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## SAFE AT HOME, BUT BETTER BUCKLE UP ON THE ROAD—SUPREME COURT SEARCH AND SEIZURE DECISIONS, 2000-2001 TERM

Stanley E. Adelman\*

### I. INTRODUCTION

The Fourth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment,<sup>1</sup> guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>2</sup> Where a search or seizure is found to be unreasonable, the law provides a remedy in criminal cases in the form of suppression of evidence, which often leads to the dismissal of criminal charges. The Federal Civil Rights Act<sup>3</sup> also provides a civil remedy in damages for an unreasonable search or seizure.

In recent decades, the Supreme Court has typically granted law enforcement officers the greatest leeway and has been most apt to find a search or seizure to be “reasonable” in cases involving searches of or seizures from motor vehicles.<sup>4</sup> In contrast, the Court has tended to afford the greatest measure of Fourth Amendment protection to

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1. *Wolf v. Colo.*, 338 U.S. 25 (1949).

2. U.S. Const. amend. XIV. The term *seizure* applies to the arrest and temporary detention of crime suspects (i.e., seizures of the person), as well as to the impounding of their property for evidentiary purposes. Therefore, virtually *any* arrest, detention, or search by a law enforcement officer can become the focus of a Fourth Amendment challenge.

3. 42 U.S.C. § 1983 (1994).

4. See e.g. *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (“One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects.”); *S.D. v. Opperman*, 428 U.S. 364, 367 (1976) (“[W]arrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not . . . . [T]he inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.”)

individuals in cases involving searches of or seizures from their houses or other dwellings.<sup>5</sup>

This article reviews seven search and seizure decisions from the Supreme Court's recently completed 2000-2001 term. Three of these cases were reviews of criminal suppression decisions; the other four involved reviews of decisions in Section 1983 civil rights actions. In three of these cases, the individual prevailed against the Government; in the other four, the Government prevailed. Although these cases do not break much new doctrinal ground, the cases where the individuals prevailed against governmental power show the Court's continued reverence for the sanctity of the home, most forcefully expressed in *Kyllo v. United States*,<sup>6</sup> and its willingness to respond in those hard-to-predict cases where the action of law enforcement officials tweaks the conscience of the Court.<sup>7</sup>

Although it is difficult to find some common thread in doctrine or policy to somehow bind all these seemingly unrelated decisions together, the three Fourth Amendment cases where the individual prevailed against the government all, significantly, involved non-traditional law enforcement initiatives in the "War on Drugs." If there is any consistent message or theme from last term's search and seizure decisions, it is that notwithstanding the Court's generally very friendly posture toward law enforcement, it will still closely scrutinize drug enforcement innovations which brush aside the Court's long-standing solicitude for the privacy of the home or its still-standing distrust of drug detection methods that do not require probable cause or individualized suspicion.

## II. THE CASES

For ease of reference (and in case you wish to read no farther), the cases discussed in this article and their holdings are as follows:

- A. *Kyllo v. United States*—use of thermal imaging device on exterior wall of house to detect infrared radiation that would indicate growing of marijuana plants inside the house held, 5-4, to be a "search" which is presumptively unreasonable if done without a warrant.<sup>8</sup>
- B. *Ferguson v. City of Charleston*<sup>9</sup>—public hospital program of

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5. See e.g. *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (acknowledging the "sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection"); *Silverman v. U.S.*, 365 U.S. 505, 511 (1961) (observing that the right to be free from unreasonable governmental intrusion in one's own home stands "[a]t the very core" of the Fourth Amendment).

6. 121 S. Ct. 2038 (2001).

7. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

8. *Kyllo*, 121 S. Ct. at 2046-47.

9. 532 U.S. 1281 (2001).

testing of pregnant patients' urine for presence of cocaine and providing positive test results to police for purposes of arrest and prosecution held, 6-3, to be unconstitutional searches, unless lower court determines on remand that the patients consented to the searches.<sup>10</sup>

- C. *City of Indianapolis v. Edmond*<sup>11</sup>—police checkpoint program (i.e., roadblock) for the purpose of interdicting illegal drugs held, 6-3, to violate the Fourth Amendment.<sup>12</sup>
- D. *Atwater v. City of Lago Vista*<sup>13</sup>—the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense committed in a police officer's presence, such as a misdemeanor seat belt violation which is punishable only by a fine (5-4 vote).<sup>14</sup>
- E. *Arkansas v. Sullivan*<sup>15</sup>—search of vehicle incident to arrest for traffic violations, which resulted in additional drug charges, was justifiable where officer had probable cause for the traffic arrest (per curiam opinion).<sup>16</sup>
- F. *Illinois v. McArthur*<sup>17</sup>—police officers who had probable cause to believe that drug suspect had hidden marijuana in his home and prevented him from entering his home unaccompanied by an officer for about two hours while they obtained a search warrant held, 8-1, to have acted permissibly under the Fourth Amendment.<sup>18</sup>
- G. *Saucier v. Katz*<sup>19</sup>—military police officer who intercepted a demonstrator who was walking toward the area where then-Vice President Gore was speaking, dragged him away from the area, shoved him into a military van, and briefly detained him held, 8-1, entitled to qualified immunity from suit; a ruling on the issue of qualified immunity, when raised in defense of a civil rights lawsuit alleging excessive use of force, should be made early in the case, and involves a determination that is separate and distinct from the Fourth Amendment question of whether unreasonable force was used.<sup>20</sup>

This review first considers the Fourth Amendment cases in which

10. *Id.* at 1292-93.

11. 531 U.S. 32 (2000).

12. *Id.* at 47-48.

13. 121 S. Ct. 1536 (2001).

14. *Id.* at 1557-58.

15. 121 S. Ct. 1876 (2001).

16. *Id.* at 1878.

17. 531 U.S. 326 (2001).

18. *Id.* at 337.

19. 121 S. Ct. 2151 (2001).

20. *Id.* at 2159-60.

the individual prevailed against the government.

#### A. *Kyllo*

If any case can be called the surprise of the Court's past term, this is it. Federal agents (of the United States Department of the Interior), suspecting that marijuana was being grown in Danny Kyllo's home in Florence, Oregon, used a thermal imaging device to scan the triplex where Kyllo lived.<sup>21</sup> A thermal imager detects invisible infrared radiation and creates images of relative heat and coolness in the area scanned—as described by Justice Scalia writing for the five-member majority, “it operates somewhat like a video camera showing heat images.”<sup>22</sup> The relevance of thermal imaging to drug detection is that growing marijuana indoors typically requires the use of high-intensity lamps.

The presence of thermal hot spots may, in combination with other indicia, furnish probable cause to believe that marijuana is being grown. Here, a Federal Magistrate Judge issued a warrant for the agents to search Kyllo's home based on their thermal imaging, tips from informants, and Kyllo's utility bills.<sup>23</sup> In their search, the agents found over 100 plants, which led to Kyllo's federal indictment for manufacturing marijuana.<sup>24</sup>

Kyllo's suppression motion made its way to the Supreme Court, presenting the question whether the use of the thermal imaging device aimed at a private home from a public street constitutes a “search” within the meaning of the Fourth Amendment.<sup>25</sup> If yes, then the warrantless heat scan by the officers would be unlawful unless it could be justified under a recognized exception to the warrant requirement. If no, then the officers did not have to have probable cause for conducting the heat scan.

Justice Scalia wrote the Court's opinion holding the thermal imaging of Kyllo's home to be a search for Fourth Amendment purposes. The Court remanded the case “for the District Court to determine whether, without the evidence it provided, the search warrant issued in this case was supported by probable cause—and if not, whether there is any other basis for supporting admission of the evidence that the search pursuant to the warrant produced.”<sup>26</sup>

As its starting reference point, the Court emphasized the heightened protection under its precedents against unreasonable and,

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21. *Kyllo*, 121 S. Ct. at 2039.

22. *Id.* at 2041.

23. *Id.*

24. *Id.*

25. *Id.* at 2040-41.

26. *Kyllo*, 121 S. Ct. at 2046 (Scalia, J., joined by Souter, Thomas, Ginsburg, & Breyer, JJ.).

particularly, warrantless intrusions into the home.<sup>27</sup> “With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”<sup>28</sup> The hard question acknowledged by the Court was whether, under *Katz v. United States*,<sup>29</sup> *Kyllo* had a reasonable expectation of privacy in the object of the search, i.e., the infrared heat waves detected by the officers’ thermal imaging device.<sup>30</sup> Without such a reasonable expectation, an act that might be a “search” in its dictionary sense is not a search at all in the constitutional sense, and therefore the act falls outside the protections of the Fourth Amendment.

Although warrantless visual surveillance of the outside of a house is lawful (because it is neither trespass nor a search), the Court acknowledged that technological enhancement of the officers’ senses utilized here had allowed them to know or reasonably infer what was taking place inside the walls of the house.<sup>31</sup> The Court concluded:

[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ [citation omitted] constitutes a search—at least where (as here) the technology in question is not in general public use. . . . On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.<sup>32</sup>

The majority rejected the contention of the dissenters (Justice Stevens, joined by the Chief Justice and Justices O’Connor and Kennedy) that the thermal imager had merely detected heat radiating from the external surface of the house and had therefore not intruded into any constitutionally protected area of *Kyllo*’s home:

The interest in concealing the heat escaping from one’s house pales in significance to the ‘chief evil against which the working of the Fourth Amendment is directed, the physical entry of the home.’<sup>33</sup>

According to the dissent, the infrared heat waves detected were akin to garbage left outside the house in plain view or the observation of smoke

27. *Id.* at 2041.

28. *Id.* at 2042 (citations omitted).

29. 389 U.S. 347 (1967) (concurring opinion of Harlan, J. which has been frequently cited and followed by the Court).

30. *Kyllo*, 121 S. Ct. at 2043-44.

31. *Id.* at 2042.

32. *Id.* at 2043. In so holding, the Court disagreed with the majority of lower court opinion to the effect that use of a thermal imager to scan a home to detect the heat given off by grow lights is not a search for Fourth Amendment purposes. Some lower courts had analogized the scanning of “waste heat” given off from building walls to garbage left out for trash collectors or to the odor of drugs given off by a traveler’s luggage, to conclude that residents have no reasonable expectation of privacy in the heat from the lamps that is detected from outside the building. *Id.*

33. *Id.* at 2049 (Stevens, J., joined by Rehnquist, O’Conner & Kennedy, JJ. dissenting) (citation omitted).

rising from chimney stacks, which may constitutionally be observed and “searched” without need of a warrant or antecedent probable cause.<sup>34</sup> The dissenters also distinguished between the use of surveillance methods which penetrate into the dwelling premises (“through-the-wall” technology) and devices, such as a thermal imager, that do not (“off-the-wall” technology), and regarded the former but not the latter surveillance methods as “searches” for Fourth Amendment purposes.<sup>35</sup>

The majority rejected the dissenters’ distinction between these methods. In their view, both technologies are potentially threatening to the privacy of the home, even if at the present state of the art off-the-wall devices do not directly discern activity within the house but, rather, provide investigators with only an *inference* of what is going on inside:

We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home. While the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.<sup>36</sup>

Further, Justice Scalia rejected in broad and emphatic language the contention that the technology here was used constitutionally because it did not detect any private activity in private areas or reveal any “intimate details.”

