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Section 1983 Fourth Amendment Cases From The Current Term

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Section 1983 Fourth Amendment Cases From The Current Term

Cover Page Footnote

18-4

SECTION 1983 FOURTH AMENDMENT CASES FROM THE CURRENT TERM

*William E. Hellerstein*¹

Erwin is always a hard act to follow, but I know he is an avid baseball fan and that he had to have been up late last night watching the game. I, for one, am glad that the World Series has moved out of town and on to Arizona. Not because I am a Yankee fan or anything, I am not, but because I need some sleep. What I'm saying is that I look at this morning's schedule and I see that Erwin is doing his thing here before you at eight o'clock, as only he can, and now I have to try to do mine at nine in his wake.

Well, Judge Pratt, the Court's past Term was quite a Fourth Amendment Term. And, unlike in many previous Terms, the Fourth Amendment did not shrink very much at all. The Court decided seven Fourth Amendment cases and, in some respects, some of the work the Court did is especially important in light of the events of September 11th.

The first case that falls into this category is *Kyllo v. United States*,² the thermal imaging case. I choose to place this decision under the rubric "*Katz Lives*," and I am referring, of course, to the landmark case of *Katz v. United States*,³ decided in 1967. *Katz*, you will recall, altered significantly the manner in which the Court determined whether a person had a privacy interest protected by the Fourth Amendment. Justice Potter Stewart, writing for the Court, held that the existence of such an interest was no longer contingent on property and trespass concepts.⁴ Instead, he told us that the Fourth Amendment "protects people, not places."⁵ Although Stewart's opinion did not go very far in telling us how that concept should be applied in future cases, Justice John

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² 533 U.S. 27 (2001).

³ 389 U.S. 347 (1967).

⁴ *Id.* at 352-53.

⁵ *Id.* at 351.

Marshall Harlan's concurring opinion emphasized that a protectible interest had both a subjective and objective basis: a person does not have a privacy interest as to anything he knowingly exposes to be public and even if does not expose something to the public, he will have a privacy interest only insofar as it is the type of interest that society is willing to recognize.⁶ When *Katz* was decided, Fourth Amendment aficionados believed it was a great day because the Court had departed from the wooden restrictiveness of property and trespass concepts in favor of a more realistic and indeed broader measure of a person's privacy interests. However, as the years have passed, what interests "society" determines are entitled to privacy protection under the Fourth Amendment became essentially what interests five Justices believe society would recognize, even though many of us, perhaps even the majority of us, would differ. For many, the promise of *Katz* was short-lived insofar as the Court, more often than not, determined that a particular interest was not one which "society" would validate. For example, did we have a privacy right in our garbage when we place it outside our abode? The Supreme Court said society does not recognize such an interest.⁷ When the police fly over and photograph a person's fenced-in property to detect marijuana growth, does the property owner have a protectible privacy interest? No, said the Court, because air traffic is commonplace.⁸ And even where it is not commonplace because FAA regulations prohibit airplane flights at low altitudes, there is

⁶ *Id.* at 361 (Harlan, J., concurring).

⁷ *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (holding that a person does not have a reasonable expectation of privacy when leaving garbage out on the curb because "society" does not have an expectation of privacy in trash left on the curb for collection, due to the fact that it is accessible to anyone. As such, the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of an individual's garbage when left on a curb).

⁸ *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (holding that a warrantless, naked-eye observation by a police officer who obtained an airplane to view an individual's backyard, because of an anonymous telephone tip reporting the individual was growing marijuana, did not violate the individual's Fourth Amendment right, reasoning that this expectation of privacy is not what "society is prepared to honor").

no privacy interest cognizable against police helicopter flights that come within FAA regulations.⁹

In view of the restrictive manner in which the Court had generally applied the *Katz* test, *Kyllo* is a significant step in the other direction. In *Kyllo*, government agents suspected that Kyllo was growing marijuana in his home.¹⁰ So they used a thermal imaging device that detects heat emanating from the walls of a building and then they obtained a warrant based on the fact that the thermal imaging device produced a positive result.¹¹ In a five to four decision, the Court held that where the government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without a physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant.¹² Since *Katz*, the Court has consistently stated that if one does not have an expectation of privacy in some thing or place that society is willing to recognize, there is no search, end of Fourth Amendment discussion.¹³ Therefore, for police conduct to constitute a search, there has to be an expectation of privacy in what the police have intruded on, and here there was.¹⁴

In his opinion for the Court, Justice Scalia acknowledged that the Court's post-*Katz* line of jurisprudence had become quite circular.¹⁵ In fact, that might be an understatement, given much scholarly criticism of the Court's rulings. But in *Kyllo*, Justice Scalia held that when a the privacy of a person's home is at issue, there is a ready criterion for crediting that privacy interest because we have roots deep in the common law about the sanctity of the

⁹ *Florida v. Riley*, 488 U.S. 445, 448-451 (1989) (holding that a police officer who obtained a warrant by observing an individual's property by helicopter after the officer could not view the property from the ground, was not in violation of the Fourth Amendment because the defendant could not reasonably have believed that his greenhouse could not have been seen by a helicopter flying overhead, and concluded that the Fourth Amendment does not require the police to obtain a warrant for naked eye observations, even in an aircraft).

¹⁰ *Kyllo*, 533 U.S. at 29.

¹¹ *Id.* at 30.

