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Essay

The Fourth Amendment as a “Big Time” TV Fad

by

WAYNE R. LAFAVE*

At a party recently, a woman was overheard to say: “My husband and I love watching ‘The Practice.’ It always gives us something to talk about we hadn’t thought much about before, I don’t know, like the Fourth Amendment.”

When that seemingly innocuous paragraph appeared some months back as the inchoation of an article prominently gracing the pages of the New York Times’ “Fine Arts” section, the average reader probably went by it without a second thought, say nothing of a first. But for programmers, writers and producers all across TV-land, those few words occasioned quite a coruscation—an intense illumination of the usually umbrageous incandescents pendent above their collective crania.

In an industry where the dogma of all dogmata is that imitation is the surest way to ratings success, it is no surprise that the above-quoted paragraph educed instantaneous recognition cum acceptance amongst TV’s fad-mongers of one suppositious immutable truth: that the success of any particular show, station or network during the forthcoming “sweeps” period would depend, more than anything else, upon just how much Fourth Amendment gallimaufry could be heaped upon acquiescent viewers’ plates.

Preparing such suasive salmagundi would have been a tall order indeed except for a most fortunate happenstance: the synchronous unraveling of a Supreme Court Term marked by a captivating

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cavalcade of Fourth Amendment decisions. During that span no less than seven search and seizure cases were brought to their denouement, more than in any other Term since John Jay first gavled to order his coadjuvant coadjudicators as they coadjacently coalesced upon the woolsack of that august body (or, some would say, that October-June body).

To some extent, the resulting shift in TV programming was reflected in the introduction of outré neoteric offerings, such as Fox Network’s fescennine blockbuster, “Search, Sex and Seizure,” to say nothing of the most transcendental ABC miniseries since “Roots,” a nulli secundum denominated simply as “IV” and featuring Arnold Schwarzenegger as the exclusionary rule, John Goodman as the weight of authority, and Nathan Lane as the fruit of the poisonous tree. But even more impressive was the manner in which highly imaginative TV producers managed to weave Fourth Amendment fasciae into the warp and woof of many of television’s mainstays.

TV-land’s newly-developed Fourth Amendment fetish is a matter of considerable interest to me, for I am similarly (albeit terminally) afflicted; the vertiginous vocation of critiquing the Supreme Court’s evolving Fourth Amendment jurisprudence has been my Lebenswerk. Although as a result of those labors I have excavated a rut remarkably long and deep, it would not be correct to say that as a consequence I either have exhausted the subject or am exhausted by the subject. And thus, once I perceived this new direction in American television programing, I began watching TV shows this past season with a frequency and intensity I had theretofore thought would be unbearable.

To my pleasant surprise, what I learned was that this “big time” Fourth Amendment focus provided by the aforementioned afflatus had given TV programs a quality well above the quotidian fare a grangousier public had abided ever since that historic premier pas of

2. For example, one entire episode of X-Files consisted of nothing more than Scully and Mulder preparing a search warrant affidavit, and one program of the preschoolers’ favorite, Blue’s Clues, had host Steve trying to figure out how many clues from Mr. Salt and Mrs. Pepper were needed to add up to probable cause.

Some plans died aborning, as with those of the producers of Hollywood Squares, who concocted a scheme to put a Supreme Court justice in each of the nine squares usually occupied by celebrities and then quiz them about Fourth Amendment minutiae.


4. This term will forever be remembered as Dick Cheney’s full reply, with his customary pauciloquy, see Nicholas Lemann, Letter From Washington: The Quiet Man, THE NEW YORKER, May 2, 2001, 56, to Dubya’s open-mike characterization of a New York Times reporter as an excretory aperture sans pareil.
television, the 1928 broadcast of *Felix the Cat*. The main reason this Times-inspired *satis superque* of search and seizure had such a profound effect, I finally surmised, was an array of High Court decisions filled with enough surprises—both joyful and otherwise—to purvey a plenitude of provocative plot-lines. The resulting change was so dramatic and pronounced that I was prepared finally to foreswear my longstanding Newtonian view of television5 in favor of a Edwardian one.6

Yet another fortunate result of this transmutation was that those wishing to assay the recent work of the Supreme Court regarding the Fourth Amendment no longer have to await divulgation of the customarily overblown and overdue offerings of the law reviews. Rather, a painless and plenteous critique is available just by turning on the TV and clicking the channel selector. The television coverage of my favorite subject has proved to be complete and comprehensive; each and every Fourth Amendment case decided this past Term has been described and analyzed to a fair thee well. Moreover, in each instance the evaluation on TV was precisely that which I would have made had I not been thus “pre-empted.” I took this similitude of synthesis anent the Supremes’ septuple search-and-seizure supererogations as further proof of the much-improved quality of television, although admittedly other interpretations are possible. For example, an acerbic colleague of mine has suggested that it instead manifests that the TV critiques and mine both amount to nothing more than “a few faint glimpses into the obvious.”7

See for yourself.

[CLICK]

**“Larry King Live”: *Atwater v. City of Lago Vista*8**

LARRY: This is a very special evening, as our guest for the full hour is none other than Ross Perot. Mr. Perot is truly an outstanding American. He is a great—

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6. Edward R. Murrow said of television: “This instrument can teach, it can illuminate, it can inspire.” Minow & Lamay, supra note 5, at 174.

7. Clever, but not very original, as many years ago an Oxford wag so characterized the lectures of Benjamin Jowett, Master of Balliol and translator of Plato. Anthony Lane, *Lost Horizon*, *The New Yorker*, Feb 19 & 26, 2001, at 208, 211.

ROSS: Hold on right there, Leery. After all, this ain’t my first rodeo! We need to fish or cut bait. I mean, let’s fry the beans or put out the campfire. I’m here for one reason, and that’s to inform the American people that we’re living in a police state, even down in my stomping grounds, the republic of Texas. Listen to this, Leery.