In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.<sup>37</sup>

Finally, in order to protect the core constitutional interest of domestic privacy as well as provide police with optimum guidance, the Court felt obliged to draw clear lines here:

We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’ That line, we think, must not only be firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. . . . Where, as here, 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 physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.<sup>38</sup>

One further point of difference (among many) between the majority and the dissent is particularly worth considering. The dissenters

34. *Id.* at 2047.

35. *Id.*

36. *Kyllo*, 121 S. Ct. at 2044.

37. *Id.* at 2045 (emphasis in original).

38. *Id.* at 2046 (citation omitted).

criticized the Court's rule as being "too narrow as well as too broad. Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home."<sup>39</sup> The fact that the surveillance in *Kyllo* was intended to learn about activity within the home (even if the method used did not physically penetrate into the dwelling), is obviously the reason why Justices Scalia and Thomas sided with the defendant against the government. The dissenters (at least some of them) seem to be questioning why the Court's solicitude—even to the point of zealotry—for personal privacy in the home does not carry over in any comparable degree to searches and seizures which take place outside the home.<sup>40</sup>

Although not discussed by either the majority or the dissent in *Kyllo*, it is at least arguable that in some situations the use of sensory-enhancing surveillance technologies, both inside and outside of dwellings, can in fact be the *friend* of privacy interests by protecting the innocent from greater investigative intrusions. For example, the use of metal detectors in airports, courthouses, and prisons, or even drug sniffing dogs, serves to *minimize* the need for much more intrusive body searches of the general public who enter those facilities. And perhaps, use of a device such as a thermal imager on a residence might serve to clear the innocent inhabitants of suspicion and obviate the need for further investigation and intrusion.

In view of the incremental constrictions on the exclusionary rule that have occurred over the years since the Court first made the rule binding on the states in *Mapp v. Ohio*,<sup>41</sup> the *Kyllo* decision qualifies as a bit of a surprise, especially given the fairly minimal degree of actual intrusion that occurred in that case, and as a reassurance to at least some skeptics<sup>42</sup> that the Fourth Amendment and the exclusionary rule, if not totally alive and well, are still breathing inside the walls of our nation's houses.

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39. *Id.* at 2051 (citing *Katz v. U.S.*, 389 U.S. 347, 351 (1967), "The Fourth Amendment protects people, not places").

40. *Id.* at 2048.

41. *Mapp v. Ohio*, 367 U.S. 643 (1961). See *Stone v. Powell*, 428 U.S. 465 (1976) (state prisoner may not seek federal habeas corpus relief on ground that evidence obtained in an unconstitutional search or seizure was introduced at trial, so long as state has provided an opportunity for full and fair litigation of the Fourth Amendment claim); *U.S. v. Havens*, 446 U.S. 620 (1980) (unlawfully seized evidence may be used at trial for impeachment purposes); *U.S. v. Leon*, 468 U.S. 897 (1984) (recognizing a "good faith" exception to the exclusionary rule where officers have acted reasonably in reliance on a judicially issued warrant).

42. See *Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting) ("[I]n case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete.").



*B. Ferguson*

In *Ferguson*, the Court struck down a program, jointly developed by the City Solicitor of Charleston, South Carolina and staff members of a public hospital operated by the Medical University of South Carolina, to test pregnant women being treated at the hospital for drug use and to arrest and prosecute those patients who tested positive.<sup>43</sup> The question presented to the Court was whether the hospital's performance of the drug tests was an unreasonable search under the Fourth Amendment if the patient had not consented to the procedure.<sup>44</sup> The Court also framed this question more narrowly as whether the State's interest in reducing the incidence of "crack babies" through the threat of criminal sanctions to deter pregnant women from using cocaine "can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant."<sup>45</sup>

Under the hospital's initial program, the hospital performed drug screens on urine samples from maternity patients who were suspected of cocaine use, and referred patients who tested positive to the county substance abuse commission for counseling and treatment.<sup>46</sup> After this initial program did not appear to reduce the incidence of drug abuse among the hospital's maternity patients, the hospital, in consultation with the City Solicitor, decided to modify the program.<sup>47</sup> The new program entailed the identification and testing of suspected drug abusing patients, and the arrest and prosecution of those who failed to follow up with substance abuse counseling and treatment.<sup>48</sup>

The purpose of the program was avowedly the enforcement of the state's drug laws through criminal sanctions, although the further goal of the program remained deterrence of drug use among the hospital's maternity patients.<sup>49</sup> The policy and procedure for implementing the program included preservation of the "chain of custody" of the urine samples for use as evidence in criminal proceedings.<sup>50</sup> Patients would be charged with simple possession if they were 27 or less weeks pregnant, but with possession and distribution to a minor if they were pregnant for 28 weeks or more.<sup>51</sup> Police were also instructed under the policy to

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43. *Ferguson*, 121 S. Ct. at 1284-85.

44. *Id.* at 1284.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Ferguson*, 121 S. Ct. at 1290.

50. *Id.* at 1285.

51. *Id.* The Court pointed out that under South Carolina law, "a viable fetus has historically been regarded as a person," and that in 1995 that state's supreme court held that "the ingestion of cocaine during the third trimester of pregnancy constitutes child neglect." *Id.* at 1284 n. 2.

interrogate arrested patients to find out who had provided them with their illegal drugs.<sup>52</sup>

Crystal Ferguson and nine other maternity patients at the hospital, who were arrested after testing positive for cocaine, filed a civil rights suit against the City of Charleston and the law enforcement officials and hospital staff who developed and carried out the test-and-arrest policy.<sup>53</sup> They claimed the urine tests were unconstitutional searches because they were conducted for criminal investigatory and enforcement purposes, without warrants and without their consent.<sup>54</sup> At trial, the jury found that the plaintiffs had consented to the urine screen “searches” and found for the defendants.<sup>55</sup> A divided panel of the Fourth Circuit affirmed, but did not reach the question of consent.<sup>56</sup> Rather, the panel upheld the reasonableness of the searches based on the defendants’ second principal defense—that they were reasonable, even absent consent.<sup>57</sup> In support of this position the defendants had relied on the “special needs” line of Supreme Court cases, which recognize that in exceptional circumstances, a policy or program of searching without any individualized suspicion is permissible in order to further certain important non-law-enforcement governmental purposes.<sup>58</sup>

The Supreme Court granted certiorari to review the circuit court’s holding on the “special needs” issue, but, like the court below, did not reach the question of the sufficiency of the evidence with respect to consent.<sup>59</sup> Rather, the Court assumed for purposes of its decision that the searches were conducted without the informed consent of the patients.<sup>60</sup> The Court reversed the circuit court on the “special needs” issue and remanded the case for a decision by the circuit on the consent issue.<sup>61</sup>

Justice Stevens, joined by Justices O’Connor, Souter, Ginsburg, and Breyer, wrote the opinion of the Court.<sup>62</sup> Justice Kennedy concurred separately, resulting in a six-member majority.<sup>63</sup> Justice Scalia dissented, joined in part by the Chief Justice and Justice

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52. *Id.* at 1285.

53. *Id.* at 1286.

54. *Id.*

55. *Ferguson*, 121 S. Ct. at 1286.

56. *Id.* at 1287.

57. *Id.*

58. *See Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug testing of certain personnel of the United States Customs Service); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1989) (drug testing of students participating in interscholastic athletics); *N.J. v. T.L.O.*, 469 U.S. 325 (1985) (warrantless search of student lockers).

59. *Ferguson*, 121 S. Ct. at 1287.

60. *Id.*

61. *Id.*

62. *Id.* at 1283.

63. *Id.* at 1293.

Thomas.<sup>64</sup>

The majority determined that the urine tests conducted by hospital staff “were indisputably searches within the meaning of the Fourth Amendment,”<sup>65</sup> and, further, that the criteria used to identify the women to be tested provided neither probable cause nor even reasonable suspicion to believe that they were using cocaine.<sup>66</sup> The Court then determined that the hospital’s practice of turning over the test results to police, presumably without the patients’ knowledge or consent, distinguishes this case “from the four previous cases in which we have considered whether comparable drug tests ‘fit within the closely guarded category of constitutionally permissible suspicionless searches.’”<sup>67</sup>

The Court also distinguished its prior “special needs” decisions from the present case on several other bases. First, in the prior cases “there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.”<sup>68</sup> Second, unlike the parties tested for drug use in the prior cases, the hospital’s patients enjoyed a “reasonable expectation . . . that the results of those tests will not be shared with nonmedical personnel without [their] consent.”<sup>69</sup> But the “critical difference,” in the Court’s view, lay in the fact that “there was no law enforcement purpose behind the searches in those cases, and there was little, if any, entanglement with law enforcement.”<sup>70</sup> In this case, however, “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.”<sup>71</sup> Where the Court had previously upheld drug testing of student athletes and customs and railway personnel on the basis of special needs unrelated to the general purpose of law enforcement, the Court concluded in *Ferguson* that given the hospital program’s primary purpose of coercing treatment through the sanctions of the criminal process and given the extensive involvement of law enforcement officials, “this case simply does not fit within the closely guarded category of ‘special needs.’”<sup>72</sup>

“In such circumstances,” the Court concluded, “the Fourth

64. *Id.* at 1296.

65. *Ferguson*, 121 S. Ct. at 1287. Justice Scalia (not joined by his fellow dissenters on this point) disputed this “indisputable” contention in his dissent. See text and discussion at *infra* n. 78.

66. *Id.* at 1287-88.

67. *Id.* at 1288 (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (striking down as unreasonable drug testing of candidates for designated state offices; citing *Von Raab*, 489 U.S. 656; *Veronia*, 515 U.S. 646; *Skinner v. Ry. Labor Executives’ Assn.*, 489 U.S. 602 (1989) (upholding drug testing of railway employees involved in train accidents)).

68. *Id.*

69. *Id.*

70. *Id.* at 90.

