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National Association of Criminal Defense Lawyers July 1992

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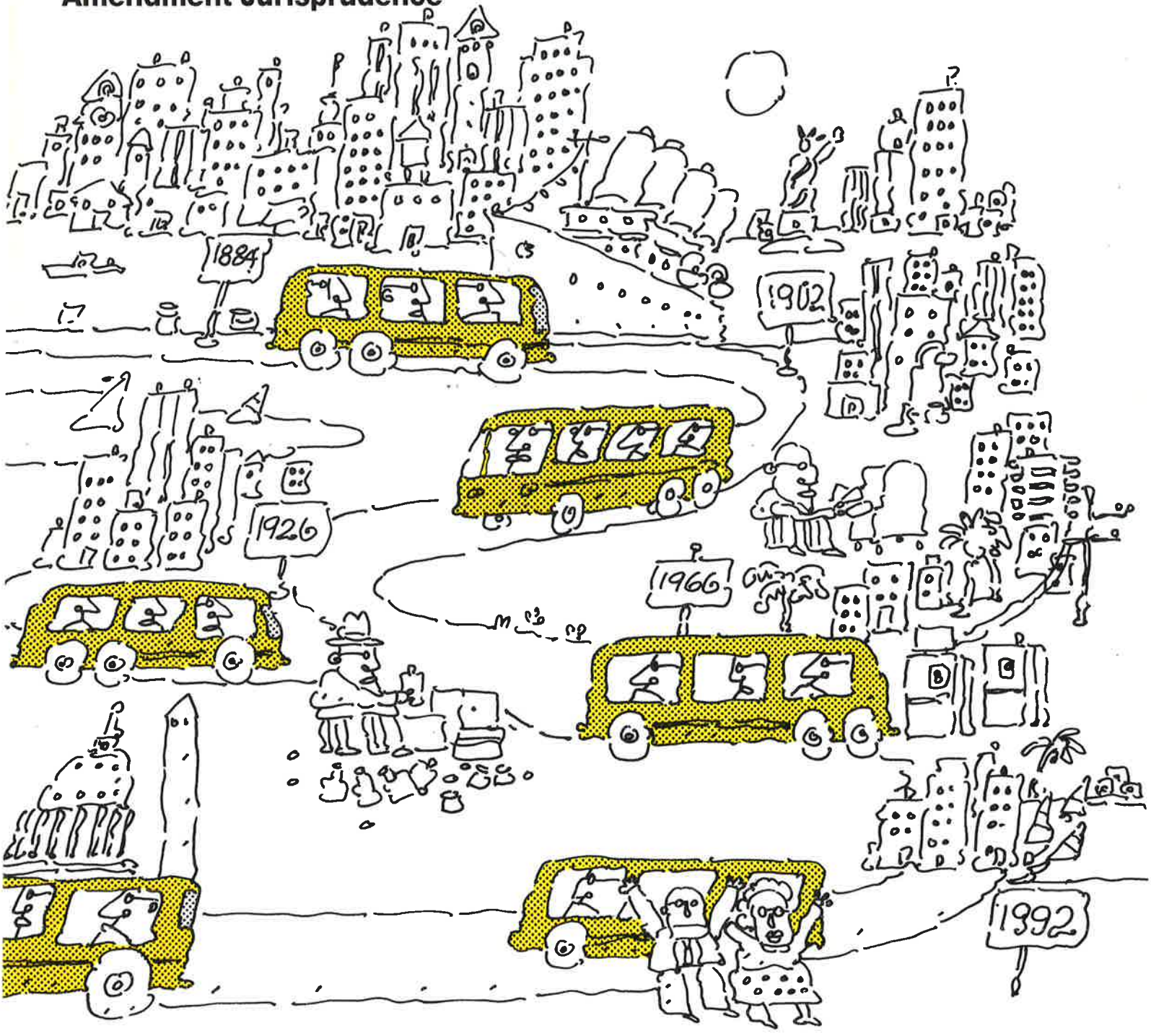
A Guided Tour Of Fourth Amendment Jurisprudence



FOURTH AMENDMENT FORUM

House Arrest : The Physical Removal Of A Mobile Home Under The Fourth Amendment

By Howard M. Srebnick and Scott A. Srebnick

HOWARD M. SREBNICK is serving as a law clerk to Judge Irving L. Goldberg of the United States Court of Appeals for the Fifth Circuit.
SCOTT A. SREBNICK is affiliated with the law firm of William P. Cagney III, P.A., concentrating on appellate and criminal trial practice.