This here cop in Lago Vista, near Austin, stops this woman for a seat belt violation but then finds out that her child’s seat belt was actually fastened, so then they exchange words, if you know what I mean, and as a result got all cattywhompus with each other. Well, that sticks in the cop’s craw, so he stops her again the next time he sees her a couple months later, and this time he finds the woman and her two young children are not wearing seat belts, so now he’s as pleased as a pig in a barrel of slop. What I’m telling you, Leery, is that he was as happy as a gopher in soft dirt. Anyway, this cop, who must be meaner than a skillet full of rattlesnakes, yells at the woman awhile and then cuffs her hands behind her back, tosses her into the squad car, and then—without fastening her seat belt, if you can believe that, Leery—hauls her off to jail, where they book her, take a mug shot and then toss her into a cell for a spell of striped daylight until she’s bailed out—all for a piddling mumpsimus punishable at most by half a C-note, just pocket change in Texas. She probably had a triple conniption, a real hissy fit, about that—who wouldn’t—and I suspect by the time she was bailed out she looked like she had been rode hard and put up wet. I know if that had happened to me, Leery, I’d be angry as a rained-on rooster.

LARRY: We’ll be back with Ross Perot for more similes in just a moment, but first this commercial messa—

ROSS: Just hold it right there, Leery, before you start drippin’ outa both ends of your taco. The American people don’t want to hear about some damn PMS medicine, they want to hear me talk! Now, this here woman sues in federal court, but the district court grants summary judgment for the city and the court of appeals affirms. If that ain’t enough to worry the warts off a frog, I don’t know what is. Mind you, Leery, this is right here in the good ol’ U.S. of A.! Anyway, this woman takes her beef right up to the Supreme Court, where in a 5-4 decision, closer than a barber-shop shave, the majority held there was no Fourth Amendment violation. It’s enough to make me think that those fellas in the majority couldn’t
pour rain out of a boot with a hole in the toe and directions on the heel.

What I'm telling you, Leery, is that the majority opinion is crazier than a run over dog, as sorry as a two-dollar watch. It starts out with a 20-page dull-as-dishwater history lesson concluding that "history, if not unequivocal, has expressed a decided, majority view that the police need not obtain an arrest warrant merely because a misdemeanor stopped short of violence or a threat of it." Well, whoop-de-do! This looks like history overkill to me, as I don't think ancient history is that helpful if you're fixin' to decide how a 21st-century Fourth Amendment issue comes out. I mean, if that lady had been arrested for a misdemeanor not witnessed by the officer, I'll bet you a Stetson full of sawbucks those Justices wouldn't have put forward those 20 pages to support a conclusion that such an arrest (even if on probable cause) was unconstitutional because contrary to common law. And anyway, I think they're putting the wrong beans in the chili. The law they examined in such persnickety detail concerns the need for an arrest warrant, that is, when an arrest should be on a judge's say-so instead of a cop's say-so. But the facts of the case before the Court raise the question whether custodial arrest, upon whoever's say-so, is ever proper for very minor offenses without some damn good reason for not just writing a ticket, which is a different pot of pisces entirely. As we say down in Texas, you can put your boots in the oven, but that don't make 'em biscuits!

LARRY: I'm not sure I understand tha—

ROSS: I'm moving on to another point, Leery, so just try to keep up. The dissent tells us what the Court has previously said about determining Fourth Amendment reasonableness: look at the facts of the particular case and then assess the search or seizure by balancing the degree of intrusion upon the individual against the degree of promotion of legitimate government interests. Well, get this, Leery: the majority at one point actually wanders down that path and concludes 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." Their boldfaced admission that "Atwater might well prevail" under the traditional approach is then negated by the chuckleheaded assertion that two other considerations mandate a contrary result: (1) the need for "readily administrable rules" necessitates instead the adoption of a bright-line rule which, in effect, treats all cases as if the government interest outweighed the individual intrusion; and (2) following such a bright line rule will have

14. *Id.* at 1553.
15. *Id.* at 1561.
16. *Id.* at 1553.
no untoward consequences, as "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests."

I'm telling you, Leery, that dog won't hunt, for this kind of reasoning is shakier than cafeteria Jell-O. Making police use the citation alternative for fine-only offenses except when the "officer reasonably thinks that a suspect poses a flight risk or might be a danger to the community if released," as the dissenters propose, ain't exactly rocket science. In those states where statutes require precisely that, I'll bet the cops have figured it out. And anyway, I don't think any "bright line" shortcut is justified if it don't produce the "right" result most of the time, by which I mean the result you'd get by actually balancing the interests. That ain't so here, as those piddling fine-only crimes rarely involve any continuing danger or any reason for a cited offender to take the first stage out of town.

But what's really got me plum riled is the Court's second point, that there's no reason to be concerned about police having totally unfettered discretion to choose between a citation and physical custody. Here again, Leery, it looks to me as if the porch light is on but nobody's home! Of these two alternatives, only custodial arrest permits (i) full search of the arrestee's person, (ii) search of the entire passenger compartment of the vehicle in which the arrestee was riding, (iii) impoundment of the car and inventory of the contents, and (iv) incarceration of the arrestee for as long as two days without judicial review. So I'm not just whistling in the

17. Id. at 1557.

About a month after Atwater, another fine-only arrest case hit the Supreme Court, prompting the Atwater dissenters to suggest the epidemic may have begun. Arkansas v. Sullivan, 121 S. Ct. 1876 (2001).