71. *Ferguson*, 121 S. Ct. at 1290

72. *Id.* at 1291.

Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches applies in the absence of consent."<sup>73</sup> The Court did not find the acknowledged gravity of the threat presented by cocaine use among the hospital's maternity patients, by itself, sufficient to lower the standards of the Fourth Amendment.<sup>74</sup>

Justice Kennedy, in concurrence, agreed with the majority that the hospital had acted "as an institutional arm of law enforcement for purposes of the [drug testing] policy,"<sup>75</sup> and on that basis therefore this case was distinguishable from the other "special needs" cases where the Court had upheld suspicionless drug testing. Justice Kennedy nevertheless takes the majority to task for its position with respect to the crucial, and as yet unresolved issue of consent, which was essential to the result in the Court's prior "special needs" cases:

The consent, and the circumstances in which it was given, bear upon the reasonableness of the whole special needs program. . . . Here, on the other hand, the question of consent, even with the special connotation used in the special needs cases, has yet to be decided. Indeed, the Court finds it necessary to take the unreal step of assuming there was no voluntary consent at all. Thus, we have erected a strange world for deciding the case. . . . Had we the prerogative to discuss the role played by consent, the case might have been quite a different one.<sup>76</sup>

Justice Kennedy's perplexity is not surprising, considering that in a case where the jury had *specifically* found in favor of the defendants on the issue of consent, the majority in effect deprived the defendants of the considerable deference appellate courts usually afford to jury fact-finding.<sup>77</sup> Instead of presuming, as the jury had found, that consent was given, the Court presumed the exact opposite for purposes of its decision, merely because the Court of Appeals had not reached the issue. A "strange" and "unreal" context for deciding indeed!

Justice Scalia, writing only for himself in the first part of his dissent, concedes that the hospital's *taking* of the urine samples might have constituted an unlawful search, but disputes that the *testing* of the samples or the *reporting* of test results to police was a search.<sup>78</sup> In his eyes, the situation presented in this case is no different than in those cases where defendants had confided incriminating information to third

73. *Id.* at 1292.

74. This is the very same conclusion the Court reached earlier in the term in *City of Indianapolis*, 531 U.S. 32 (2000), also reviewed in this article, where the Court found the general law enforcement interest in enforcing the drug laws on the highways to be insufficient justification to uphold the drug enforcement roadblock at issue there.

75. *Ferguson*, 121 S. Ct. at 1294.

76. *Id.* at 1295.

77. See Fed. R. Civ. P. 52(a) (1999) ("Findings of fact shall not be set aside unless clearly erroneous[.]").

78. *Ferguson*, 121 S. Ct. at 1296.

parties who turned out to be government informants.<sup>79</sup> Not very nice or honorable, according to Justice Scalia, but neither unconstitutional under the Court's precedents,<sup>80</sup> nor violative of physician-patient privilege which does not exist in South Carolina.

Justice Scalia concludes Part I of his dissent with the contention that since the hospital was free to provide the test results to police, with or without the patients' consent; and since the police had not exploited any unlawful search, the issue of consent is superfluous and there is no factual basis for challenging the constitutionality of the drug testing procedures. Therefore, in Part II of his dissent (joined by the Chief Justice and Justice Thomas) he would not reach the "special needs" doctrine either, "since it operates only to validate searches and seizures that are otherwise unlawful."<sup>81</sup> However, were they to reach the special needs doctrine (in other words, assuming *arguendo* that the urine samples had been taken and tested without the patients' consent), the dissenters would apply the special needs doctrine to validate the hospital's drug testing program.

In the dissenters' view, the testing program was indisputably begun without law enforcement involvement or purposes to facilitate treatment of addicted expectant mothers and to protect both them and their unborn children.<sup>82</sup> The fact that a law enforcement purpose was later added in the hope of protecting mothers and their children did not, in their view, destroy the applicability of the special needs doctrine.<sup>83</sup>

Justice Scalia's dissent concludes with his distinctive irony. Although in his view the doctors and nurses and even the police (who arrested only 30 of the 253 women who had tested positive and only prosecuted two of them) had acted for a benign purposes,

[i]t would not be unreasonable to conclude that today's judgment, authorizing the assessment of damages against the county solicitor and individual doctors and nurses who participated in the program, proves once again that no good deed goes unpunished.<sup>84</sup>

Although his writing (agree with him or not) is a refreshing relief from the ponderousness of most judicial prose, the Justice protests a bit too much here. The case is a long way from being decided, and the imposition of damages against the hospital's "ministers of mercy"<sup>85</sup> is far from a sure thing. The issue of qualified immunity is not mentioned anywhere in the various opinions in *Ferguson*. But given the availability

79. *Id.*

80. *Id.* at 1297 (citing among other cases *Hoffa v. U.S.*, 385 U.S. 293 (1966)).

81. *Id.* at 1299.

82. *Id.*

83. *Id.* at 1299-1300.

84. *Ferguson*, 121 S. Ct. at 1302.

85. *Id.* at 1296 (Scalia, J. dissenting).

of qualified immunity to individual civil rights defendants who have not acted in violation of "clearly established rights,"<sup>86</sup> such a defense would seem to have a substantial likelihood of success. The very fact the Supreme Court itself wasn't able to clearly resolve the legal issues presented in *Ferguson* (maybe, after remand and further litigation this case will ultimately be known as *Ferguson I*) suggests that the relevant law is not yet "clearly established," in which case the defendants should be shielded by qualified immunity even if their actions are ultimately found to have been unconstitutional.<sup>87</sup> Even absent qualified immunity, it is still altogether possible that the lower courts may decide the consent issue in the defendants' favor. In sum, there is no judgment against the defendants, and the plaintiffs' path to ever recovering one remains blocked by substantial, perhaps insurmountable, hurdles.

To this writer, the hospital's practice, however benign may have been its intentions, of testing its patients for drugs and reporting those tests to the police for possible arrest and prosecution violated the patients' "reasonable expectation" under *Katz* that the hospital would use its diagnostic procedures for treatment purposes, not as an arm of the state's law enforcement apparatus. Their expectation was reasonable even absent a physician-patient privilege in South Carolina law. Despite its seemingly flawed methodology, the majority in *Ferguson* has correctly distinguished this case from the other "special needs" cases on the basis of the heavy involvement of law enforcement shown here. Still, however, there remains the substantial question of whether the defendants are entitled to qualified immunity from suit and damages, as well as the remanded question of consent. Whatever the ultimate outcome of the case, the *Ferguson* decision shows that the Court takes seriously its self-imposed commitment to "closely guard[] [the] category of constitutionally permissible suspicionless searches."

### C. *City of Indianapolis*

In 1998, the Indianapolis Police Department began a program of vehicle checkpoints with the avowed purpose of interdicting illegal drugs.<sup>88</sup> In the first four months of the program's operation, police stopped 1,161 vehicles and made forty-five arrests for drug-related crimes, and forty-nine arrests for unrelated charges.<sup>89</sup> At each

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86. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Saucier*, 121 S. Ct. 2151 (the Court's most recent word on qualified immunity, also discussed in this article).

87. One wonders, especially in light of the guidance from *Harlow* and *Saucier* (that qualified immunity, when applicable, shields state actors from the rigors of litigation, not just from the imposition of monetary damages, and should be litigated at the earliest possible stage), whether and when the defense of qualified immunity was raised in the trial court and if so, how the trial court treated it.

88. *City of Indianapolis*, 531 U.S. at 34.

89. *Id.* at 34-35.

checkpoint, police stopped a predetermined number of vehicles (i.e., the officers operating the checkpoint did not pick and choose which vehicles to stop), advised the driver that he or she was being stopped briefly at a drug checkpoint, and asked the driver for license and registration.<sup>90</sup> An officer looked for signs of impairment and viewed the inside of the vehicle from the outside while a narcotics detection dog walked around the vehicle.<sup>91</sup> Officers would detain the vehicle and investigate further only by consent or if they had developed some degree of individualized suspicion during the initial stop.<sup>92</sup> Checkpoint locations were selected in advance based on factors such as area crime statistics and traffic flow; and the checkpoints generally operated only during daylight hours with lighted warning signs.<sup>93</sup> The average initial stop lasted two to three minutes or less.<sup>94</sup>

James Edmond and Joell Palmer, two drivers who had been stopped at a narcotics checkpoint (but apparently not detained beyond the initial stop or charged with any criminal offense) filed a federal civil rights class action against the city and city officials on behalf of "all motorists who had been stopped or were subject to being stopped in the future at the Indianapolis drug checkpoints."<sup>95</sup> Their action sought "declaratory and injunctive relief for the class, as well as damages and attorney's fees for themselves."<sup>96</sup> They also sought a preliminary injunction against the continued operation of the checkpoint program which the District Court denied holding that the program did not violate the Fourth Amendment.<sup>97</sup>

After the Seventh Circuit reversed, holding that the checkpoints were in violation of the Fourth Amendment, the Supreme Court granted certiorari and affirmed the Circuit by a 6-3 vote.<sup>98</sup> The Court's analysis began with the observation that "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing," but that in "only limited circumstances . . . the usual rule does not apply."<sup>99</sup> The Court cited examples<sup>100</sup> from three lines of such cases: the "special needs" drug testing cases,<sup>101</sup> cases upholding administrative

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90. *Id.* at 35.

91. *Id.*

92. *Id.*

93. *Id.*

94. *City of Indianapolis*, 531 U.S. at 35.

95. *Id.* at 36. The city stipulated to certification of the plaintiff class.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 37.

100. *City of Indianapolis*, 531 U.S. at 37.

