight given to the evidence, as well as the inferences and conclusions drawn therefrom, are matters for the trial judge. However, the ultimate determination of reasonableness under the Fourth Amendment is a question of law which we review de novo.

Fernandez, 18 F.3d at 876. (Citations omitted).

129. *Wilson*, 874 P.2d at 218. The court explains its deference to the trial judge by pointing out that he or she has the "opportunity to: assess the credibility of the witnesses; the weight given the evidence; and make the necessary inferences, deductions and conclusions . . . ." *Id.*

130. Lawrence v. Lawrence, 628 P.2d 542, 545 (Wyo. 1981).

131. *Id.* The court said:

> We must not forget that when we examine the cold words of the transcript of testimony, we do not have the benefit of how the trial judge sees and hears the witness—the pitch of the voice, facial changes, the movement in the witness—all of which may tell a separate story, to be given credence.

Id.

132. Ironically, in a 1991 case, the court reinstated a municipal court conviction reversed by the same district judge, and rebuked the judge for "considering the case de novo instead of applying the appropriate appellate standard of review." City of Laramie v. Hysong, 808 P.2d 199, 205 (Wyo. 1991).

133. Michael R. Cogan, Comment, *The Drug Enforcement Agency's Use of Drug Courier Profiles: One Size Fits All*, 41 CATH. U. L. REV. 943, 972 (1992).

134. *Id.* at 973.

believed that even the highest court in the land was not immune from this temptation.[135] Noting that nothing about Sokolow's conduct suggested with reasonable specificity that criminal activity was afoot, Justice Marshall said: "The majority's hasty conclusion to the contrary serves only to indicate its willingness, when drug crimes or antidrug policies are at issue, to give short shrift to constitutional rights."[136]

A dissent[137] by Justice Thomas in the *Wilson* case advocates that the courts take the position that Marshall condemns in *Sokolow*. Tacit acceptance of Justice Thomas' reasoning by the court in *Welch* offers a possible explanation for the court's willingness to ignore its standard of review in the case. In *Wilson*, Justice Thomas urged the court not to follow the lead of "more permissive tribunals" in unnecessarily reversing criminal convictions due to constitutional technicalities.[138] He asserted that constitutional principles are a means to the well-being of society, and they should not be allowed to interfere with that well-being when it is threatened by crime and drugs.[139] He warned that reversals of criminal convictions on the premise of protecting rights have contributed to the development of a society in which "violence stalks our streets and fear permeates our neighborhoods. Every decision that tightens the cuffs with which we shackle our law enforcement officers contributes to such evolution."[140]

Justice Thomas appears to contend that Americans must destroy what they have in order to protect it. Privacy is dear to Americans, and they should not have to sacrifice that value in order to protect themselves against crime. The United States Supreme Court has rightly rejected the approach espoused by Justice Thomas. In *Almeida-Sanchez v. United States*, the Court acknowledged, "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."[141] The Court in *Terry* continued in that spirit in finding:

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135. *Sokolow*, 490 U.S. at 17. (Marshall, J., dissenting).

136. *Id.*

137. *Wilson*, 874 P.2d at 226-30.

138. *Id.* at 228. Justice Thomas argued, "In assuming our proper role of assisting in the protection of the rights of the citizens of Wyoming to be secure in their persons and property, this court should not follow the lead of more permissive tribunals in endeavoring to discover academic technicalities to justify reversing criminal convictions." *Id.*

139. *Id.* Justice Thomas states that his analysis "is based upon the premise that the application of constitutional principles is not an end in itself but a means to an end. Invoking constitutional principles as an end in itself is a purely academic approach." *Id.*

140. *Id.*

141. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

> [E]xperience has taught that [the rule excluding evidence gained through unconstitutional means] is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." The rule also serves another vital function—"the imperative of judicial integrity."[142]

Courts need not cast aspersions on police integrity to see the need for neutral scrutiny. If an officer's "subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects only in the discretion of the police.'"[143]

Justice Brennan reminds us of a fundamental consideration that is often forgotten in the debate over the propriety of reversing criminal convictions because constitutional rights were violated. The Founding Fathers "did not enact the Fourth Amendment to further the investigative powers of the authorities, however, but to curtail them."[144] Judges should not take it upon themselves to change that. As Justice Douglas concluded in his dissent in *Terry*, any gutting of the protection against unreasonable searches and seizures "should be the deliberate choice of the people through a constitutional amendment"[145] and not accomplished by judicial fiat.

Some may react to such statements by calling for a ballot and professing their desire to unshackle the police. The old parental admonition would seem appropriate: "Be careful what you wish for, you might get it." If people sharing the belief that the Fourth Amendment is outmoded were to triumph, they would soon regret their choice. The protection against unreasonable searches and seizures goes to the core of what it means to be free. That fact was fresh on Justice Jackson's mind when he wrote the following soon after returning from the Nuremberg trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable

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142. *Terry*, 392 U.S. at 12-13 (quoting Mapp v. Ohio, 367 U.S. 643, 655 (1961) and Elkins v. United States, 364 U.S. 206 (1960)).

143. *Terry*, 392 U.S. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

144. *Sharpe*, 470 U.S. at 719 (Brennan, J., dissenting).

145. *Terry*, 392 U.S. at 38. Justice Douglas concluded his dissent in dramatic fashion:

> Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

Id.

> freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[146]

CONCLUSION

The Wyoming Supreme Court must forget that its action in a particular search and seizure case might unlock the jail door for a drug trafficker. The court should set standards for reasonable suspicion that will take into account the innocent and guilty alike. The holding in *Welch* not only affected the fates of Welch and Michener, but it also weakened the constitutional protections afforded travelers who may quite innocently fit a peace officer's generalized idea of a drug trafficker. The court, therefore, should not have ignored its standard in reviewing evidentiary rulings. The trial judge's factual findings were not clearly erroneous, and his decision to suppress the evidence was not an abuse of his broad discretion. The court should have stepped aside and deferred to the trial judge in his acknowledged role as the first and best defense against unconstitutional intrusions.[147]

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146. *Brinegar*, 338 U.S. at 180 (Jackson, J., dissenting).

147. The United States Supreme Court has emphasized the vital role judges play as a buffer between private citizens and government power:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Terry, 392 U.S. at 21.