¹² *Id.* at 40.

¹³ *See, e.g., United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a dog sniff is not a "search"); *see also supra*, notes 7-9.

¹⁴ *Kyllo*, 533 U.S. at 34.

¹⁵ *Id.*

home and the expectation of privacy that exists within it, which is acknowledged as reasonable both historically and by the Court's decisions.¹⁶ Thus, utilization of a device that obtains information about a person's behavior inside a home that could not have been obtained without a physical intrusion of the home constitutes a search.¹⁷

The *Kyllo* decision is very significant because Justice Scalia suggests that the Court's decision is not a ticket for this case alone. He stated that the rule the Court is adopting must take account of more sophisticated surveillance systems than are already in use or development¹⁸ so that a homeowner is not to be left to the mercy of expanding technology.¹⁹

Of considerable interest is that the dissent is written by Justice Stevens, whom you would not expect to be hanging out with Chief Justice Rehnquist, O'Connor and Kennedy on an issue such as this. Justice Stevens felt upset, however, about a number of things: first, he asked, what happened to traditional restraint in decision making?²⁰ He pointed out that Justice Scalia's opinion is not limited to thermal imaging devices.²¹ Justice Scalia, says Stevens, is laying a blueprint for the future that extends to all types of developing technology that could expose things within a home.²² Well, think about some of the things that have come to our attention since 9/11. The thermal imager may be crude in comparison to devices such as very sophisticated ones that can detect explosives and certain gases from within premises. There are also in use powerful directional microphones that can detect sounds within the home and satellite detection devices that can detect certain types of light rays. All of these technologies and more are out there. Is the fact that some are not yet in general public use a criterion present in the Court's opinion? Justice Stevens suggests that "public use" is not a meaningful criterion since, according to him, a person can go to Home Depot or a

¹⁶ *Id.*

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 35-36; *see also id.* at 36 n.3 (describing projects already underway by law enforcement to see through walls and other barriers).

¹⁹ *Id.* at 35.

²⁰ *Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting).

²¹ *Id.*

²² *Id.*

similar store and acquire a thermal imager -- and that would be true for many other devices.²³ Second, in Stevens' view, the thermal imager does not intrude seriously on a person's privacy.²⁴ All that it exposes are heat rays. Here, Stevens makes light of Justice Scalia's observation that a thermal imager would allow the police to tell whether the lady of the house is taking a bath or is in her sauna.²⁵ Stevens says, "not so," because images from inside the house are not transmitted; all that is transmitted is heat intensity.²⁶

Consider this in connection with *Kyllo*. In *United States v. Place*,²⁷ decided a few years ago, the Court held that when the police submit your luggage to a dog sniff, it is not a search.²⁸ If, after *Kyllo*, the police can no longer aim a thermal imager at your home, can they bring their trained pooch to the door for a sniff and obtain a warrant based on the dog's positive reaction at your doorstep? It is clear that *Kyllo* is extremely important with respect to governmental use of technology in general and that its holding extends beyond thermal imaging devices.

The Court's decision in *City of Indianapolis v. Edmond*²⁹ is also of considerable significance both in its own right and in connection with the events of 9/11. *Edmond* should also be considered in tandem with the equally significant decision in *Ferguson v. City of Charleston*.³⁰ In *Edmond*, the issue was the constitutionality of a police fixed checkpoint at which vehicles would be stopped to determine the presence of drugs.³¹ In *Ferguson*, the issue was whether pregnant women in city hospitals whose tests turned up positive for drug use could then be subjected to arrest and threatened with criminal prosecution unless they entered a specified drug program.³² Both governmental programs would stand or fall depending on how the Supreme Court would

²³ *Id.* at 47 n.5. (Stevens, J., dissenting).

²⁴ *Id.* at 50-51 (Stevens, J., dissenting).

²⁵ *Kyllo*, 533 U.S. at 50 (Stevens, J., dissenting).

²⁶ *Id.*

²⁷ 462 U.S. at 696.

²⁸ *Id.* at 697-98.

²⁹ 531 U.S. 32 (2000).

³⁰ 532 U.S. 67 (2001).

³¹ *Edmond*, 531 U.S. at 34.

³² *Ferguson*, 532 U.S. at 69-70.

assess each case under the newly minted “special needs” doctrine.³³

Let me go back a little just to refresh your recollection about the evolution of the “special needs” doctrine. Recall that traditional Fourth Amendment doctrine required that the police had to have a warrant and probable cause.³⁴ Then you learned that there were exceptions to the warrant requirement such as the automobile exception pursuant to which the police had to have probable cause but a vehicle’s mobility excused the need for a warrant.³⁵ Then, in the Warren Court era, a major adjustment was made to the probable cause requirement when in *Terry v. Ohio*,³⁶ the Court gave us the stop and frisk doctrine, which deleted the probable cause requirement primarily with regard to police-citizen street encounters.³⁷ Under stop and frisk, the police could seize somebody on reasonable suspicion and search him or her as long as the seizure was not an arrest and the search was not a full search but a patdown for weapons to protect an officer who had a reasonable basis to conclude that the person stopped was armed.³⁸ Next, along came a case from New Jersey, *New Jersey v. T.L.O.*³⁹ in which a high school principal searched the pocketbook of a student on suspicion that she had cigarettes and then went deeper and found drugs.⁴⁰ The Court upheld the search on the ground that the principal was not a law enforcement officer, and what the principal did was a reasonable search in light of the fact that a school official serves not a law enforcement function but is *in loco*

³³ *Id.* at 76; *Edmond*, 531 U.S. at 37.