101. *See Von Raab*, 489 U.S. 656 (drug testing of certain personnel of the U.S. Customs Service); *Acton*, 515 U.S. 646 (drug testing of students participating in interscholastic athletics).

inspection of closely regulated businesses,<sup>102</sup> and, most particularly, two cases where the Court had upheld the constitutionality of brief, suspicionless highway checkpoint stops to combat drunk driving<sup>103</sup> and to intercept illegal immigrants near the Mexican border.<sup>104</sup>

The Court noted that neither *Sitz* nor *Martinez-Fuerte* approved a checkpoint program “whose primary purpose was to detect evidence of ordinary criminal wrongdoing.”<sup>105</sup> The roadblocks at issue in *Martinez-Fuerte* involved a separate governmental interest in intercepting illegal aliens near the national border.<sup>106</sup> The roadblocks at issue in *Sitz* involved the government’s “grave and legitimate” interest in getting drunk drivers off the road and preventing highway fatalities.<sup>107</sup> In both cases, the gravity of the governmental (non-law-enforcement) interest, combined with the lack of officers’ discretion as to which vehicles to stop and the relatively brief and modest intrusion entailed by the stops, led the Court to determine that those programs were constitutional.<sup>108</sup>

By contrast, the Court had struck down a spot check operation for drivers’ license and vehicle registration in *Delaware v. Prouse*.<sup>109</sup> There, the Court acknowledged the States’ vital interest in ensuring that licensing, registration, and inspection requirements are being observed, but struck down the operation because it found that the officer had exercised “standardless and unconstrained discretion.”<sup>110</sup> In dicta, the Court suggested that a prearranged stopping protocol that left no discretion to the officer, such as stopping all oncoming traffic, would be a lawful means of carrying out this function.<sup>111</sup> As glossed by the Court in *City of Indianapolis*, “[w]e further indicated in *Prouse* that we considered the purposes of such a hypothetical roadblock to be distinct from a general purpose in investigating crime.”<sup>112</sup>

The Court acknowledged in *City of Indianapolis*, as it had in *Sitz*, that a vehicle stop at a highway checkpoint, however brief and relatively unintrusive, amounts to a *seizure* within the meaning of the Fourth Amendment.<sup>113</sup> However, the Court did not find a *search* to have taken place in *Sitz*, even with the added element of an “exterior sniff” by a drug

102. See *N.Y. v. Burger*, 482 U.S. 691 (1987).

103. See *Mich. Dept. of St. Police v. Sitz*, 496 U.S. 444 (1990).

104. See *Martinez-Fuerte*, 428 U.S. 543.

105. *City of Indianapolis*, 531 U.S. at 38.

106. *Id.* at 38-39.

107. *Id.* at 39. See *Breithaupt v. Abram*, 352 U.S. 432, 438 (1957) (“The increasing slaughter on our highways. . . , now reaches the astounding figures only heard of on the battlefield.”).

108. *City of Indianapolis*, 531 U.S. at 39.

109. 440 U.S. 648 (1979).

110. *City of Indianapolis*, 531 U.S. at 39.

111. *Id.*

112. *Id.*

113. *Id.* at 40.



detection dog.<sup>114</sup> Rather, what the Court found to distinguish the drug checkpoints in *City of Indianapolis* from those it had approved in *Sitz* and *Martinez-Fuerte* was its primary purpose of general law enforcement.<sup>115</sup> Consistent with the suggestion in its *Prouse* dicta that “we would not credit ‘the general interest in crime control’ as justification for a regime of suspicionless stops,”<sup>116</sup> the Court in *City of Indianapolis* held that “[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”<sup>117</sup>

The Court rejected the city’s attempt to equate its roadblock program with the *Sitz* and *Martinez-Fuerte* checkpoints on the basis of their common “ultimate purpose of arresting those suspected of committing crimes:”

If we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.<sup>118</sup>

Likewise, the Court also rejected the city’s argument that the drug checkpoint program was justified by its lawful secondary purposes of keeping impaired drivers off the road and verifying licenses and registrations:

If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check.<sup>119</sup>

The Court cautioned, in conclusion, that its inquiry into the purpose of a checkpoint involving suspicionless stops “is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.”<sup>120</sup>

114. *Id.* Here, the majority appears to be refuting the contention of the dissenters that “the only difference between this case and *Sitz* is the presence of the dog.” *Id.* at 52.

115. *Id.* at 40-41.

116. *City of Indianapolis*, 531 U.S. at 41 (quoting *Prouse*, 440 U.S. at 659 n. 18).

117. *Id.* at 41-42.

118. *Id.* at 42.

119. *Id.* at 46.

120. *Id.* at 48. Therefore the Court finds no inconsistency between its holding in *City of Indianapolis* and the holding in *Whren v. U.S.*, 517 U.S. 806 (1996), that an individual officer’s subjective intentions are irrelevant to the Fourth Amendment validity of a traffic stop that is otherwise justified. The Court relied heavily on *Whren* in *Atwater v. City of Lago Vista*, 121 S. Ct. 1536 (2001) (determining that a civil rights plaintiff’s arrest and pre-bail detention for a seat belt violation were lawful under the Fourth Amendment, irrespective of the subjective motivation of the arresting officer), and again in *Ark. v. Sullivan*, 121 S. Ct. 1876 (2001) (determining that an officer who had lawfully arrested a traffic violator under state law for speeding could properly conduct an inventory search of the arrestee’s vehicle, irrespective of the officer’s subjective motivation for doing so). Both *Atwater* and *Sullivan* are discussed in this article, *infra*.

The first part of the Chief Justice's dissent (joined by Justices Thomas and Scalia) takes the view that on the basis of "blackletter roadblock seizure law," the Indianapolis drug interdiction roadblock was indistinguishable from the checkpoints upheld in *Sitz* and *Martinez-Fuerte*.<sup>121</sup> Based on the criteria set forth in *Brown v. Texas*<sup>122</sup> for determining the constitutionality of seizures that are less intrusive than a traditional arrest,<sup>123</sup> the dissenters considered the operation in *City of Indianapolis* to be constitutional because the stops "effectively serve the State's legitimate interests; they are executed in a regularized and neutral manner; and they only minimally intrude on the privacy of the motorists."<sup>124</sup>

In the second part of his dissent (joined only by Justice Thomas), the Chief Justice takes issue with what he considers to be the majority's inappropriate addition to existing roadblock law here—"a new non-law-enforcement primary purpose test lifted from a distinct area of Fourth Amendment jurisprudence relating to the *searches* of homes and businesses."<sup>125</sup> In his view, the Indianapolis program, like the *Sitz* and *Martinez-Fuerte* operations, was properly based, at least in part, on a legitimate governmental interest (highway safety), and all three checkpoint programs shared, at least in part, a common ultimate purpose of arresting law breakers.<sup>126</sup>

The Chief Justice would limit the "special needs" test (i.e., requiring that there be a primary non-law-enforcement purpose) to searches, not seizures, and intrusions into the home, and observes that there were no such intrusions in the present case.<sup>127</sup> He considers special needs analysis to be particularly inappropriate here based on the reduced expectation of privacy persons have in their automobiles.<sup>128</sup> In conclusion, the Chief Justice stated, "[t]he Court's opinion today casts a shadow over what had been assumed, on the basis of *stare decisis*, to be a perfectly lawful activity," and then reiterated his view that the stops were consistent with the Fourth Amendment.<sup>129</sup>

Justice Thomas submitted a brief but somewhat surprising separate dissent. He expressed serious doubt that *Sitz* and *Martinez-Fuerte* were correctly decided:

I rather doubt that the Framers of the Fourth Amendment would have

121. *City of Indianapolis*, 531 U.S. at 49.

122. 443 U.S. 47 (1979).

123. *Id.* at 51. *Brown*, although not a roadblock case, has been followed in all the Court's later roadblock cases.

124. *City of Indianapolis*, 531 U.S. at 53.

125. *Id.* (emphasis in original).

126. *Id.* at 55-56.

127. *Id.* at 54.

128. *Id.* at 55.

129. *Id.* at 55-56.

considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.<sup>130</sup>

However, since the respondents in *City of Indianapolis* did not advocate overruling either case and Justice Thomas would be reluctant to do so without the benefit of briefing and argument, he felt that those cases remained binding precedents and, as stated by the Chief Justice in his dissent, that they compelled upholding the Indianapolis drug enforcement checkpoint program.<sup>131</sup> He therefore joined the Chief Justice's dissent.<sup>132</sup>

The Chief Justice is probably correct, in an academic sense, to characterize the Court's explicit requirement of a primary non-law-enforcement purpose to sustain a program of suspicionless highway roadblock stops as "new." That "requirement," true enough, appears only as a suggestion in dicta in *Prouse*. However, even if not "essential" to the holding in *Prouse*, *Sitz*, or *Martinez-Fuerte*, consideration of a significant, legitimate non-law-enforcement purpose was certainly *relevant* to the constitutional balancing of interests which the Court undertook in all three cases—a balancing which had persuaded the Court in the two prior cases to relax the general requirement that police have individualized suspicion before stopping vehicles on the highway based on the substantial non-law-enforcement interests at stake.

The sense in which the Chief Justice is correct is that the majority in *City of Indianapolis* simply made an explicit part of its holding the common thread running through all the Court's decisions that recognize exceptions to the requirement of individualized suspicion—that the police action at issue be in furtherance of some significant public interest that is not a part of the government's general interest in criminal law enforcement. The reason why the Court made this requirement explicit in *City of Indianapolis* obvious and well stated in Justice O'Connor's majority opinion—that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life"—a concern that appears to be lost on the Chief Justice. Justice O'Connor and the other majority Justices here, as they did in *Ferguson*, are simply, and appropriately, "closely guarding" the category of constitutionally permissible suspicionless searches *and* seizures, fully consistent with the letter and the core purposes of the Fourth Amendment.

This review now considers the Fourth Amendment cases in which the government's activity or interest prevailed.

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130. *City of Indianapolis*, 531 U.S. at 56.

131. *Id.*

132. *Id.*

#### D. *Atwater*

Gail Atwater was stopped by a Lago Vista, Texas police officer in 1997 for driving without wearing a seatbelt and failing to secure her two small children who were riding in the front seat of the pickup truck.<sup>133</sup> Both violations were misdemeanors punishable by a maximum fine of \$50.<sup>134</sup> Texas law also expressly authorized a police officer to arrest seatbelt law violators without a warrant or to issue a citation in lieu of arrest.<sup>135</sup>

Atwater and her husband sued the officer, the city, and the police chief under the Federal Civil Rights Act, seeking compensatory and punitive damages, claiming that the defendants had violated her Fourth Amendment right to be free from unreasonable search and seizure.<sup>136</sup> The Atwaters' complaint additionally alleged<sup>137</sup> that when approaching her truck the officer yelled words to the effect of "we've met before" and "you're going to jail."<sup>138</sup> When she told the officer that she did not have her license or insurance documentation because her purse had been stolen the day before, the officer arrested and handcuffed her in the presence of her "frightened, upset, and crying" children.<sup>139</sup> After a friend came by to take charge of her children, the officer drove her in his cruiser to the police station where she was required to remove her shoes, jewelry, eyeglasses, and to empty her pockets.<sup>140</sup> Officers took her "mug shot" and placed her alone in a cell where she stayed for an hour until she was taken before a magistrate and released on bond.<sup>141</sup> In short, this was a full-scale arrest that could take place for any criminal offense, except that there is no allegation that she was subjected to a body search that often occurs when a criminal suspect is jailed. Atwater was charged with the two seatbelt offenses, to which she later pleaded no contest and was fined fifty dollars each. The other charges —driving without her license and failing to provide proof of insurance—were ultimately dismissed.<sup>142</sup>

The city successfully moved for summary judgment on the ground that Atwater's arrest was consistent with both state law and the Fourth Amendment.<sup>143</sup> The Fifth Circuit reversed concluding that an arrest for

133. *Atwater*, 121 S. Ct. at 1541.

