Influential But Uninformed: What Scotus Knows About Policing

Author : Elizabeth Joh

Date : October 1, 2014

Seth W. Stoughton, *Policing Facts,* 88 **Tulane L. Rev.** 847 (2014).

Sift through any number of Fourth Amendment decisions from the Supreme Court, and you will find many general observations about the police: that theirs is a dangerous profession, or that they possess a specialized instinct for spotting criminal behavior. Typically, such statements are made without citation to any source. How do the Justices know these facts? And are such statements accurate?

That is the central issue in the insightful article *Policing Facts,* written by Seth Stoughton (himself a former police officer turned law professor): what should we think of general observations about police that are made by the Court? While we expect Supreme Court decisions to discuss the facts that arise out of a particular case, it is also true that in resolving the issues the Justices will often make some assertion about policing in general: such as the working environment of the police, police practices, or police psychology. (Indeed, as Stoughton notes, the Court is quite willing to make general observations about nearly every aspect of policing.) While some of these "legislative facts" are supported by citations, more typically they aren't. (P. 857.) These policing facts appear seemingly from nowhere. What's wrong with inserting unsupported statements about the police into opinions? As Stoughton argues, policing facts are "simply wrong almost all of the time." (P. 868.)

The Court's regular use of unsupported policing facts will not surprise many, but hardly anyone has noticed its importance before. Of course, a mainstay of criminal procedure scholarship is the critique of the Supreme Court's decisions for their normative undesirability or their doctrinal confusion. But what if the Court gets the basic factual premises wrong?

Mistaken factual premises can distort the kinds of questions posed by the Court as well as the doctrinal solutions it develops to address them. Further, a Court decision based on that mistaken view can lead to problematic rules for the police: intervention that is too heavy-handed or ineffectual. Finally, a policing fact of the type described by Stoughton takes on an implicit precedential value of its own. For example, the Court's description of the use of force by police in *Graham v. Connor*–which Stoughton picks apart as grossly inaccurate–has itself been quoted more than 2,300 times in subsequent lower court opinions. (P. 887.)

Some policing "facts," as Stoughton demonstrates, are just plain wrong. Take the exclusionary rule's modern rationale: police deterrence. While many have criticized the rule's development and application, Stoughton takes to task the basic factual premise: do the police care about "good" convictions? The simple answer is no. In the vast majority of cases, nothing about the patrol officer's workaday world hinges on the ultimate conviction of the person they arrest. Convictions carry no weight in an officer's professional evaluations. Indeed, it may be nearly impossible for the arresting officer ever to find out what actually happened in any one case, given the limited interactions between the bureaucracies of police and prosecutorial administration. Moreover, the informal advice a rookie officer is likely to receive is to deaden herself to the ultimate disposition of the arrestee. Doing otherwise leads to unnecessary professional stress. Thus, police deterrence, while perhaps conceptually appealing, doesn't square with reality.

Stoughton proposes a number of possible solutions to improve policing facts. The Court could rely upon existing procedural mechanisms like requesting additional briefing from the parties or further oral argument. More ambitiously, Stoughton proposes the possibility of formally acknowledging the independent fact-finding the Court already engages in as an informal matter. For instance, the Court could call on amici to brief specific factual issues. Most simply, the

Court might regulate itself so that legislative facts appear in opinions only when empirically supported. (It's been done before: the *Miranda v. Arizona* majority opinion cites more than "six police training manuals; three texts about policing; eight academic articles, three news articles, [and] reports by the Wickersham Commission, the Commission on Civil Rights, and the [ACLU]." (P. 855.))

It would be strange if the Supreme Court asserted unsupported "facts" about genetics or economics in its opinions; so why does it do so about the police? Many Americans feel some familiarity with the realities of law enforcement because of its pervasive presence in fictionalized media and the news, even if those depictions are mistaken. Learning criminal procedure from *Law and Order* might be inadvisable, but it's not dangerous. Yet, as Stoughton points out in his thoughtful article, when the Court gets the police wrong, that misunderstanding threatens our basic liberties.

Cite as: Elizabeth Joh, *Influential But Uninformed: What Scotus Knows About Policing*, JOTWELL (October 1, 2014) (reviewing Seth W. Stoughton, *Policing Facts,* 88 **Tulane L. Rev.** 847 (2014)), http://crim.jotwell.com/influential-but-uninformed-what-scotus-knows-about-policing/.