³⁴ See, e.g., *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause. . .”).

³⁵ See, e.g., *Carroll v. United States*, 267 U.S. 132, 147, 149 (1925) (“The Fourth Amendment does not denounce all searches or seizure, but only such as are unreasonable.... On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause... that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.”); see also *Brinegar v. United States* 338 U.S. 160, 164-65 (1949).

³⁶ 392 U.S. 1 (1968).

³⁷ *Id.* at 10.

³⁸ *Id.*

³⁹ 469 U.S. 325 (1985).

⁴⁰ *Id.* at 327-28.

parentis to the student.⁴¹ But it was Justice Blackmun's concurring opinion that, for the first time, utilized the term "special need" as another category in which traditional Fourth Amendment doctrines could recede.⁴²

For Justice Blackmun, the special need existed because what was involved was a school and a student.⁴³ This special need concept soon was embraced by the full Court. In two cases decided in 1989, *Treasury Employees v. Von Raab*⁴⁴ and *Skinner v. Railway Labor Executives Association*,⁴⁵ the concept found its first full articulation by the Court. Both were urine testing cases. In *Skinner*, government regulations required urine testing for railway employees involved in accidents and in *Treasury Employees*, urine testing was required for U.S. Customs Service employees who sought promotions to certain positions in the Customs Service.⁴⁶ In these cases, the Court could have gone one of two ways. It could have held, as the Government argued, that urine testing did not constitute a search, or that it was a search that required adherence to established Fourth Amendment requirements such as probable cause or, at least, reasonable suspicion. The Court rejected the Government's argument that urine testing was not a search.⁴⁷ But it rejected the employees' arguments that probable cause or reasonable suspicion was required.⁴⁸ Instead, the Court

⁴¹ *Id.* at 340; *see also id.* at 341 ("The accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause. . . .").

⁴² *Id.* at 351 (Blackmun, J., concurring) ("I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with a 'special law enforcement need for greater flexibility.'" (citations omitted)).

⁴³ *Id.* at 352 (Blackmun, J., concurring) ("The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers.").

⁴⁴ 489 U.S. 656 (1989).

⁴⁵ 489 U.S. 602 (1989).

⁴⁶ *Id.* at 606; *Von Raab*, 489 U.S. at 662-63.

⁴⁷ *Skinner*, 489 U.S. at 614.

⁴⁸ *Id.* at 634 ("We conclude that the compelling Government interest served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee"); *Von Raab*, 489 U.S. at 665-66.

held that the Fourth Amendment's reasonableness requirement was satisfied in both cases by the "special needs" of the Government.⁴⁹ With respect to post-railway accident testing, there was the special need to determine the cause of the accident and with respect to the Customs Service there was the special need to ensure that front-line customs officers who carry weapons and search for drugs, are not themselves involved in the use or sale of drugs.⁵⁰ Then came the important case of *Vernonia School District v. Acton*,⁵¹ in which drug testing of high school athletes was fit by the Court into the special needs doctrine because its purpose was to detect drug use, not for law enforcement purposes, but because high school athletes were role models and they were leading the charge in drug use, although the trial record in the case leaves some doubt as to whether this was the case.⁵² As you can see, the Government was on a roll, so to speak, with regard to the special needs doctrine that was evolving.

In addition to the special needs cases, the City of Indianapolis relied heavily on two other cases in which searches and seizures on less than probable cause or reasonable suspicion were upheld because the governmental conduct involved did not relate directly to criminal law enforcement.⁵³ In *United States v. Martinez-Fuerte*,⁵⁴ decided by the Court in 1976, the Court sustained fixed immigration checkpoints located approximately a hundred miles from the Mexican border for which no suspicion about a vehicle's occupants was required.⁵⁵ The other case, one that was even closer to the situation in *Edmond*, was the decision

⁴⁹ *Skinner*, 489 U.S. at 620-21 ("The FRA has prescribed toxicological tests...to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."); *Von Raab*, 489 U.S. at 679 (holding that "testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable").

⁵⁰ *Skinner*, 489 U.S. at 620-21; *Von Raab*, 489 U.S. at 679.

⁵¹ 515 U.S. 646 (1995).

⁵² *Id.* at 665 (holding that due to the decreased expectation of privacy of students, the "relative unobtrusiveness of the search," and the severity of the need satisfied by the search, the policy was constitutional).

⁵³ *Edmond*, 531 U.S. at 34.

⁵⁴ 428 U.S. 543 (1976).