134. *Id.*

135. *Id.*

136. *Id.* at 1542 (They filed their suit in Texas state court, but the defendants removed the case to federal court.).

137. *Id.* at 1541 (The Supreme Court assumed the facts alleged in the complaint to be true for purposes of its decision.).

138. *Id.*

139. *Atwater*, 121 S. Ct. at 1541.

140. *Id.* at 1542.

141. *Id.*

142. *Id.*

143. *Id.*

a first-time seatbelt offense was an unreasonable seizure within the meaning of the Fourth Amendment and that the officer was not entitled to qualified immunity.<sup>144</sup> However, a majority of the full circuit, sitting *en banc*, reversed and affirmed the summary judgment for the city.<sup>145</sup> The full bench concluded under *Whren v. United States*<sup>146</sup> that if (as here) an arrest is based on probable cause, the court should not, except in rare circumstances, undertake to balance the interests of the individual versus those of the government to determine if the arrest was reasonable under the Fourth Amendment.<sup>147</sup> Such circumstances, not present here according to the *en banc* circuit, might occur where an arrest is “conducted in an extraordinary manner, unusually harmful to privacy or even physical interests.”<sup>148</sup> The Supreme Court granted certiorari to determine “whether the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers’ authority to arrest without warrant for minor criminal offenses.”<sup>149</sup>

Justice Souter, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas, wrote the opinion of the Court. Justice O’Connor, joined by Justices Stevens, Ginsburg, and Breyer, dissented.<sup>150</sup>

After a painstaking review of both English common law (for guidance regarding “the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing”<sup>151</sup>), and later American law, the Court rejected Atwater’s contention (although finding some authority to support her position) that the Framers understood the Fourth Amendment as prohibiting warrantless misdemeanor arrests except in cases of “breach of the peace.”<sup>152</sup> The Court found “disagreement, not unanimity” among the common law cases and commentators, and came to the conclusion that “history, if not unequivocal, has expressed a decided, majority view” that police need not obtain an arrest warrant for misdemeanor behavior that stops short of actual or threatened violence.<sup>153</sup> Further, the Court was “not convinced that Atwater’s is the correct, or even necessarily the better, reading of the common law history.”<sup>154</sup>

144. *Id.*

145. *Atwater*, 121 S. Ct. at 1542.

146. 517 U.S. 806, 818 (1996).

147. *Atwater*, 121 S. Ct. at 1542.

148. *Id.*

149. *Id.*

150. *Id.* at 1540.

151. *Id.* at 1543 (quoting *Wilson v. Ark.*, 514 U.S. 927, 931 (1995)).

152. *Id.* at 1544.

153. *Id.* at 1553.

154. *Id.* at 1546. In addition to the common law history, the Court found many examples in early English and later American statutes (including federal statutes and statutes

The Court then declined Atwater's suggestion, embraced by the four dissenting Justices, that it "mint a new rule of constitutional law" forbidding custodial arrest, even upon probable cause, for misdemeanors that are not punishable by any jail time unless the government can show a compelling need for immediate detention.<sup>155</sup> After doing so, the Court acknowledged, as any casual reader of the case would, that Mrs. Atwater got a pretty raw deal. As an established resident of Lago Vista, she would have had no incentive to flee if she had been given a citation in lieu of arrest; she was subjected to gratuitous humiliation; and the officer at best had exercised extremely poor judgment.<sup>156</sup> The Court went so far as to say that "[i]f we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. . . . [Her] claim to live free of pointless confinement clearly outweighs anything the City can raise against it specific to her case."<sup>157</sup>

The Court, however, opted for drawing "clear and simple" and "administrable" Fourth Amendment rules, which do not require courts to engage in constitutional review of "every discretionary judgment in the field."<sup>158</sup> And, bad luck for Mrs. Atwater again, the bright line the Court chose was to insulate from constitutional review, except in extreme circumstances, the discretionary decision of the police to arrest where probable cause exists, even for the most minor of infractions.<sup>159</sup> The Court saw the rule suggested by Atwater as posing a host of questions of administrability, including uncertainty in the heat of the moment of arrest as to exactly what charges would ultimately be justified by the facts known to the officer, and an officer's lack of knowledge at the time of arrest of factors such as the existence of prior convictions, that could affect the severity of the charges and the potential punishment.<sup>160</sup> In the Court's view, "Atwater's various distinctions between permissible and impermissible arrests for minor crimes strike us as 'very unsatisfactory lines' to require police officers to draw on a moment's notice,"<sup>161</sup> risking

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presently in effect in all 50 states) that permit warrantless arrests for misdemeanors not involving a breach of the peace. Also, the Court cited 3 W. LaFare, *Search and Seizure* § 5.1(b) (1996) which observes that statutes "removing the breach of the peace limitation and thereby permitting arrest without warrant for *any* misdemeanor [emphasis in original] committed in the arresting officer's presence" have "never been successfully challenged and stand as the law of the land." *Id.* at 1552.

155. *Atwater*, 121 S. Ct. at 1553. In a footnote, the Court threw the earlier words of Justice O'Connor (the author of the *Atwater* dissent) right back at her. *Id.* at 1553 n. 14 (quoting from her dissent in *Tennessee v. Garner*, 471 U.S. 1, 26 (1985), that courts must be "reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures").

156. *Id.* at 1553.

157. *Id.*

158. *Id.*

159. *Id.* at 1557.

160. *Id.* at 1554-55.

161. *Atwater*, 121 S. Ct. at 1555 (quoting *Carroll v. U.S.*, 267 U.S. 132, 157 (1925)).

suppression of evidence or even personal liability under section 1983 if they guess wrong.<sup>162</sup>

“Cap[ping] the reasons for rejecting Atwater’s request for the development of a new and distinct body of constitutional law,” the Court alluded to a “dearth of horrors demanding redress,” and the failure of Atwater’s counsel at oral argument to cite the Court to more than one solitary example of “comparably foolish, warrantless misdemeanor arrests.”<sup>163</sup> “We are sure that there are others, but just as surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.”<sup>164</sup>

Accordingly, the Court “confirmed . . . what our prior cases have intimated: . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”<sup>165</sup> Applying this principle to the facts at hand, the Court found no dispute that the officer had probable cause to believe that Atwater had committed a crime in his presence, and concluded that the *Whren* exception<sup>166</sup> did not apply here.

Atwater’s arrest was . . . no more harmful to privacy or physical interests than the normal custodial arrest. . . . The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment.<sup>167</sup>

Accordingly, the Court affirmed the Court of Appeal’s *en banc* judgment.<sup>168</sup>

The dissenters agreed with the majority that the history of the issue before the Court is inconclusive.<sup>169</sup> They therefore felt obliged to engage in the Fourth Amendment balancing test eschewed by the majority here, weighing the individual’s interest in privacy versus the governmental issue at stake here.<sup>170</sup> In so doing, the dissenters found “significant differences between a traffic stop and a full custodial arrest.”<sup>171</sup>

While both are seizures that fall within the ambit of the Fourth

162. *Id.* Although not cited or quoted by the Court in *Atwater*, the colorful language of Chief Justice Warren, writing for the Court in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), comes to mind here: “A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”

163. *Atwater*, at 1557 (reciting a newspaper account of a girl taken into custody for eating French fries in a Washington, D.C. subway station).

164. *Id.*

165. *Id.*

166. *See supra* n. 155.

167. *Atwater*, 121 S. Ct. at 1558 (Court’s ellipses and internal quotes omitted).

168. *Id.*

169. *Id.* at 1561.

170. *Id.*

171. *Id.* at 1562.

Amendment, the latter entails a much greater intrusion on an individual's liberty and privacy interests. . . . [A] motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way [citation omitted]. Thus, when there is probable cause to believe that a person has violated a minor traffic law, there can be little question that the state interest in law enforcement will justify the relatively limited intrusion of a traffic stop. It is by no means certain, however, that where the offense is punishable only by fine, 'probable cause to believe the law has been broken [will] 'outbalance' private interest in avoiding' a full custodial stop. Justifying a full arrest by the same quantum of evidence that justifies a traffic stop—even though the offender cannot ultimately be imprisoned for her conduct—defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures.<sup>172</sup>

In contrast to the "obvious toll" a custodial arrest "exact[s] on an individual's liberty and privacy, even when the period of custody is relatively brief," the dissenters found the state's interest in taking into custody a person suspected of committing an offense punishable by fine, but not by imprisonment, to be "surely limited, at best."<sup>173</sup> Rather than "[g]iving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only offense has been committed," the dissenters would require that:

[W]hen there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest.'<sup>174</sup>

Such a rule, according to Justice O'Connor, "merely requires a legitimate reason for the decision to escalate the seizure into a full custodial arrest."<sup>175</sup>

In response to the majority's preference to articulate a bright-line rule here (i.e., that warrantless arrests for fine-only offenses are always reasonable under the Fourth Amendment whenever there is probable cause), the dissenters opined that "[w]hile clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the

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172. *Id.* at 1562-63 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)) (citations omitted).

173. *Atwater*, 121 S. Ct. at 1563.

174. *Id.* at 1563-64 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

175. *Id.* at 1564.



Fourth Amendment's protections."<sup>176</sup> As an example of an imprecise but practicable rule in this area, the dissenters offered the *Terry* stop-and-frisk rule.

What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment. Over the past 30 years, it appears that the *Terry* rule has been workable and easily applied by officers on the street.<sup>177</sup>

As for the majority's concern with police officers becoming subject to personal liability under section 1983 if they misapply a constitutional standard, the dissenters found this concern to be "more than adequately resolved by the doctrine of qualified immunity."<sup>178</sup>

Weighing the competing interests presented here, Justice O'Connor came to the conclusion that "neither law nor reason supports [the officer's] decision to arrest her instead of simply giving her a citation. . . . The majority's assessment that 'Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,' is quite correct. In my view, the Fourth Amendment inquiry ends there."<sup>179</sup>

Which is the better view? Both opinions are extraordinarily well reasoned in law, policy, and history, and acknowledge much of the same core Fourth Amendment values. The dissent's final point—its concern with the degree of unbounded and essentially unreviewable police discretion made possible by the Court's opinion—seems to tip the balance here. Despite the absence in the *Atwater* record of a "parade of horrors," the dissent cites the current national debate over racial profiling on the highways (also known colloquially as "DWB"—driving while black) as evidence that "a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."<sup>180</sup> This is not to tar the entire law enforcement community with the same broad brush, but rather to acknowledge that abuses do occur and that where they do, drawing too bright a line can put such actions beyond the reach of the courts to remedy.