In Sullivan, the trial court had determined that Sullivan's arrest was pretextual and made for the purpose of searching his car for narcotics evidence. Id. at 1878. On this basis, the Arkansas Supreme Court affirmed the trial court's ruling suppressing narcotics evidence found in Sullivan's car after the arrest. Id. The Court granted certiorari and reversed on the spot, in part because of the lower court's faux pas in claiming it had the power, when such a decision would result in an expansion of individual rights, to interpret the Constitution more broadly than the Supreme Court. Id. The Court seemed so intent in slapping down the lower court that it appears not to have noticed that the case presented the intriguing issue of whether the Bertine exception to the pretext-is-irrelevant rule would permit challenge of a vehicle inventory made possible only by a post-arrest impoundment itself linked to a pretextual arrest. Unlike the other Fourth Amendment cases last term, Sullivan received scant attention on TV, and was deservedly dismissed with a curt "goodbye" by malapert quizmistress Anne Robinson at the end of the first round of "The Weakest Link."

18. Atwater, 121 S. Ct. at 1564.
19. Id. at 1557.
bunkhouse when I say that the Court's holding provides a dadgum humongous temptation for cops to choose custodial arrest, either out of spite or in order to see if they might stumble onto evidence of some real crime. And anybody who thinks that's not important has been out to lunch during all the recent hullabaloo about racial profiling. Ask any black or Hispanic, and he'll tell you that these days just driving a car is as risky as squatting with your spurs on! And if, like me—and like Miz Atwater, for that matter—you're not black or Hispanic, you might still get the short end of the stick, 'cause the sun don't shine on the same dog's tail all the time.

The Atwater majority says its ruling squares with that earlier Supreme Court case saying searches and seizures ordinarily can't be challenged because of improper ulterior motives, but that claim is at least half a bubble outa plumb. The dissenters got it right: "it is precisely because those motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness." But if you were expecting the other Justices to understand that, Leery, you were waiting on a toaster that wasn't plugged in!

Are you paying attention, Leery? I mean, do you get all this, or has your cheese slipped off the cracker? It's almost time to put the chairs in the wagon, so let me test you out with this riddle: what has eighteen legs and...

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24. In Whren v. United States, 517 U.S. 806, 812-813 (1996), the petitioners, both African-American, were arrested on drug charges after being pulled over by police officers for purportedly breaking traffic laws. The petitioners contended that the traffic stop was merely a pretext used by the officers to uncover more serious violations and that such pretextual stops allowed for racial profiling. The court nevertheless declined to prohibit pretextual traffic stops of vehicles, leading to a renewed debate about the propriety of racial profiling.


26. Id.


28. Because in some of Ross Perot's prior appearances in the legal literature (which number nearly seven hundred!) he has been characterized as one of the "extremist crazies," Matthew Spitzer, Dean Krattenmaker's Road Not Taken: The Political Economy of Broadcasting in the Telecommunications Act of 1996, 29 CONN. L. REV. 353, 361 (1996), and "as having a propensity for untruthful storytelling," Donald E. Daybell, Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections?, 80 B.U. L. REV. 289, 290 n.5 (2000), I want to emphasize that with respect to his description and assessment of Atwater he is right on the money.
"The David Letterman Show": 
City of Indianapolis v. Edmond

DAVE: Before we get to our guests for this evening, it's time for our Top Ten list: the top ten reasons for the cops in Indianapolis to applaud the Supreme Court's recent decision in the Edmond case. Back in my home state some time ago, the cops in Indianapolis started using something called a drug-offender roadblock. They would set up checkpoints at various places in the city and stop every passing car, ask the driver for his license and registration papers, look in the windows, and then trot one of them there drug-sniffing dogs around each car. If you're carrying any of the stuff, believe me, those dogs have got you cold!

These roadblocks were challenged in court, and the case finally reached the U.S. Supreme Court, which is when my mom alerted me to watch for the decision. She said she was interested simply as a citizen of Indiana, but I don't know; that last batch of brownies she sent me was a little different, if you know what I mean. Anyway, I read up on the subject a little. I learned that the Court had previously held that a dog sniff is no search and also that police can conduct roadblocks for various reasons, such as to check drivers' licenses and to seek out persons driving under the influence, and I figured that would be all it would take, at least for that Scalia guy, [Laughter] to make the Indianapolis roadblocks A-OK. Well, I was right about that, and the same goes for Rehnquist and Thomas, but the other six Supremos felt differently, as they indicated in an opinion by Justice O'Connor.

I've got her opinion right here, and let me tell you, it is pretty powerful stuff. She notes that in none of the Court's prior checkpoint cases "did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing," and she then says that the distinction between "highway safety interests and the general interest in crime control"
has "Fourth Amendment significance." 36 This leads to the conclusion that "because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravene the Fourth Amendment." 37

And I'll tell you, folks, the clincher for me is in this statement: "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." 38 Now, that's a scary thought, even worse than being up close to Richard Simmons.

Of course, those devilishly clever people who brought us the Indianapolis drug checkpoints then claimed the secondary purpose of checking licenses and registrations was justification enough, 39 but the Court wasn't fooled, no siree bob! As the Madam Justice says, if that were the case then "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they included a license or sobriety check." 40 So the important bottom line here, folks, is that "the usual requirement of individualized suspicion" applies to detentions for purposes of narcotics interdiction. In other words, the cops may be able to stop Paul there, but not good citizens like me and you.

There are many reasons why the American public should applaud this Edmond decision, but what we are interested in now are the top ten reasons for Indianapolis cops to do likewise. I now call out onto the stage ten of the Indianapolis Police Department's finest, who will recite those reasons.

1ST OFFICER: Reason # 10: Now maybe the residents of Indianapolis will stop calling us "jack-booted Gestapo."

2D OFFICER: Reason # 9: Now we can get rid of that dog urine smell in the police cars.

3D OFFICER: Reason # 8: Now the city council can forget about renaming the city "Pot-Free USA."

4TH OFFICER: Reason # 7: Now we can go back to finding drug couriers the old fashion way: by racial profiling.

5TH OFFICER: Reason # 6: Now I don't have to continue telling my friends that I'm just a security guard at the K-Mart.

6TH OFFICER: Reason # 5: Now rock stars can resume booking gigs in Indianapolis.