⁵⁵ *Id.* at 545.

upholding a sobriety checkpoint.⁵⁶ In *Michigan Department of State Police v. Sitz*,⁵⁷ the Court in 1990 held that there was nothing unreasonable about a sobriety checkpoint because its purpose was highway safety.⁵⁸ So, here comes the City of Indianapolis. It argues that we have *Martinez-Fuerte*, we have *Sitz*, and here we are interested in interdicting drugs, which is also a serious problem.⁵⁹ Hence, the Indianapolis police set up a roadblock checkpoint, their trained dog comes by and sniffs the car, which, as you recall, is not a search, and Indianapolis believes that it is on safe constitutional ground.⁶⁰ But the Court by a five to four vote said, sorry, you are wrong, this checkpoint is a violation of the Fourth Amendment because highway safety is not its purpose, drug interdiction is, and that is a law enforcement purpose.⁶¹

Writing for the Court, Justice O'Connor acknowledged that drug interdiction is a legitimate social interest, but it is an interest that rendered the roadblock a criminal law enforcement enterprise for which Fourth Amendment requirements are requisite.⁶² Although Justice O'Connor insisted that she was not applying a "primary purpose" test, I am not sure that is clear from a reading of the entire opinion. In fact, Chief Justice Rehnquist accuses the majority of saying precisely that.⁶³ Regardless which view is accurate, it is certainly very important that the purpose of a particular police operation be ascertained. In *Edmond*, there was no escaping the fact that the checkpoint's purpose was not highway safety.⁶⁴ The city did not seriously argue that as with drunk

⁵⁶ *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

⁵⁷ *Id.*

⁵⁸ *Id.* at 447.

⁵⁹ *Edmond*, 531 U.S. at 40-41.

⁶⁰ *Id.*

⁶¹ *Id.* at 48 ("Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment").

⁶² *Id.* at 41 ("We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion").

⁶³ *Id.* at 53 (Rehnquist, C.J., dissenting).

⁶⁴ *Edmond*, 531 U.S. at 40-41.

driving, cars were being driven by lots of people who were under the influence of narcotics. Thus, *Sitz* was distinguishable because it involved drunk drivers and *Martinez-Fuerte* was distinguishable because the checkpoint there was for the purpose of enforcing our immigration laws.⁶⁵

Applicable to post-9/11 circumstances is the Court's reminder in *Edmond* that fixed checkpoints for other purposes such as to interdict terrorist activity or to catch a dangerous criminal are quite different from a checkpoint for drug interdiction.⁶⁶ And the Court's decision predated 9/11. Thus, *Edmond* will not affect searches at airports and public buildings or even roadways where public safety concerns are acute.

Chief Justice Rehnquist's dissent in *Edmond* is quite interesting. In short, he says, wait a minute, this to me seems to be a simple arithmetic operation; one plus one equals two.⁶⁷ Why? *Martinez-Fuerte* and *Sitz* allow checkpoints that have a valid purpose and are limited in scope.⁶⁸ *United States v. Place*⁶⁹ holds that sniffs by dogs are not searches.⁷⁰ Here we have a valid purpose plus a dog sniff -- conduct that does not amount to a search. If one plus one equals two, Rehnquist asks, how can the checkpoint be unconstitutional?⁷¹ Another interesting note is that Justice Thomas dissents on the ground that he cannot distinguish *Sitz* and *Martinez-Fuerte* and therefore he is unable to join Justice O'Connor's opinion that distinguishes them.⁷² But he states that he would be open to overruling both *Sitz* and *Martinez-Fuerte*.⁷³ In this regard, Justice Thomas again displays what is becoming his judicial signature, so to speak. Time and time again, more than any Justice that I can recall, he has expressed the greatest

⁶⁵ *Id.* at 43.

⁶⁶ *Id.* at 44.

⁶⁷ *Id.* at 49-53 (Rehnquist, C.J., dissenting).

⁶⁸ *Id.* at 49-51 (Rehnquist, C.J., dissenting).

⁶⁹ 462 U.S. at 696.

⁷⁰ *Id.* at 697-98.

⁷¹ *Edmond*, 531 U.S. at 53 (Rehnquist, C.J., dissenting).

⁷² *Id.* at 56 (Thomas, J., dissenting).

⁷³ *Id.* ("I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.").

willingness to overrule decisions that he does not like irrespective of whether or not the decision antedated his arrival on the Court.

In *Ferguson v. City of Charleston*, the government again came up short in trying to fit its program into the special needs doctrine.⁷⁴ Here, state hospital obstetric patients who were arrested after testing positive for cocaine in urine tests conducted by the hospital pursuant to a policy developed in conjunction with the police sued.⁷⁵ The plaintiffs were women who went to the hospital for prenatal care and for child delivery.⁷⁶ If a woman in the first 27 weeks of pregnancy tested positive she would be charged with possession and if she tested positive immediately before or right upon delivery she would be charged with child abuse.⁷⁷ The purpose of the program was to employ the criminal process as leverage to get the mother to enter a drug program.⁷⁸ Few can quarrel with the proposition that drug use by pregnant women and its terrible consequences to children is a serious problem. And, so it seemed that coping with it is a legitimate special need. However, as in *Edmond*, the Court rejected the argument.⁷⁹ It held that the urine tests were “searches” within the meaning of the Fourth Amendment and the tests, together with the reporting of the positive test results to the police, were unreasonable searches absent the patient’s consent.⁸⁰ The 800-pound gorilla in the room, again, was law enforcement. Unlike prior special needs cases, said the majority, this one was not divorced from the State’s general interest in law enforcement.⁸¹ The central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.⁸² Like *Edmond*, therefore, the purpose of the searches of the patients was indistinguishable from the general interest in crime control. The majority pointed out that

⁷⁴ *Ferguson*, 532 U.S. at 76.

⁷⁵ *Id.* at 70-71.

⁷⁶ *Id.*

⁷⁷ *Id.* at 72-73.

⁷⁸ *Id.* at 72.

⁷⁹ *Ferguson*, 532 U.S. at 82-84.