Both the majority and the dissenters agree that Mrs. Atwater was grievously wronged. But only the dissenters would offer her the possibility of a judicial remedy. In that regard, the dissenters are truer to the core value of security from unreasonable search and seizure that the Fourth Amendment is explicitly designed to protect.

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1566.

180. *Id.* at 1567.

*E. Sullivan*

The Supreme Court again relied on the *Whren* case in *Arkansas v. Sullivan*.<sup>181</sup> A Conway, Arkansas police officer stopped Kenneth Sullivan in 1998 for speeding and having an improperly tinted windshield.<sup>182</sup> Upon seeing Sullivan's license, the officer realized that he was aware of intelligence on Sullivan regarding narcotics.<sup>183</sup> When Sullivan opened his car door in an unsuccessful attempt to locate his registration and insurance papers, the officer "noticed a rusted roofing hatchet on the car's floorboard" and then arrested him for "speeding, driving without his registration and insurance documentation, carrying a weapon (the roofing hatchet), and improper window tinting."<sup>184</sup>

"After another officer arrived and placed Sullivan in his squad car," the arresting officer "conducted an inventory search of Sullivan's vehicle pursuant to the Conway Police Department's vehicle inventory policy."<sup>185</sup> Under the vehicle's armrest, the officer discovered a bag that contained what appeared "to be methamphetamine as well as numerous items of suspected drug paraphernalia."<sup>186</sup> As a result of the search, Sullivan was additionally "charged with various state-law drug offenses."<sup>187</sup>

"Sullivan moved to suppress the evidence seized from his vehicle" claiming "that his arrest was merely a "pretext and sham" to search' him," and that therefore both the arrest and search violated the Fourth and Fourteenth Amendments.<sup>188</sup> The trial court granted the suppression motion, and the Arkansas Supreme Court affirmed.<sup>189</sup> On the State's petition for rehearing, a 4-3 majority of the court rejected the State's argument, based on *Whren*, that the officer's subjective motivation was irrelevant to determining the reasonableness of the arrest and search, so long as there is probable cause for the traffic stop.<sup>190</sup>

The Arkansas Supreme Court declined to follow *Whren* on the ground that "much of it is dicta," and agreed with the trial court that suppression was appropriate because the arrest was pretextual and made for the purpose of searching Sullivan's vehicle for evidence of a crime.<sup>191</sup> The court did not feel that *Whren* precluded such a result; and, alternatively, asserted that even if *Whren* precluded inquiry into the arresting officer's subjective motivation, the court was not precluded

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181. *Sullivan*, 121 S. Ct. at 1877.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Sullivan*, 121 S. Ct. at 1877.

188. *Id.*

189. *Id.*

190. *Id.* at 1877-78.

191. *Id.* at 1878.

“from interpreting the United States Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights.”<sup>192</sup>

The United States Supreme Court wasted few words in summarily applying the back of the hand to the state court on both issues. In a two-page per curiam reversal, the Court first observed that, as in *Atwater*, it was undisputed that the officer had probable cause to arrest Sullivan.<sup>193</sup> Relying on *Whren*, the Court then rejected the state court’s conclusion that the arrest of Sullivan, although supported by probable cause, nevertheless “violated the Fourth Amendment because [the officer] had an improper subjective motivation for making the initial stop.”<sup>194</sup>

The Arkansas Supreme Court’s holding to that effect cannot be squared with our decision in *Whren*, in which we noted our ‘unwillingness to entertain Fourth Amendment challenges based on the actual motivations of individual officers,’ and held unanimously that ‘subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.’ That *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment; indeed, *Whren* itself relied on *United States v. Robinson*, for the proposition that ‘a traffic-violation arrest . . . [will] not be rendered invalid by the fact that it was ‘a mere pretext for a narcotics search.’<sup>195</sup>

The Court similarly made short work of the state court’s alternative holding. “While ‘a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,’ it ‘may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.”<sup>196</sup>

Justice Ginsburg, joined by Justices Stevens, O’Connor, and Breyer (the same four justices who had dissented one month before in *Atwater*) joined the Court’s opinion, but concurred to express the same concern

192. *Id.*

193. *Sullivan*, 121 S. Ct. at 1878.

194. *Id.* (citation omitted).

195. *Id.* (quoting *Whren*, 517 U.S. at 812-13).

196. *Id.* (quoting from *Or. v. Hass*, 420 U.S. 714, 719 (1975)) (emphasis in original). The Court in *Hass* had observed that the Oregon court’s statement that it could “interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court” was “not the law and surely must be inadvertent error.” *Hass*, 420 U.S. at 719 n. 4. Although the Court’s comment smacks of insincere *politesse*, the possibility seems quite real indeed that the error was an editing oversight, given that either the Oregon or Arkansas Supreme Court could easily have insulated its opinion from Supreme Court review by simply resting its holding, at least in part, on its own state’s constitutional analogue of the Fourth Amendment. Doing so would have furnished “adequate and independent state grounds” for decision that would preclude review by the High Court. See *Mich. v. Long*, 463 U.S. 1032, 1041 (1983). If the error was other than accidental, one can only ask, “What were they thinking?”

with the potential for abuse that the Arkansas Supreme Court had.<sup>197</sup> The concurring justices noted the state court's unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity."<sup>198</sup> However, the *Atwood* dissenters considered the *Sullivan* case to be bound by the holding in the prior case "that such exercises of official discretion are unlimited by the Fourth Amendment."<sup>199</sup>

The concurrence noted that the Court in *Atwater* had relied in part on a "perceived 'dearth of horrors demanding redress.'"<sup>200</sup> Taking the baton from Justice O'Connor's dissent in *Atwater*, Justice Ginsburg remarked, "I hope the Court's perception proves correct. But if it does not, if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests,' I hope the Court will reconsider its recent precedent."<sup>201</sup>

#### F. *McArthur*

In 1997, "Tera McArthur asked two police officers to accompany her to the trailer where she lived with her husband, Charles, so that they could keep the peace while she removed her belongings."<sup>202</sup> Officers accompanied her and waited outside while "Tera went inside, where Charles was present."<sup>203</sup> "When Tera emerged after collecting her possessions," she told one officer "who was on the porch . . . that she had seen Charles "slide some dope underneath the couch."<sup>204</sup>

The officer "knocked on the trailer door, told Charles what Tera had said, and asked for permission to search the trailer, which Charles [refused]."<sup>205</sup> The officer then sent the other officer with Tera to get a search warrant.<sup>206</sup> The officer who remained refused to allow Charles, who was also on the porch, to reenter the trailer unless a police officer accompanied him.<sup>207</sup> "Charles subsequently reentered the trailer two or three times (to get cigarettes and make phone calls)," each time observed by the officer from just inside the door.<sup>208</sup> The second officer returned in

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197. *Sullivan*, 121 S. Ct. at 1879.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *McArthur*, 531 U.S. at 328.

203. *Id.*

204. *Id.* at 328-29.

205. *Id.* at 329.

206. *Id.*

207. *Id.*

208. *McArthur*, 531 U.S. at 329.

less than two hours with a warrant and searched the trailer along with other officers.<sup>209</sup>

During their search, the officers found a small amount of marijuana, a marijuana pipe, and a box for marijuana under the sofa.<sup>210</sup> They then arrested Charles for possessing marijuana and drug paraphernalia, two misdemeanor charges.<sup>211</sup> The trial court granted McArthur's motion to suppress the pipe, box, and marijuana on the ground that they were all the "fruit" of a seizure which was unlawful because of the officer's refusal to allow him to reenter the trailer unaccompanied.<sup>212</sup> In his motion, McArthur averred that he would have destroyed the marijuana had he been allowed to reenter.<sup>213</sup> After the Appellate Court affirmed the suppression order and the Illinois Supreme Court denied the State's petition for leave to appeal, the Supreme Court granted certiorari to determine whether the Fourth Amendment prohibits the kind of temporary seizure which occurred here.<sup>214</sup>

The Supreme Court reversed the trial court's suppression order by a vote of 8 to 1.<sup>215</sup> Justice Breyer, joined by all the other Justices except Justice Stevens, wrote the opinion of the Court.<sup>216</sup> Justice Souter, while joining the opinion of the Court, also wrote a concurring opinion.<sup>217</sup> Justice Stevens dissented.<sup>218</sup>

The Court recognized that despite the strong preference that seizures be done pursuant to a judicial warrant, issued by a neutral magistrate after finding probable cause,<sup>219</sup> certain general or individual circumstances may render a warrantless search or seizure reasonable.<sup>220</sup> Looking at the present case, the Court found that the exigencies of the circumstances rendered the officer's actions in preventing McArthur from entering the trailer alone while a warrant was being sought reasonable, and therefore lawful under the Fourth Amendment.<sup>221</sup>

The Court considered four circumstances, in combination with each other, in reaching this determination. First, the police had probable cause, based on Tara's statements, to believe that McArthur had unlawful drugs inside the trailer.<sup>222</sup> McArthur acknowledged the

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *McArthur*, 531 U.S. at 329-30.

215. *Id.* at 327-28.

216. *Id.* at 328.

217. *Id.* at 337.

218. *Id.* at 338.

219. *Id.* at 330 (quoting *U.S. v. Place*, 462 U.S. 696, 701 (1983)).

220. *McArthur*, 531 U.S. at 330.

221. *Id.* at 331.

222. *Id.* at 331-32.

existence of probable cause before the state appellate court and again in his brief in opposition to certiorari.<sup>223</sup> Second, the police had good reason to believe that if given the opportunity to reenter the trailer alone, he would destroy the drugs before they could return with a search warrant.<sup>224</sup> Third, they made reasonable efforts to accommodate McArthur's personal privacy interests by leaving McArthur's home and belongings intact and not searching before obtaining a warrant.<sup>225</sup> And fourth, the restraint on McArthur reentering the trailer was for a limited period of time, less than two hours, and lasted no longer than reasonably necessary for police to obtain the warrant.<sup>226</sup> Under all these circumstances, the Court found the brief seizure of the premises to have been reasonable.<sup>227</sup>

The Court found "significant support in [its] case law" for this conclusion, including cases where the Court "upheld temporary restraints where needed to preserve evidence until police could obtain a warrant."<sup>228</sup> "In our view," concluded the Court, "the restraint met the Fourth Amendment's demands."<sup>229</sup>

Justice Souter concurred to make two points. First, he believed that at least up to the point where McArthur came out to the porch, the risk that he would destroy the drugs would have justified police entering the trailer to make a lawful, warrantless search, which would have been a greater intrusion than what actually occurred.<sup>230</sup> Second, Justice Souter emphasized that "the legitimacy of the decision to impound the dwelling follows from the law's strong preference for warrants. . . ."<sup>231</sup>

Justice Stevens, dissenting, would have dismissed the writ of certiorari as improvidently granted. In his view, the Illinois law enforcement interest in this case was so slight (as evidenced by the legislature's classification of the small amount of marijuana seized as a misdemeanor, punishable by a jail sentence of no more than 30 days) that "this [case] is a poor vehicle for probing the boundaries of the

223. *Id.* at 334-35.