36. Id. at 40.
37. Id. at 41-42.
38. Id. at 42.
39. Id. at 40.
40. Id. at 46.
7TH OFFICER: Reason # 4: Now they can take down those signs at the city limits reading: “The Constitution Stops Here!”

8TH OFFICER: Reason # 3: Now the mayor can stop pretending that he’s Rudy Giuliani.

9TH OFFICER: Reason # 2: Now it’s safe for Dave to visit Indianapolis again.

10TH OFFICER: And, finally, reason # 1: More time to spend at the donut shop.

DAVE: While Biff is passing out complimentary boxes of Krispy Kremes to the officers, let me say one more thing about this Edmond case. Since Paul looks more puzzled than usual, let me state again that what the majority says is that a checkpoint cannot be utilized where the primary purpose is “to advance the general interest in crime control,” and that it is not good enough that there were secondary purposes “of keeping impaired motorists off the road and verifying licenses and registrations.” But, get this folks: then there’s a footnote saying the Court is expressing no view about “whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics.” Now, I’m no Supreme Court justice, nor one of them there high-priced lawyers with the shiny suits and ring on the pinky finger, or even one of those legal pundits that jabber on TV all the time. I’m just a simple late-show host and TV celebrity, but I think I’ve got about an ounce of common sense, which is all it takes to see that if these drug checkpoints are bad, it shouldn’t make any difference what purpose is listed first and what is listed second. And if the Court doesn’t make that clear when the time comes, I guarantee that you’ll hear about it on this show during our occasional “Stupid Supreme Court Tricks” segment.

[CLICK]

“Sixty Minutes”: Saucier v. Katz

LESLIE STAHL: And now, a few minutes with Andy Rooney.

ANDY: Do you get a lot of junk mail? I do too. If its junk mail, why doesn’t the post office just junk it? Look at this pile on my desk—catalogs, bills, illegible post cards. And this paperback booklet isn’t even addressed to me; it should have been delivered to the CBS legal department. Lawyers get these things all the time; they’re called

41. Id. at 44 n.1.
42. Id. at 32.
43. Id. at 47 n.2.
44. 121 S. Ct. 2151 (2001).
“advance sheets.” I wonder why they call them advance sheets. I mean, just what is being advanced, and by whom? And does this mean there are also “retreat sheets”? These advance sheets are published by a company called West. I wonder why they call it West? The cover says they’re located up in St. Paul, Minnesota. I’d call that north, wouldn’t you? My lawyer—I’m sure there’s a bill from him in this pile somewhere—tells me there are advance sheets, or “Reporters,” for all parts of the country: Atlantic, Northeastern, Northwestern, Southeastern, Southern, Southwestern, even Pacific. I looked in a Pacific Reporter once and found cases from Kansas. Does West really think Kansas is on the Pacific? Then I looked in a Northeastern Reporter and found Illinois cases. Does West really think Illinois is in the Northeast? No wonder West doesn’t understand that it is north instead of west! You know what I think? I think they need a Midwestern Reporter. That’s where Illinois and Kansas really belong.

Now, this booklet I received is different; the cover says “Supreme Court Reporter.” I’ll bet this Reporter is more important than those with dislocated states. Let’s take a look inside. Ah, here’s a case called Saucier v. Katz. First comes a bunch of numbered paragraphs they call headnotes. But if footnotes are at the very bottom of the page, I wonder why headnotes aren’t at the very top of the page. Then comes a “syllabus,” but down at the bottom of the page it says: “The syllabus constitutes no part of the opinion of the Court.” What I’d like to know, then, is: what is it doing there? Can’t lawyers understand the case without a syllabus? When I find my lawyer’s bill in this pile, I’ll bet he has charged me for reading lots of cases, although I think he has probably just read a bunch of syllabi. And by the way, I think more than one syllabus ought to be called a traffic jam.

Looking at this syllabus, I see that the case involves an exciting Al Gore speech, if that isn’t an oxymoron. But the excitement was provided by one Katz, who—true to his name—tried to unfurl an animal rights banner during Gore’s talk at a military base, only to be hustled away and shoved into a van by a couple M.P.s. Katz sued one of them for damages, and the case came to the Supreme Court on a highly technical point: whether the Ninth Circuit—aren’t they always getting reversed?—was correct in concluding that the M.P.s qualified immunity claim posed an issue identical to that which would determine the merits of Katz’s lawsuit. No says a majority of the Supreme Court, as the merits of an excessive force claim depend

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45. Id. at 2151.
46. Id. at 2154.
47. Id.
upon whether the defendant officer's factual mistakes were reasonable, while the immunity matter "has a further dimension" regarding the officer's reasonable mistakes about "the legal constraints on particular police conduct." The concurring Justices say that's not so because both issues "hinge on the same question," but I'll tell you what I think. I think those justices are flat-out wrong even though I don't understand the majority's distinction. After all, drawing distinctions inexplicable to the rest of us is what lawyering is all about!

But what I like best about this case is that the concurring Justices then go on to conclude that under their approach Katz can't proceed with his case, as Saucier could have reasonably believed hurrying Katz from the scene was appropriate, and anyway a TV videotape of the event shows that Saucier wasn't even the M.P. doing the shoving into the van. Back when this case was argued, I saw an article in the paper stating that some of the Justices had watched a TV videotape of Katz's arrest, which had influenced their thinking about the case, while other Justices refused to watch the tape. Well, I think that the Justices should always watch such tapes when reviewing challenged police actions, and that police-citizen encounters should always be videotaped so that such review would be possible. After all, if instant replay is good enough to be used in NFL games, then surely...