⁸⁰ *Id.* at 76-77.

⁸¹ *Id.* at 79-80.

⁸² *Id.* at 80.

throughout the development and application of the testing policy, prosecutors and police were extensively involved in its administration.⁸³ And, while the ultimate goal may have been to help women into substance abuse treatment, the immediate objective of the searches was to generate evidence for law enforcement purposes, use of the process itself made it a law enforcement primary purpose. In other words, the ends may be legitimate but the means are not.⁸⁴ The Court pointed out that law enforcement involvement always serves some broader social purpose or objective, but that would mean that any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining a search solely in terms of its ultimate, rather than immediate, purpose.⁸⁵ Such a result, said the Court, is unacceptable under the Fourth Amendment.⁸⁶

In dissent, Justice Scalia argued that a Fourth Amendment search did not take place, because the women patients are already tested in connection with their general medical needs.⁸⁷ All that was done here was that the tests were turned over to the police department.⁸⁸ But his argument did not carry the day.

Thus, in these two cases, decided back to back in one Term, the special needs doctrine came up short. In light of the previous direction of the doctrine, there is considerable significance for the future in the fact that the government lost both times. Until these two cases, in only one case,⁸⁹ had the government lost a special needs case, and that involved a Georgia statute requiring that persons running for political office submit to urine testing, almost a laughable requirement, at least in my view, and the Court's as well, judging by the lopsidedness of the vote in the case.⁹⁰

⁸³ *Id.* at 83 n.20.

⁸⁴ *Ferguson*, 532 U.S. at 85-86.

⁸⁵ *Id.* at 84.

⁸⁶ *Id.* at 85.

⁸⁷ *Id.* at 96 (Scalia, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *Chandler v. Miller*, 520 U.S. 305 (1997).

⁹⁰ *Id.* (Ginsberg, J., delivered the opinion of the Court with Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas and Breyer, JJ, all joining. Rehnquist, C.J., dissented).

The next case I want to discuss has come to be known colloquially as “The Soccer Mom Case,” but its real name is *Atwater v. City of Lago Vista*.⁹¹ When I taught this case in my Criminal Procedure class, I referred to it as the soccer mom case. Yesterday, while I was having lunch in our cafeteria, one of my students came up to me and said, “the soccer mom was arrested for terrorism, did you hear? She was a member of the SLA. (Symbionese Liberation Army).” I said, “You mean Ms. Atwater?” She said “No, Ms. Olson.” I told my student that Sara Jane Olson is the SLA fugitive, who spent the last 25 years raising a family under an alias, who was finally found in Minnesota. And I guess that when I said “soccer mom” in class, my student thought there was only one soccer mom. The irony is that Ms. Atwater was not even taking her children to play soccer; they were too young. But what she did not do was lace them up and use a seat belt.⁹² However, the officer who stopped her did not just give her a ticket; he arrested her.⁹³ Texas law treats Ms. Atwater’s offense as a misdemeanor, but it is punishable by a fine only.⁹⁴ The law allows for arrest, but also authorizes the issuance of citations instead.⁹⁵ After Ms. Atwater was arrested, she was handcuffed, taken to the stationhouse, required to remove her shoes and empty her pockets, photographed and placed in a cell until she was arraigned.⁹⁶ Had it not been for neighbors nearby who came and took custody of Ms. Atwater’s children, it is not clear what the officer would have done with them.⁹⁷ Obviously there was something going on between this officer and Ms. Atwater from a previous encounter; Lago Vista is a small town.

One of my former colleagues is a justice of the New York State Supreme Court whose son just finished clerking for Justice

⁹¹ 532 U.S. 318 (2001).

⁹² *Id.* at 323-24.

⁹³ *Id.* at 324.

⁹⁴ *Id.*

⁹⁵ *Id.* at 322.

⁹⁶ *Atwater*, 532 U.S. at 324.

⁹⁷ *Id.* at 368 (O’Connor, J., dissenting) (“Atwater’s young children were terrified and hysterical....Atwater asked if she could at least take her children to a friend’s house down the street before going to the police station. But Turek...refused and said he would take the children into custody as well.”) (citing the trial record).

Souter. Her son called me and asked a favor. I said "Kenneth, I will grant you anything you want if you tell me you had nothing to do with Justice Souter's opinion in *Atwater*." Why did I say that? I personally love Justice Souter. I think he is brilliant. I think he is wonderful. But I do not know what happened to him in this case. Here is why I say that.

Writing for a five to four majority, Justice Souter held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense such as a misdemeanor seatbelt violation, punishable only by a fine.⁹⁸ He reasoned as follows. The common law is less than clear. On one side, eminent authorities support *Atwater's* claim that the common law confined warrantless misdemeanor arrests to actual breaches of the peace.⁹⁹ Other authorities differed, and prior to the American Revolution, Parliament extended warrantless arrest authority beyond breaches of the peace.¹⁰⁰ After the revolution, many states extended arrest authority to a host of nonviolent misdemeanors.¹⁰¹ Also, said Justice Souter, there is no evidence that the Framers were particularly concerned with the arrest powers of the police for non-breach of the peace offenses.¹⁰² Furthermore, he pointed out, there was no support in the Court's decisions for a limitation on arrests to breach of the peace instances, and all 50 states and the District of Columbia permit warrantless misdemeanor arrests by some police officers without requiring breaches of the peace.¹⁰³ Therefore, Justice Souter concluded that a balancing of interests was not required and that the Fourth Amendment is not well served by a sensitive, case-by-case inquiry.¹⁰⁴ The police need a bright-line rule because distinctions between jailable and non-jailable offenses are not immediately known to the police.¹⁰⁵ To bolster his conclusion, Justice Souter 'went empirical' and concluded that there existed no real problem in this regard between the police and

⁹⁸ *Id.* at 353.