224. *Id.* at 332.

225. *Id.*

226. *McArthur*, 531 U.S. at 332.

227. *Id.* at 333. It could be argued, although it would not make a difference to the outcome or significantly alter the Court's Fourth Amendment analysis, that the police effected a temporary seizure not of the trailer but rather of McArthur, by limiting his freedom of movement to reenter it, or that a seizure of *both* McArthur and the trailer took place.

228. *Id.* at 333-34.

229. *Id.* at 337.

230. *Id.*

231. *Id.* at 338. In federal courts and most states, the defendant has the burden of proof if the search or seizure was pursuant to a warrant, but burden is on the prosecution if police acted without one). Justice Souter concluded that "The law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one." *Id.*

government's power to limit an individual's possessory interest in his or her home pending the arrival of a search warrant."<sup>232</sup> Reaching the merits, however, he would affirm the suppression order in view of the constitutional "sanctity of the ordinary citizen's home," and in reliance on *Welsh v. Wisconsin*,<sup>233</sup> which he reads as holding that "some offenses may be so minor as to make it unreasonable for police to undertake searches that would be constitutionally permissible if graver offenses were suspected."<sup>234</sup>

The majority opinion seems to successfully counter Justice Stevens' sanctity-of-the-home argument by pointing out that the police in fact respected and protected the sanctity of McArthur's home by refraining from entering and searching his trailer until they could get a warrant.<sup>235</sup> The majority also distinguish the *Welsh* case on its facts from *McArthur* finding that the offense here was more serious than the one in *Welsh* (a jailable drug offense, rather than a nonjailable traffic offense), and that the intrusion here was less serious than in *Welsh* (where police entered the defendant's home without a warrant in order to the prevent loss of evidence, namely, the defendant's blood alcohol level).<sup>236</sup>

#### G. Saucier

In 1994, Vice President Al Gore was speaking at an event commemorating the conversion of the Presidio Army Base in San Francisco to a national park.<sup>237</sup> As he began to speak, Elliot Katz removed and began opening a banner from inside his jacket that expressed opposition to experimentation on animals, and walked toward a waist-high fence behind which was the platform where the Vice President was speaking.<sup>238</sup>

Military police officer Donald Saucier and another officer had been warned of the possibility of demonstrations that day and recognized Katz as a person who had protested at the Presidio before.<sup>239</sup> The officers intercepted Katz as he reached the fence, "grabbed [him] from behind, . . . and rushed him out of the area," half-walking, half-dragging him.<sup>240</sup> They shoved him into a nearby military van and drove him to a military police station, where he was detained briefly and then released.<sup>241</sup> Katz was not injured in the confrontation.<sup>242</sup>

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232. *Id.* at 339.

233. 466 U.S. 740 (1984).

234. *McArthur*, 531 U.S. at 340.

235. *Id.* at 330-34.

236. *Id.* at 335-36.

237. *Saucier*, 121 S. Ct. at 2154.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

Katz sued Saucier and other officials in federal court pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>243</sup> alleging that the officers had violated his Fourth Amendment rights by using excessive force to arrest him.<sup>244</sup> The District Court denied Saucier's motion for summary judgment on grounds of qualified immunity, holding that a dispute existed on the material fact of whether Saucier had used excessive force in the incident.<sup>245</sup> On interlocutory appeal from the denial of qualified immunity,<sup>246</sup> the Ninth Circuit affirmed.<sup>247</sup>

The circuit applied a two-step analysis of the qualified immunity issue. First, the court determined that the law regarding Saucier's conduct was "clearly established."<sup>248</sup> The court then looked to see "if a reasonable officer could have believed, in light of clearly established law, that his conduct was lawful."<sup>249</sup> On this issue the Circuit court determined that "the second step of the qualified immunity inquiry and the merits of the Fourth Amendment excessive force claim are identical, since both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene."<sup>250</sup> On this reasoning, the Ninth Circuit held that qualified immunity was inappropriate since, as the District Court had determined, the use of force was an issue of fact for trial.<sup>251</sup>

The Supreme Court reversed on a virtually unanimous vote.<sup>252</sup> Justice Kennedy, joined by the Chief Justice and Justices O'Connor, Scalia, and Thomas wrote the opinion of the Court, holding that the "reasonable belief" and excessive force issues were to be analyzed separately, and that Saucier was entitled to qualified immunity under its

242. *Id.*

243. 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that federal officials may be liable for violating civil rights in the same manner and to the same extent that state officials are under §1983. *Id.* at 389. The only difference between a "*Bivens* action" against a federal official and a § 1983 action against a state official is more theoretical than practical—whereas the right to sue state officials for damages comes from the federal civil rights statute, the *Bivens* action arises directly from the Due Process Clause of the Constitution. The key issue in the *Saucier* case, qualified immunity, is thus analyzed the same as it would be in an action brought against a state official under § 1983.

244. *Saucier*, 121 S. Ct. at 2155.

245. *Id.*

246. Interlocutory appeal is permitted to allow a defendant to challenge a denial of summary judgment on qualified immunity grounds where "the issue appealed concern[s] not which facts the parties might be able to prove but, rather, whether or not certain given facts show] a violation of 'clearly established' law." *Johnson v. Jones*, 515 U.S. 304, 311 (1995). This enables defendants who have meritorious appeals to avail themselves of the purpose of qualified immunity—to avoid the expense and other rigors of defending litigation to which they are immune, not just to be shielded from damages judgments should they be awarded after trial.

247. *Saucier*, 121 S. Ct. at 2155.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 279.



analysis.<sup>253</sup> Justice Souter joined in the Court's analysis of qualified immunity but dissented in part over the result, believing that the case should be remanded for the lower courts to determine the question of qualified immunity pursuant to the Court's opinion, rather than the Court deciding the issue for itself as it did.<sup>254</sup> Justice Ginsburg, joined by Justices Stevens and Breyer, concurred in the Court's judgment, agreeing that Saucier was entitled to qualified immunity but disagreeing with the Court's determination that the qualified immunity and excessive force issues had to be separately analyzed.<sup>255</sup>

The difference between the majority and the concurring justices here is not merely abstract and theoretical. It affects *when* the question of qualified immunity is to be decided, and *if* the officer will have to "stand trial or face the other burdens of litigation."<sup>256</sup> The Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation,"<sup>257</sup> and a preference for deciding immunity questions on summary judgment.<sup>258</sup> The qualified immunity issue can be decided without trial, via summary judgment, more often (though perhaps not all the time) under the majority's "separate-issues" analysis than under the "merged-issues" analysis of the concurrence.

The Court stressed that "the requisites of a qualified immunity defense must be considered in proper sequence."<sup>259</sup> The "threshold question" is much like a Rule 12(b)(6) determination of a motion to dismiss for failure to state a claim for which relief can be granted: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"<sup>260</sup> If a violation is made out, "the next sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."<sup>261</sup>

253. *Saucier*, 121 S. Ct. at 279.

254. *Id.* at 2164.

255. *Id.*

256. *Id.* at 2156 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

257. *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

258. *Id.*

259. *Id.* at 2155.

260. *Id.* at 2156.

261. *Id.* The Court had cautioned in *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) that all constitutional rights are "clearly established," in some sense, by the Constitution itself, but that "if the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. It should not be surprising, therefore, that our cases

In *Graham v. Connor*,<sup>262</sup> the Court had held that because police officers “are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation,” the reasonableness of the officer’s belief as to the appropriate level of force should be judged from the perspective of the officer on the scene at the time of the incident, as opposed to after the fact with the luxury of “20/20 vision of hindsight.”<sup>263</sup> Accordingly, the Court stated in *Saucier* that “[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.”<sup>264</sup> Thus the excessive force inquiry allows for a *reasonable mistake of fact* by the officer.

The qualified immunity inquiry, however, has the additional dimension of allowing for a *reasonable mistake of law*.

The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. . . . Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.<sup>265</sup>

Thus, the Court concluded that it is possible for a court to find an officer to have violated the Fourth Amendment by conducting an unreasonable, warrantless search, but still be entitled to qualified immunity for a reasonable mistake as to the legality of his actions.<sup>266</sup>

Applying these principles to the facts presented here, the Court found that the circumstances “disclose substantial grounds for the officer to have concluded he had legitimate justification under the law for acting as he did.”<sup>267</sup> In other words, “[a] reasonable officer in [Saucier’s] position could have believed that hurrying [Katz] away from the scene, where the Vice President was speaking and [Katz] had just approached

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establish that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant sense[.]”

262. *Graham v. Conner*, 490 U.S. 386, 397 (1989).

263. *Id.* at 396.

264. *Saucier*, 121 S. Ct. at 2158.

265. *Id.* (citation omitted).

266. *Id.* at 2158-59.

267. *Id.* 2159-60.

the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses.<sup>268</sup> Given the uncertainties under which the officer was acting at the time (e.g., whether Katz, by himself or possibly in concert with other persons there, might intend a threat to the security of the Vice President, and how much force would be necessary to protect the Vice President and restore order), the Court concluded,

It cannot be said there was a clearly established rule that would prohibit using the force [Saucier] did to place [Katz] into the van to accomplish these objectives. . . . Our conclusion is confirmed by the uncontested fact that the force was not so excessive that [Katz] suffered hurt or injury.<sup>269</sup>

Consistent with its often stated preference that qualified immunity be decided at the earliest possible time, the Court held that Saucier was entitled to qualified immunity as a matter of law, and that the suit should have been dismissed at an early stage in the proceedings.<sup>270</sup> Rather than working any substantive change in the law of qualified immunity, the Court's holding is probably best understood in this procedural context, that qualified immunity is an issue of law that can and should be decided on summary judgment.<sup>271</sup>

Justices Ginsburg, Stevens, and Breyer concurred in the Court's judgment that summary judgment was appropriate on the basis of the material facts of the case that were not in dispute. However, they "would not travel the complex route the Court lays out for lower courts."<sup>272</sup>

In their view, the Court here had unnecessarily "doubl[ed]" the qualified immunity test of *Graham v. Connor*—which would ask "whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully."<sup>273</sup> Both the issue of qualified immunity and the issue of excessive force hinge, in their view, on this same question.