[CCLICK]

"Candid Thermal Imager": *Kyllo v. United States*

PETER FUNT: Yes, you heard the announcer correctly, folks, the new name of our show is *Candid Thermal Imager*, replacing *Candid Camera*. Undoubtedly this is the most exciting change that has been

48. Id. at 2158.
49. Id.
50. Id. at 2161.
51. Id.
52. Id. at 2161-62.
53. Although people Rooney's age often make things up, he's right about this. Fort Myers News-Press, March 21, 2001, at 5A, col. 1, reports that Justices O'Connor and Breyer watched the videotape and found it to portray a situation different than had been represented in court, and that the unlikely duo of Justices Stevens and Scalia had declined to look at the tape.
54. Thomas George, *The N.F.L. Decides to Renew Replay*, N.Y. TIMES, March 29, 2001, at D8, col. 1, reports that National Football League owners voted in favor of a three-year renewal of instant replay, used the last two seasons on a one-year basis, "in the hope that the certainty of its use would result in more extensive analysis of it and a search for ways to improve it."
56. This programming move may have been inevitable, given the increasing
made in this program since my father, Alan Funt, started "Candid Camera" as a radio program back in 1947. Now we can catch people in the act of being themselves even when they are in the supposed privacy of their own homes! And it is all made possible by one of the finest examples of modern law enforcement technology, the thermal imager.

SUZANNE SOMERS: My cousin has one of those, Peter, but he can't play it very well.

FUNT: No, Suzanne, what you're thinking of is a theremin. A thermal imager is that gadget over there you see pointed at that house. This little rascal, officially named the "Agema Thermovision 210 thermal imaging device," is now freelancing for us after a highly successful career in law enforcement, including some extraordinary detection work in a case where it left the defendant, a fellow called Kyllo, in quite a dither.

SOMERS: Its interesting you should bring that up, as my cousin can't seem to figure out how to play it either.

FUNT: No, my callipygian friend, I believe you're thinking of a zither. Anyway, in this Kyllo case, which ultimately reached the Supreme Court, ol' 210—as he is affectionately called by the narcs—detected and measured the amount of heat emanating from a certain residence, and because that information suggested that marijuana was being grown therein, ol' 210's information was used to get a search warrant.57 The question before the Supremes was whether ol' 210 himself engaged in an illegal search, thus tainting the marijuana later seized in reliance upon the judge's ukase (and no, Suzanne, I don't mean ukulele). The lower court had answered in the negative, as had most other courts confronting the same issue, but the Supreme Court, in a strange bedfellows58 5-4 decision, concluded otherwise. In a very well-crafted opinion, Justice Scalia restated the much-maligned Katz expectation-of-privacy test in less abstract terms as to one important genre of cases, stating "that obtaining 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' constitutes a search where (as here) the technology in question is not in general public use."59

I tell you, Suzanne, after reading both opinions in Kyllo I feel as if I have witnessed a sword fight in which both sides drew blood. The


57. Kyllo, 121 S. Ct. at 2041.
58. Scalia, for the majority, was joined by Breyer, Ginsburg, Souter and Thomas; Stevens, for the dissenters, was joined by Kennedy, O'Connor and Rehnquist. Id. at 2040.
59. Id. at 2043.
dissenters’ most telling blow concerns the majority’s “not in general public use” qualification, rightly condemned as “somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available.”61 Scalia attempts to deflect the criticism by correctly noting that the limitation comes from “this Court’s precedent,”62 but having said that appears to concede a need on some future occasion “to reexamine that factor.”63 I’d say that is definitely the case, even though the Court appears to be more demanding in Kyllo than before as to what constitutes “general public use.”64

One thing I like about the majority opinion in Kyllo is that it does not impose extreme burdens upon the Fourth Amendment’s “people” in terms of what they have to do to protect their privacy, in sharp contrast to the dissenters’ view that those who don’t want to suffer the kind of privacy intrusion Kyllo did should “make sure that the surrounding area is well insulated.”65 But what I like most about Scalia’s approach is that he forthrightly recognized the need to take a stand now against the increasing intrusiveness of modern technology,66 instead of waiting, as would the dissenters, until the equipment is even more sophisticated and the intrusions even more severe.67 Since snooping is my business, I’ve done a bit of reading on the subject, so I can tell you that the Scalia opinion is true to the wisdom imparted long ago in Boyd v. United States.68 In much the same fashion as in Kyllo, the government in Boyd said the conduct at issue there shouldn’t trouble the Court because it lacked “many of the aggravating incidents of actual search and seizure.”69 This prompted the grandiloquent response by the meticulous70 Justice

60. Id. at 2050 n.5.
61. Id. at 2050.
62. Id. at 2046.
63. Id.
64. I believe Funt is referring to the fact that in Kyllo the majority concluded it was clear beyond question that thermal imagers are not in general public use even though, as the dissenters pointed out, there are at least 11,000 imagers out there “for commercial, personal, or law enforcement purposes, and is just an 800-number away from being rented from ‘half a dozen national companies’ by anyone who wants one.” Compare Dow Chemical Co. v. United States, 476 U.S. 227, 251-252 n.13 (1986) (dissenters complain that $22,000 aerial mapping camera—use of which held by the majority to be no search—not likely to be purchased by “members of the public”).
65. This is reminiscent of some earlier cases stating, in effect, that one residing in a hotel or apartment building has “the choice of papering over his transom and stuffing his keyhole or else having a policeman look in.” 1 LAFAVE, supra note 3, at 493.
67. Id. at 2045.
69. Id. at 635.
70. Best remembered for his calculation that the Crucifixion occurred precisely on
Bradley that "unconstitutional practices get their first footing... by silent approaches and slight deviations from legal modes of procedure," so that it "is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."71

SOMERS: I remember that from my football cheerleading days: "Obsta principiis—Resist the opening wedge!"72 To put the point another way, Peter, had the Court come out differently, then what we do on this show would become so common-place that we'd probably be canceled.

FUNT: So true! Ah, we're having some good luck here. The door of the house ol' 210 has had under surveillance for the past several days has just opened, and the man I assume lives there is now walking down the driveway in our direction. Excuse me, sir, may we have a word with you?

VICTIM: Sure.

FUNT: Do you live here?