⁹⁹ *Id.* at 327-30.

¹⁰⁰ *Id.* at 328.

¹⁰¹ *Atwater*, 532 U.S. at 328.

¹⁰² *Id.* at 340.

¹⁰³ *Id.* at 344; *see also id.* at 355-60 (Justice Souter included as an Appendix to the Opinion of the Court the fifty-one laws in question).

¹⁰⁴ *Id.* at 347-50.

¹⁰⁵ *Id.*

the citizenry, and he drew sustenance from the inability of Atwater's attorney to provide more than a single example of highly questionable police conduct, and that the ACLU's amicus brief could point to only a handful of questionable incidents.¹⁰⁶ What does he hold? The Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense for which there can be no jail time.¹⁰⁷

In her dissent, Justice O'Connor says bright line rules are okay, but not here.¹⁰⁸ The calibrating approach taken by the Court in its landmark stop and frisk ruling in *Terry v. Ohio* is more apt here she said, what the Terry rule "lacks in precision it makes up for in fidelity to the Fourth Amendment's command of "reasonableness."¹⁰⁹ A per se rule that gives police unbounded discretion to arrest, she argued, "carries grave potential for abuse" given the extensive powers which the police have to arrest on probable cause, regardless if the arrest is pretextual, and to search incident to the arrest and conduct inventory searches.¹¹⁰

How bad was Souter's opinion? Well, compare it with *Payton v. New York*,¹¹¹ a case that I argued more than 20 years ago, which held that absent exigent circumstances, the Fourth Amendment required that to arrest a person in his or her home the police must have an arrest warrant.¹¹² The major problem that I faced in *Payton* was convincing the Court that the common law required a warrant for arrests in the home. The conundrum that I faced was that in *United States v. Watson*,¹¹³ the Court had previously held that arrests in public did not require warrants.¹¹⁴ In scoping out the Court for *Payton*, we concluded that Justice Powell's vote could well be determinative. Yet, in his concurring opinion in *Watson*, Justice Powell stated that although logic led to the conclusion that a warrant is required, there are times when

¹⁰⁶ *Atwater*, 532 U.S. at 353; see also *id.* at 353 nn.23-24.

¹⁰⁷ *Id.* at 353.

¹⁰⁸ *Id.* at 361-63 (O'Connor, J., dissenting).

¹⁰⁹ *Id.* at 366 (O'Connor, J., dissenting); see also *Terry v. Ohio*, 392 U.S. at 1.

¹¹⁰ *Id.* at 364-66 (O'Connor, J., dissenting).

¹¹¹ 445 U.S. 573 (1980).

¹¹² *Id.* at 603.

¹¹³ 423 U.S. 411 (1976).

¹¹⁴ *Id.* at 424.

“logic must defer to history.”¹¹⁵ The common law history that led to Powell’s vote against a warrant requirement, as described by the leading English common law commentators, was that an arrest warrant for a public arrest was not required.¹¹⁶ I concluded that to get Justice Powell’s vote in *Payton*, I had to show that the common law history as to home arrests was different than it was with respect to arrests in public. But the great English common law commentators, like William Blackstone and Sir Matthew Hale, the Babe Ruth and Lou Gehrig of the English common law, were against me.¹¹⁷ However, I did find some lesser commentators, such as Lord Coke and Dalton, who said warrants were required.¹¹⁸ Consequently, I argued to the Court that at best, the common law was a wash on the subject of arrests in the home.¹¹⁹ The Court so held and proceeded to focus on the interests protected by the Fourth Amendment in regard to a person’s privacy in his or her home.¹²⁰

What I do not understand about Justice Souter’s opinion in *Atwater*, is that Ms. Atwater’s common law argument was much stronger than it was for me in *Payton*. She had Hale, she had Blackstone, and a bunch of the other “kenockers” as well.¹²¹ Nonetheless, Justice Souter says that although Atwater has serious support in the common law, it is not enough.¹²² Since Atwater’s

¹¹⁵ *Id.* at 429 (Powell, J., concurring).

¹¹⁶ *Id.*; see also *id.* at 418 (saying “the ancient common-law rule [was] that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”).

¹¹⁷ *Id.* at 429. Blackstone and Hale helped to establish the premise that magistrates could issue arrest warrants based upon information supplied by other people as opposed to first hand information. They also both suggested that it was valid to enter without a warrant to make a felony arrest. *Id.*

¹¹⁸ *Payton*, 445 U.S. at 594. Lord Coke, an English jurist, questioned whether a Justice of the Peace could authorize an arrest by warrant if he received his information second hand rather than through personal knowledge. He believed that it was necessary to have a warrant to enter the premises to make an arrest.

Id.

¹¹⁹ *Id.* at 598.

¹²⁰ *Id.* at 603.

¹²¹ *Atwater*, 532 U.S. at 327-30.