Under the facts adduced at that stage, the concurring justices would have granted summary judgment based on Katz's inability to identify Officer Saucier as the person who shoved him into the van. Therefore they found that "Katz had tendered no triable excessive force claim against Saucier."<sup>274</sup> In other words, "fact-based" summary judgment should have been granted because Katz failed to establish his case, leaving it unnecessary for the trial court to reach the "law-based" summary judgment issue of whether Saucier was entitled to the defense

268. *Id.* at 2160.

269. *Id.*

270. *Saucier*, 121 S. Ct. at 2160.

271. *Id.* at 2161.

272. *Id.*

273. *Id.* The concurring Justices opined that "The two-part test today's decision imposes holds large potential to confuse." *Id.* at 2160.

274. *Id.* at 2162.

of qualified immunity.

The concurrence shares the majority's preference for resolving qualified immunity via summary judgment. However, seeing the qualified immunity defense and the Fourth Amendment claim as turning on the same question, the concurring Justices would find summary judgment inappropriate "if an excessive force claim turns on which of two conflicting stories best captures what happened on the street."<sup>275</sup>

When a plaintiff proffers evidence that the official subdued her with a chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had. In such a case, the Court's two-step procedure is altogether inutile.<sup>276</sup>

Conversely, in their view, "[o]nce it has been determined that an officer violated the Fourth Amendment by using 'objectively unreasonable' force . . . there is simply no work for a qualified immunity inquiry to do."<sup>277</sup>

This is the most analytically complex and difficult case of the seven search and seizure decisions reviewed in this article. At the end of the day, one wonders just how much ground separates the majority view and concurring views, and whether (or how often) the differing analyses may yield different results in other Fourth Amendment/qualified immunity cases. The majority in *Saucier* did not go so far as to say that the immunity defense in such cases must *always* be decided on summary judgment, but that seems to be the logical consequence of the Court's opinion. The concurrence shares the majority's preference for early resolution of the immunity question, but identifies at least a certain band of cases on the broad Fourth Amendment spectrum, where material facts are truly disputed, in which it believes summary judgment is inappropriate.<sup>278</sup>

At first blush, *Saucier* might seem to be a pro-police decision, providing police with both a belt and suspenders to keep them "clothed" with qualified immunity. However, on closer reading this does not appear to be the case. It will probably require further Supreme Court case law before it can be said categorically that the immunity defense *must always* be decided on summary judgment. Even if that is the eventual rule, however, it would probably neither favor nor disfavor police with respect to the *substantive* law of immunity. Certainly, police would benefit in those cases where summary judgment is granted,

275. *Id.* at 2164.

276. *Saucier*, 121 S. Ct. at 2164.

277. *Id.* This is the reverse of the majority's approach, which can be stated as follows: once it is determined that the officer acted on a reasonable belief that he was acting lawfully, the officer is entitled to summary judgment on qualified immunity grounds and there is no work for a trial on the underlying Fourth Amendment claim to do.

278. *Id.* at 2163-64.

shielding them from having to face the rigors and uncertainty of trial. However, where summary judgment is denied, they would go to trial knowing that if the plaintiff persuades the jury that excessive force was used, they won't have the safety net of qualified immunity underneath them to protect them from incurring personal liability under § 1983. Moreover, denial of summary judgment, by inducing the parties to the settlement table, may be just as dispositive in effect as the granting of summary judgment.

At most, it can be said that *Saucier* favors police by allowing them two bites at the "reasonable belief" apple, one at summary judgment on the qualified immunity issue and the other at trial on the merits of the underlying Fourth Amendment claim. In that light, this decision is arguably more about procedure than immunity.

The law of qualified immunity, and its underlying rationale, are unchanged by *Saucier*. Recognizing the dangers, the uncertainties, and the need to make split-second decisions that are inherent in policing, the law allows for mistakes to be made and immunizes officers from personal liability under section 1983 even when civil rights have been violated, so long as the mistake of either fact or law is an objectively reasonable one.

### III. WHAT DOES IT ALL MEAN?

The Court's seven search and seizure rulings from last term are an idiosyncratic lot and difficult to rationalize as parts of any overall unifying doctrinal trend. However, the Court's voting patterns (if, indeed there is anything like a "pattern" to be discerned here) are *as always* fascinating. As noted in the Introduction to this article, the three cases in which the individual prevailed against the government all involved non-traditional efforts in our nation's often quixotic "War on Drugs."

#### A. Counting noses

These seven decisions, in contrast to a large percentage of the Court's decisions last term do not show any consistent voting "blocs." One-third of the Court's 2000-2001 decisions (26 of 79) were by a 5 to 4 vote.<sup>279</sup> In fourteen of these cases, the Court split identically as it did in *Bush v. Gore*,<sup>280</sup> with the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority and Justices Stevens, Souter, Ginsburg, and Breyer in the minority. None of the Court's search and seizure cases, including the two 5 to 4 decisions (*Kyllo* and *Atwater*), followed that recurring voting pattern.

Two of the seven decisions were unanimous (*Sullivan*), or virtually

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279. David G. Savage, *United they Sit*, 87 ABA J. 34 (Sept. 2001).

280. 531 U.S. 98 (2000).

unanimous (*Saucier*), as to outcome. In the remaining five decisions, only the Chief Justice voted to uphold the governmental interest at issue each and every time. Justices Scalia and Thomas voted in favor of the government in every case except *Kyllo*, where their strongly expressed concern for the sanctity of the home persuaded them to vote in contrast to their usual strong tendency to favor the government in criminal matters.

The remaining Justices voted sometimes for the individual, sometimes for the government, in no readily discernible pattern. Justices O'Connor and Kennedy are often described, with some accuracy, as "swing" votes, who can sometimes be persuaded to part company with the more consistently pro-government Justices. In four of the five split decisions (except for *Atwater*), the individual prevailed against the government if *either* Justice O'Connor *or* Justice Kennedy, or both (as in *City of Indianapolis*), voted that way. However, the true "swing" Justice in these search and seizure cases appears to be Justice Souter, who was the only Justice to vote in the majority in all five cases. His vote was absolutely pivotal in *Atwater*, where his finely detailed analysis of legal history came to the fore in his opinion for the Court's slim majority. Justices Stevens, Souter, Ginsburg, and Breyer voted most of the time, but not always (and not always in agreement with each other) in favor of the individual interest.

All of this ultimately futile nose counting simply underscores the idiosyncratic nature of these search and seizure decisions. That certain Justices tend to favor either the government or the individual in these cases is no profound insight. But is there any way to explain or predict the kinds of Fourth Amendment cases where a majority of the Court has voted, or might vote in the future, to uphold the individual interest against the government's interest in law enforcement? A brief attempted explanation follows.

#### *B. Tweaking the conscience of the Justices and the "War on Drugs"*

Five of the seven search and seizure decisions arose out of drug cases. The two cases where the government prevailed (*McArthur* and *Sullivan*) involved more or less ordinary law enforcement situations—a traffic stop that escalated into probable cause for arrest followed by an inventory search (*Sullivan*), and a response to a domestic incident where officers who were furnished probable cause (when they weren't even looking for it) sealed off the premises while they obtained a search warrant (*McArthur*). The Court had little difficulty in either case recognizing that an officer has to be able to "do what an officer's gotta do," in emerging law enforcement situations. Perhaps the officers in both cases came close to the edge of Fourth Amendment "reasonableness," but the Court as a whole seems quite comfortable

giving the officers there the benefit of the doubt in doing their dangerous jobs, where legal lines governing the extent and limits of search and seizure powers are sometimes less than crystal clear.

In contrast, the three cases where the government interest did not prevail (*Kyllo*, *Ferguson*, and *City of Indianapolis*) all involved non-traditional drug enforcement efforts where the Court was persuaded that the government, in its zeal (or desperation) to “do something” about the problem, had resorted to methods that trample on core Fourth Amendment values. In *Kyllo*, the core concern that resonated with the Justices was the sanctity of the home; in *Ferguson* and *City of Indianapolis* it was the Court’s disfavor of searches and seizures that are not supported by probable cause, or even some quantum of individualized suspicion.

In *Kyllo*, the Court put a brake on (but did not halt) the use of emerging technologies that have the capability of finding out what goes on inside the walls of our houses. As a result of the Court’s determination that the thermal imaging scan of *Kyllo*’s house was a “search” for Fourth Amendment purposes, police may not use these sense-enhancing devices to investigate or to furnish probable cause to arrest or search within the home; rather, they must first have independently-acquired probable cause (and, presumably, a warrant) *before* using them. One still wonders, however, whether the expectation of privacy the Court so vigorously protects here tends to vanish when one leaves home and hearth and ventures out into the world outside.

*Ferguson* and *City of Indianapolis* involved neither individually targeted drug investigations nor fast-developing enforcement scenarios on the streets, but rather governmental *programs* that cast nets (i.e., searches and seizures in the form of urine tests and highway roadblocks), without individualized suspicion, for the purposes of catching and arresting drug offenders. *Ferguson* also involved the distasteful element of governmental intrusion into the physician/patient treatment relationship. By “closely guarding” the category of constitutionally permissible suspicionless searches and seizures as it has in these cases, the Court demonstrates a regard for the traditional requirement of probable cause that approaches, even if it doesn’t quite equal, its reverence for the privacy of the home.

As in *Kyllo*, the plaintiffs in *Ferguson* and *City of Indianapolis* managed to set off a warning bell in the Justices’ consciences that basic freedoms were at risk of falling victim to the War on Drugs, however well motivated that crusade might be. Considering these cases in the same term, the Justices may have perceived a certain Orwellian<sup>281</sup> spectre

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281. George Orwell, *1984* (David Campbell Publishers 1992) (“Big Brother is Watching”). From Justice Scalia’s point of view, the “off-the-wall” thermal imager is too close for comfort to the ultimate “through-the-wall” device, the government telescreen that observes

abroad in the land that gave them serious pause—Big Brother peering into our homes with high technology and monitoring our intimate activities, examining our bodily wastes, and detaining us on the highway without cause, to see if we have been involved with forbidden substances.

All in all, Fourth Amendment rights came through this past Supreme Court term in pretty good shape, probably a lot better than might have been expected. Justice Brennan<sup>282</sup> would be encouraged.

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hero Winston Smith's every action.

282. *See supra* n. 42.