VICTIM: Certainly do! My wife and I have lived here almost a year.

FUNT: There sure has been a lot of heat emanating from your basement these past few days. Tell me, are you growing marijuana down there?

VICTIM: Well, er, ah...

FUNT: And last night after you retired, we detected an extraordinary amount of heat escaping from the bedroom window. Tell me, were you...

VICTIM: Wait a minute! Aren't you that guy on TV?

FUNT: Smile! You're on "Candid Thermal..."

[CLICK]

"The Jerry Springer Show": Ferguson v. City of Charleston73

SPRINGER: Hello, everyone, and welcome to our show, where we seek enlightenment through confrontation, contentiousness and conflict. Our combatants today are two Justices of the Supreme Court, the Honorable Antonin Scalia and the Honorable Ruth Bader Ginsburg.74 Just a reminder that on Wednesday's show there will be a

71. Boyd, 116 U.S. at 635.
72. Yes, this really is the nonliteral translation. See KEVIN GUINDAGH, DICTIONARY OF FOREIGN PHRASES AND ABBREVIATIONS 179 (1965).
73. 121 S. Ct. 1281 (2001).
74. Those who believe that "Jerry Springer is a world without law... the 'anti-
rumble between the Bloods and the Crips, followed on Thursday with an equally gory bout of jurisprudential fistcuffs between the Positivists and the Crits. Now on with today's show, starting with Justice Ruth Bader Ginsburg, who I first want to ask: Badder than what?

GINSBURG: That's Bader; it rhymes with gasconader, which brings us back to you, you impertinent twit!

SPRINGER: Very well, Mrs. Justice. My first question to you concerns the justification for the Court's recent Ferguson decision.

GINSBURG: In Ferguson, staff members at the Charleston public hospital, concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment, offered to cooperate with the city in prosecuting mothers whose children tested positive for drugs at birth. Accordingly, a task force made up of hospital representatives, police, and local officials developed a policy which set forth procedures for identifying and testing pregnant patients suspected of drug use; contained police procedures and criteria for arresting patients who tested positive; and prescribed prosecutions for drug offenses and/or child neglect, depending on the stage of the defendant's pregnancy. Other than provisions describing substance abuse treatment to be offered women testing positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns. Obstetrical patients arrested after testing positive for cocaine filed suit challenging the policy on the theory that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches. But the Fourth Circuit held that the searches in question were reasonable as a matter of law under our cases recognizing that "special needs" may, in certain exceptional circumstances, justify a search policy designed to serve non-law-enforcement ends.

Wapner"," and that "where law ends, Jerry Springer begins," 659, Lisa Scottoline, Get Off the Screen, 24 NOVA L. REV. 655 (2000), may find it difficult to accept the appearance of two Supreme Court justices on his show. It is well to note, however, that there have been tracasseries between justices in the past so intense as to deserve comparison with a Springer show stramash. See, e.g., Roger C. Hartley, Alden Trilogy: Praise and Protest, 23 HARV. J.L. & PUB. POL'Y 323, 325 (2000) (describing an exchange between justices that "was ['n']ot exactly a street brawl episode of "The Jerry Springer Show," but... was about as close to high drama as it gets."); Jeff Bleich et al., Courtly Manners: Is Rudeness From on High Eroding Civility Throughout the Profession?, 59 OR. ST. B. BULL. 19, 20 (Oct. 1998) (noting that a "quarrel between Justices Black and Jackson, in particular, reached Jerry Springer-esque lows").

75. Ferguson, 121 S. Ct. at 1284-85.
76. Id. at 1285.
77. Id. at 1286.
78. Id. [citing Chandler v. Miller, 520 U.S. 305, 309 (1997)].
Now, a majority of the Supreme Court in *Ferguson* quite rightly concluded that the instant case differed in various ways from the four previous cases in which the Court considered whether comparable drug tests fit within the closely guarded category of constitutionally permissible suspicionless searches. We pointed out that the most critical difference was the nature of the "special need" asserted: in each of the prior cases, the "special need" was one divorced from the State's general law enforcement interest, while here the policy's central and indispensable feature from its inception was the use of law enforcement to coerce patients into substance abuse treatment.

Thus, while the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal. Because of that purpose and the extensive involvement of law enforcement officials at every stage of the policy, we decided *Ferguson* simply did not fit within the closely guarded category of "special needs." The majority's conclusion in *Ferguson* is a most reasonable one and, indeed, is an essential one, for if the "special needs" doctrine were not reigned in this way, then the traditional Fourth Amendment protections of warrant and probable cause in criminal prosecutions could be too readily circumvented. Of course, my "learned brother" here, in a dissenting opinion joined in by his cohorts Rehnquist and Thomas, came out differently.

**SPRINGER:** Gee, I had no idea you two were siblings.

**SCALIA:** We're not, thank God! "Learned brother" is merely a term of respect used by one judge when referring to another, or at least it was before everything became confused by appointing female judges. But in any event, this time it was said with sarcasm rather than respect.

**GINSBURG:** Well, you're not a choshever mentsh, as we say in Yiddish.

**SCALIA:** Le vostre osservazioni sono completamente errate. Come dicono in Italia, la vostra testa deve essere riempita di gorganzola.

**GINSBURG:** Gai feifen ahfen yam! Zol ze vaksen ze ve a tsibble mit de kopin dreyd.

79. *Id.* at 1288.
80. *Id.* at 1289-90.
81. *Id.* at 1291.
82. *Id.* at 1292.
83. *Id.* at 1291-1292.
84. [English subtitle] Respected person.
85. [English subtitle] Your observations are completely wrong. As they say in Italy, your head must be filled with gorganzola.
SCALIA: Siete una persona insensata. 87 Aaaaaaaaauuuuugghhh!!!
SPRINGER: My God, did you see what she did to him. That was some sockdolager! Quick, turn off the cameras, and call the police and an ambulance!
PRODUCER: I was tipped off about these two, so we’ve got the cops and medics standing by back stage.
SPRINGER: Well, I’ll be . . .