¹²² *Id.* at 338-40 (“We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.”).

case as to the common law was even stronger than it was in *Payton*, why not give her the benefit of the doubt here? Consequently, I cannot give Justice Souter very high marks for the manner in which he deals with the historical materials on the subject. The second weakness in Souter's opinion is the conclusion that he draws from Atwater's and the ACLU's inability to deliver a parade of horrors as to what police officers have done with their misdemeanor arrest powers—a sort of empirical “no harm, no foul” rule.¹²³ But, just as the great Sherlock Holmes could draw a positive inference from the fact that “the dog *didn't* bark,”¹²⁴ could the inference not be drawn that the reason so few examples of police misconduct in this context were discoverable is that the type of conduct engaged in by the officer who arrested Ms. Atwater is so aberrant that its infrequency attests to its very unreasonableness. Indeed, Justice Souter himself condemned the officer's conduct as outrageous and uncalled for, and stated that it demeaned the interest of the City of Lago Vista.¹²⁵ Could he not have taken the next step and concluded that it was so outrageous that it explains why numerous instances do not abound and that the infrequency pro tanto evinces why such conduct, when engaged in, is unreasonable?

Let me now turn to the Court's other Fourth Amendment rulings, which, though not nearly as important as the ones already described, are not insignificant. In *Illinois v. McArthur*,¹²⁶ the Court held that the police can prevent a homeowner from going back into his home when they have probable cause to believe there are drugs in it, or if they allow him to enter, to accompany him

¹²³ *Id.* at 353.

¹²⁴ See 1 SIR ARTHUR C. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335, 347 (Doubleday & Co., N.Y. n.d.) (1922). The passage is as follows:

“Is there any point to which you would wish to draw my attention?”

“To the curious incident of the dog in the night-time.”

“The dog did nothing in the night-time.”

“That was the curious incident,” remarked Sherlock Holmes.

¹²⁵ *Atwater*, 532 U.S. at 346-47 (“Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”)

¹²⁶ 531 U.S. 326 (2001).

while they are getting a warrant.¹²⁷ Mr. McArthur had a problem with his spouse.¹²⁸ The police came to enforce a protective order she had obtained against him.¹²⁹ She was moving out, and she said to the police, "Oh, by the way, he's got marijuana in the house."¹³⁰ In an eight to one decision, Justice Breyer writing for the majority held that given the nature of the police intrusion and the law enforcement interest at stake, the brief seizure of the premises while the police sought a warrant was not unreasonable.¹³¹ In contrast with *Atwater*, the Court saw no reason to adopt a *per se* rule.¹³² Instead, it balanced the privacy-related interest McArthur had in his home and law enforcement concerns.¹³³ Justice Breyer pointed out that the police had probable cause and they had good reason to fear that unless restrained, McArthur would destroy the drugs before they could return with a warrant.¹³⁴ He emphasized that the police made reasonable efforts to reconcile their needs with McArthur's privacy interests in that they neither searched the premises nor arrested McArthur before obtaining a warrant.¹³⁵ Justice Breyer distinguished *Welsh v. Wisconsin*,¹³⁶ which held that the police could not enter a home without a warrant to prevent the loss of evidence as they were pursuing a drunk driver whose offense was non-jailable.¹³⁷ In this case, Breyer reasoned, the evidence was for a jailable offense and temporarily keeping a

¹²⁷ *Id.* at 327.

¹²⁸ *Id.* at 328. Tera McArthur, the defendant's wife, asked the police to accompany her to their trailer, where they both lived, so the police could keep the peace while she removed her belongings. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 329. Tera stated to the police, "Chuck [the defendant] has dope in there." *Id.*

¹³¹ *McArthur*, 531 U.S. at 331 ("The warrantless seizure was not *per se* unreasonable. It involves a plausible claim of specially pressing or urgent law enforcement need, i.e., 'exigent circumstances.'").

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 332.

¹³⁵ *Id.*

¹³⁶ 466 U.S. 740 (1984).

¹³⁷ *Id.* at 753 (holding that the application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, had been committed).

person from entering his home is considerably less intrusive than a police entry into the home itself.¹³⁸

In *Arkansas v. Sullivan*,¹³⁹ decided *per curiam*, the Court reminded us that its decision in *Whren v. United States*,¹⁴⁰ upholding pretextual arrests, is alive and well and is to be followed.¹⁴¹ In *Sullivan*, the Arkansas Supreme Court declined to follow *Whren* on the grounds that much of *Whren* was dicta and even if *Whren* precludes inquiry into an arresting officer's subjective motivation, it was free to interpret the U.S. Constitution more broadly than the U.S. Supreme Court.¹⁴² The Court told the Arkansas Supreme Court that *Whren* means what it says, and that a state high court has no power to afford greater protections under the Federal Constitution than those acknowledged by the Supreme Court.¹⁴³

What significance exists in *Sullivan* resides in Justice Ginsburg's concurring opinion, which was joined by Justices Stevens, O'Connor, and Breyer. Justice Ginsburg observes that the Arkansas courts had recognized that validating Sullivan's arrest would give the police disturbing discretion.¹⁴⁴ She explained that *Atwater*, taken in tandem with *Whren*, poses a great danger: *Atwater* relied in part on a "dearth of horrors demanding redress," but "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests,' I hope the Court will reconsider [*Atwater*]." ¹⁴⁵

As we speak, the issue is very relevant here in New York because last week the New York Court of Appeals heard argument in three pretext cases and the court will decide whether it will follow *Whren*, or whether under Article I, § 12 of the New York

¹³⁸ *McArthur*, 531 U.S. at 336.