[CLICK]

"So You Want to be a Millionaire": *Florida v. Thomas* 88

REGIS PHILBIN: If you have just joined us, you can probably feel the tension and excitement here. In the hot seat is Smedley Perdant, the retired logician from Chagrin Falls, Ohio, who has just won half a million dollars and is now poised to take on the million dollar question. And get this, folks: he has done it all by utilizing his skills in logic, and thus has *all three* of his lifelines remaining. So here’s the final question: “Reviewing a Florida case holding the Supreme Court’s *Belton* rule, 89 that the passenger compartment of a vehicle may be completely searched incident to the arrest of an occupant of that vehicle, is inapplicable when the arrestee exited the vehicle prior to any efforts by the police to encounter him, the Supreme Court, after hearing oral argument: A. Decided for the defendant; B. Decided for the state; C. Had a tie vote; D. Decided it could not decide.”

SMEDLEY: I’d better phone a friend, actually my lawyer, whose name is Legis.
REGIS: I’ll ask our friends at A.T. & T. to get in touch with him.

[ring]
LEGIS: Hello!
REGIS: Legis, this is Regis . . .
LEGIS: Regis, this is Legis.
REGIS: Is there an echo in here, or what? Legis, your friend, or maybe I should say your client, needs your help with the million dollar question. As soon as he asked to call you, we didn’t press the question with him any further, just as *Miranda* requires. 90 Maybe you can help out on a contingent fee basis. Anyway, he’ll read you the

86. [English subtitle] Go peddle your fish elsewhere! You should grow like an onion with your head in the ground.
87. [English subtitle] You are one foolish person.
89. See *supra*, note 21 and accompanying text.
question and the four possible answers. Smedley, you have 30 seconds starting right now.

SMEDLEY: Reviewing a Florida case holding the Belton rule inapplicable when the arrestee exited the vehicle before the police sought to encounter him, the Supreme Court: A. Decided for defendant; B. Decided for the state; C. Had a tie vote; D. Decided it could not decide.

LEGIS: Well, I think we can eliminate C, as you can't have a tie with nine Justices unless one isn't participating, and since they all participated in the review of another Florida case, Bush v. Gore,\(^9\) they probably all participated here too. As between A and B, A is definitely the answer the Court should give. After all, Belton adopted a highly artificial "bright line" rule so that cops would not have to think too hard about when an arrestee might be able, notwithstanding his arrest, to reach items in the vehicle, and it makes no sense to extend such a rule to cases where the suspect wasn't even in the car when the cops first approached, as the purported uncertainty surely does not exist in such a situation. So, on the one hand, I think that had the Court instead opted for B, there would have been a huge outcry, comparable to the full page ad in the New York Times after Bush v. Gore,\(^9\) where several hundred law professors joined together in a decidedly Renault-esque\(^9\) statement declaring that they were shocked, absolutely shocked, that politics could enter into a Supreme Court decision. On the other hand, maybe the answer is B, as a Court that has held it is constitutionally permissible for police to make subterfuge arrests\(^9\) and to make custodial arrests when clearly a summons would suffice\(^9\) might also broaden the range of situations in which the police are tempted to do both. Still another consideration is — [click].

REGIS: I’m sorry, Smedley, but the time ran out. Maybe that’s inevitable when you ask a lawyer to answer a question in 30 seconds. And all this “on the one hand”/ “on the other hand” stuff reminds me of the hoary wheeze about the guy who wanted a straight answer to a legal question, so he went looking for a one-armed lawyer. But enough of that. Smedley, you still have two lifelines left.

SMEDLEY: Let’s poll the audience.

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92. Id.
93. The reference, of course, is to a character in the classic motion picture Casablanca (Warner Brothers, 1943), Captain Louis Renault, Prefect of Police, who declared he was “shocked, shocked to find gambling is going on in” Rick’s Cafe Americain, only to be immediately approached by the croupier, who announced, “Your winnings, sir.”
REGIS: Members of the audience, please press either A, B, C or D on your keypads now. Well, look at these numbers, Smedley. A, 32%; B, 29%, C, 12%, D, 27%. Not much help there!

SMEDLEY: At this point, it would just be a guess on my part. It has been a great run, so I'm going to bow out with the $500,000. And yes, Regis, that is my final —

REGIS: Wait a minute, Smedley, do you really want to give up without even using all your lifelines? Why not see what happens when the computer takes away two of the answers?

SMEDLEY: Well, O.K., Regis, I guess you're right.

REGIS: All right, now we're down to answers A and D, so even pure guesswork would give you a 50-50 chance of winning. Of course, if you pick the wrong answer you drop back to $32,000, thus losing $468,000, but remember that if you pick the right one you instead make an even larger sum, $500,000, for a grand total of one million, which is a lot of spondulicks.

SMEDLEY: Gee, when you put it that way, Regis, the odds look pretty good. A is the answer Legis said the Court should reach, and D is ridiculous—logically, how could the Court decide not to decide that which it had decided to decide? So I'll pick A, and that is my final answer.\footnote{Had not Smedley made this latter declaration, Regis would have asked “Is that your final answer?,” a query required by the show's attorneys and embraced by other lawyers. See, e.g., Louis J. Speltz & Ann S. Grayson, Is That Your Final Answer?: Are Insureds Entitled to Insurance Coverage for Trademark Infringement?, 23 HAMLINE L. REV. 348 (2000); Thomas R. Tinder, “Is That Your Final Answer?”, 2000 W.VA.LAW. 35 (2000).