¹³⁹ 532 U.S. 769 (2001).

¹⁴⁰ 517 U.S. 806 (1996).

¹⁴¹ *Sullivan*, 532 U.S. at 772 ("A traffic-violation...arrest will not be rendered invalid by the fact that it was a mere pretext for a narcotics search.").

¹⁴² *Id.* at 771.

¹⁴³ *Id.* at 772.

¹⁴⁴ *Id.* at 772-73 (Ginsburg, J., concurring).

¹⁴⁵ *Id.* at 772 (Ginsburg, J., concurring) (quoting *Atwater*, 352 U.S. at 353).

Constitution¹⁴⁶ it will hold that our state constitution provides greater protection than does the Fourth Amendment.¹⁴⁷ Prior to my reading about the oral argument in those cases and talking to my former colleagues at the Legal Aid Society who argued the case, I was predicting that the New York Court of Appeals would depart from *Whren* and give us additional protection. However, from what I have learned, it seems that from the defendant's side of the table, the oral argument in those cases was a disaster. I could not detect from the reports or from those who had watched a videotape of the arguments that the judges of the Court of Appeals were sympathetic to the argument that the court should decline to follow *Whren* even though some Court of Appeals' precedents and decisions of the lower courts cast aspersion on the use of the arrest power pretextually. So those cases are out there and you should keep your eyes open for their decision.¹⁴⁸

The final Fourth Amendment case is actually one in which the Court granted certiorari, but then decided that because of the procedural posture of the case, certiorari was improvidently granted.¹⁴⁹ I mention it only because the issue that interested the Court initially will surely arise again. The case was *Florida v. Thomas*¹⁵⁰ and the Court had granted certiorari to resolve the question of whether *New York v. Belton*¹⁵¹ is limited to situations in which an arresting officer initiates contact with the occupant of

¹⁴⁶ N.Y. CONST. Art. I, § 12 provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

¹⁴⁷ U.S. CONST. amend IV provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

¹⁴⁸ Subsequent to Professor Hellerstein's speech, on December 18, 2001, the New York Court of Appeals decided the case of *People v. Robinson*, 97 N.Y.2d 341 (2001), and held that the New York State Constitution is to be read as coterminous with the United States Constitution on this issue. *Id.* at 346. The Court stated "we adopt *Whren v. United States* as a matter of state law." *Id.* (internal citations omitted).

¹⁴⁹ *Florida v. Thomas*, 532 U.S. 774, 777-80 (2001) (stating that since there was no final order or judgment of the case in the Florida courts, the Court lacked jurisdiction).

¹⁵⁰ *Id.*

¹⁵¹ 453 U.S. 454 (1981).

a vehicle while that person remains inside the vehicle.¹⁵² In *Belton*, the Court had held that the search incident to arrest doctrine allows the police to search the passenger compartment of a vehicle even though the arrestee has already been removed from the vehicle.¹⁵³ In *Thomas*, while the police were investigating marijuana sales and making arrests at a Florida home, Thomas drove up, parked in the driveway and walked toward the back of the car.¹⁵⁴ After a license check revealed an outstanding warrant, Thomas was arrested, handcuffed, and taken inside the home.¹⁵⁵ The officer then went back outside, alone, and searched Thomas' car, finding several bags containing methamphetamine.¹⁵⁶

The Florida Supreme Court held that *Belton* did not apply.¹⁵⁷ The dismissal of certiorari thus leaves open the question as to the precise scope of the search incident doctrine. In *People v. Belton*, our Court of Appeals had held that the search incident doctrine did not allow a search of the defendant's leather jacket located in the car's passenger compartment when the arrest was for a traffic offense.¹⁵⁸ The Supreme Court disagreed, holding that the officer's protection allows for the search.¹⁵⁹ On remand to the Court of Appeals, the court upheld the search but not under the search incident doctrine.¹⁶⁰ Instead, it held that the officers had probable cause to believe there was contraband in the car and therefore the passenger compartment and the leather jacket could be searched pursuant to the automobile exception to the warrant requirement.¹⁶¹ The Court of Appeals stated that it was reluctant to follow the Supreme Court's analysis in *Belton*, because it felt that the Supreme Court was expanding the search incident doctrine

¹⁵² *Thomas*, 532 U.S. at 776.

¹⁵³ *Belton*, 453 U.S. at 460.

¹⁵⁴ *Thomas*, 532 U.S. at 776.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *People v. Belton*, 50 N.Y.2d 447, 452 (1980), *rev'd by Belton*, 453 U.S. at 454.

¹⁵⁹ *Belton*, 453 U.S. at 461.

¹⁶⁰ *People v. Belton*, 55 N.Y.2d 49, 55 (1982) *on remand from Belton*, 453 U.S. at 454.

¹⁶¹ *Id.* at 55.

beyond the grabbable area concept that had justified the doctrine when the Supreme Court decided *Chimel v. California*¹⁶² in 1969.

So, that is the Court's work on the Fourth Amendment for the Term. It was not only an interesting Fourth Amendment Term, but also one in which the number of Fourth Amendment cases decided rendered it a Term in which the Fourth Amendment was rather dominant.

¹⁶² 395 U.S. 752 (1969).