98. Perhaps prompted by a lawsuit filed against the show by an insurance firm obliged to pay out winnings in excess of half a million dollars, as the firm complained that “two contestants have already won a million bucks apiece by answering such difficult questions as ‘Who is buried in Grant's Tomb?’ and ‘How long was the tour supposed to be for the ill-fated cruise ship on “Gilligan's Island”?’” See Bill Haltom, Coming Soon: Regis Philbin Stars in the 'Trial of the Century,' 36 TENN.B.J. 37, 37 (April, 2000).}

REGIS: Oh, gosh, I'm sorry Smedley, but the correct answer is D, for the Court decided it lacked jurisdiction, meaning it could not decide the issue even if it wanted to.\footnote{Perhaps prompted by a lawsuit filed against the show by an insurance firm obliged to pay out winnings in excess of half a million dollars, as the firm complained that “two contestants have already won a million bucks apiece by answering such difficult questions as ‘Who is buried in Grant’s Tomb?’ and ‘How long was the tour supposed to be for the ill-fated cruise ship on “Gilligan's Island”?’” See Bill Haltom, Coming Soon: Regis Philbin Stars in the 'Trial of the Century,' 36 TENN.B.J. 37, 37 (April, 2000).}

SMEDLEY: What the hell is this, Regis. That's an unfair, trick question.\footnote{Perhaps prompted by a lawsuit filed against the show by an insurance firm obliged to pay out winnings in excess of half a million dollars, as the firm complained that “two contestants have already won a million bucks apiece by answering such difficult questions as ‘Who is buried in Grant’s Tomb?’ and ‘How long was the tour supposed to be for the ill-fated cruise ship on “Gilligan's Island”?’” See Bill Haltom, Coming Soon: Regis Philbin Stars in the 'Trial of the Century,' 36 TENN.B.J. 37, 37 (April, 2000).} And anyway, I was going to take my $500,000 and leave, but you talked me out of it. You cheated me, and you damn well better give me—; ugh, you guys get your hands off me. I'll sue you for every—

REGIS: Sorry we had to rough Smedley up a bit, but no one likes a sore loser.
"The Oprah Winfrey Show": *Illinois v. McArthur* 99

OPRAH: Ladies, I want to tell you a very poignant story about Tera McArthur, who lived in a trailer with her husband Charles in a small community in central Illinois. He was abusive, so she decided to move out on him. 100 [Cheers.] Not only that, she had the cops go with her when she retrieved her clothes, so that he couldn't try anything. 101 [Cheers.] And not only that, but after she got her stuff out of the trailer, she told the cops her pot-puffing worst half had his stash stashed, er, stored under the couch. 102 [Extended cheers and applause.] When he wouldn't let the cops in, Assistant Chief of Police Love sat with Charles on the porch about two hours, during which time he wouldn't let Charles enter the trailer unaccompanied, while Officer Skidis got a search warrant, and the police then served the warrant and found the pot. 103 But a judge suppressed that evidence because he said Love had seized the trailer by sitting outside with Charles and refusing to allow him to enter the trailer unaccompanied, and on appeal that ruling was affirmed, 104 so Charles went scott free. [Gasps of astonishment.] But that decision was later reversed by the U.S. Supreme Court, and so this is a case where both Justice and Love (the Assistant Chief, that is) prevailed! [More cheers and applause.] So I say to Tera, you go, girl!

What the Supreme Court held was that, given the nature of the intrusion and the law enforcement interest at stake, the brief seizure of the premises was permissible under the Fourth Amendment. 105 Applying the Amendment's reasonableness requirement, the Court said that no warrant was required because of the exigent circumstances, and that the intrusion here was reasonable considering the circumstances. 106 Those circumstances were: (1) the cops had probable cause to believe the trailer contained unlawful drugs; (2) they had good reason to fear that, unless restrained, Charles would destroy the drugs before they could get a warrant; (3) the cops avoided a warrantless entry or arrest and merely prevented Charles from entering his home unaccompanied; and (4) they imposed the

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100. Id. at 948.
101. Id.
102. Id. at 949.
103. Id.
104. Id.
105. Id. at 951.
106. Id. at 950.
restraint for a limited period, no longer than reasonably necessary for
them to get the warrant.\textsuperscript{107}

Despite the fact that my fellow Chicagoan Justice Stevens—he’s
the one with the funny bow-tie—dissented because the offense being
investigated was only a minor misdemeanor, I have to say that this
\textit{McArthur} case looks like a no-brainer to me. Now, I’m no lawyer,
but it just seems to me that Charles doesn’t have much of a beef, as
Assistant Chief Love was giving him an overdose of love by doing less
than he could have (or, at least, should have if defendant’s theories
are accepted). For one thing, if Charles is correct in claiming that the
exigent circumstances did not permit Love to maintain the status quo
while Skidis got a search warrant, then surely it must follow that Love
could have made the greater intrusion of simply making an immediate
warrantless search of the trailer. Similarly, Charles’ complaint about
being held on his front porch for two hours while the warrant was
obtained rings hollow as well, as Love had probable cause to arrest
Charles and thus could have made the greater intrusion of
immediately hauling him off to the pokie. And finally, Charles can
hardly object to the fact that Love stood in the doorway when Charles
entered to get cigarettes and make a phone call, as Love could have
made the greater intrusion of keeping Charles out of the premises
entirely.

Now, I’m sure you are all wondering, where did I get that
touching story, and the answer is a book (or perhaps I should say
books), which just happens to be the newest offering of \textit{Oprah’s
Book Club TM}. The name of this amazing disquisition is \textit{Search and
Seizure}, by a Professor LaFave, on the faculty of some college down
state. This marvelous collection of poignant tales is really a rare treat,
though it is actually called a treatise, which, by the way, runs five
volumes. But I am telling you, ladies, once you pick up those five
volumes you will not be able to put them down until you have
finished the final chapter (and perhaps not even then!). Believe me,
after you’ve read LaFave you’ll never go back to the likes of Maya
Angelou and Toni Morrison!\textsuperscript{108} To get your personal set of these
extraordinary volumes, just send . . .

\textbf{[CRASH, TINKLE, TINKLE\textsuperscript{109}]}