In the October 1990 Term, the Supreme Court issued opinions in four significant Fourth Amendment cases, all of which further limited the scope of constitutional protection afforded to individuals. *See California v. Hodari D.*, 111 S. Ct. 1547 (1991); *Florida v. Jimeno*, 111 S. Ct. 1801 (1991); *California v. Acevedo*, 111 S. Ct. 1982 (1991); *Florida v. Bostick*, 111 S. Ct. 2382 (1991). By contrast, no Fourth Amendment case made its way up to the High Court in the 1991 Term, perhaps to the relief of civil libertarians and proponents of individual rights.

Thus far, the Court has granted *certiorari* in one Fourth Amendment case for the October 1992 Term, and it does not appear that any other important cases are on the horizon. The one case that the Court has agreed to hear, however, *Soldal v. County of Cook*, 942 F.2d 1073 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 1290 (1992), may offer the public its first glimpse at the views of Justice Clarence Thomas on the Fourth Amendment.

Facts

Edward Soldal, his wife, and four children lived in a trailer home, which Soldal owned, on a rented lot in a trailer park in Elk Grove, Illinois. The owner of the trailer park, Terrace Properties, decided to evict the Soldals by suing for an eviction order in Illinois state court. Two weeks before the eviction hearing, however, Terrace Properties undertook on its own to forcibly evict the Soldals by removing their trailer home from the park, even though no court order authorizing eviction had yet been issued (and none ever was).

When two employees of Terrace Properties showed up at the Soldals' trailer home to remove it, they were accompanied by a Cook County deputy sheriff, who told Soldal that he was there to prevent him from interfering with the eviction. In addition, other deputy sheriffs were at the scene to make sure that the eviction ran smoothly. The employees proceeded to disconnect the home from the utilities and towed it off the lot and out of the trailer park. While doing so, they damaged the home.

The Soldals subsequently sued Terrace Properties and the deputy sheriffs, under 42 U.S.C. Section 1983, for violating their Fourth Amendment right against unlawful search and seizure while acting under color of state law. On appeal from the district court's grant of summary judgment in favor of the deputies and employees of Terrace Properties, the Seventh Circuit, sitting *en banc*, framed the question presented as follows: "If police officers disconnect and tow away a trailer home, can their action be challenged under the Fourth Amendment as an unreasonable seizure?" *Id.* at 1075.

Fourth Amendment Seizure: *Privacy v. Property*

As an initial matter, the court held that all the defendants had acted under the color of state law for purposes of a Section 1983 action. The court reasoned that because the presence of deputy sheriffs had prevented Soldal from exercising his right to forcibly resist the unlawful eviction, these sheriffs had, in effect, towed the trailer home away themselves. Moreover, the private defendants had effectively been "deputized" to assist the sheriffs.

As for the merits of the Soldals' claim based on an unlawful Fourth Amendment "seizure," Judge Posner, writing for the six-judge majority, commented that "the usual rules do not apply" when there is no invasion of privacy, or investigative search to accompany a seizure. Neither the deputy sheriffs nor the Terrace Properties employees entered Soldal's trailer home. They did not search his belongings, nor did they "invade the private 'space' for solitude or secrecy." *Id.* at 1077. All that the deputies and employees did was disconnect and remove the trailer home from

the trailer park.

Stated simply, while there was certainly a deprivation of property, there was no traditional *invasion* of privacy. As an analogy, Judge Posner rhetorically asked: "If police tow an illegally parked car, without entering or even looking into it, it is a deprivation of property within the meaning of the due process clause, but is it also a seizure under the Fourth Amendment?" *Id.* at 1079.

Based on this distinction between property and privacy interests, the court held that no interest protected by the Fourth Amendment was implicated. The court acknowledged that police "seizures" often involve invasions of privacy such as when a person's letter, package, or luggage is seized and opened. But those seizures implicate the Fourth Amendment only when they compromise privacy—when the letter is opened and read, or when the package is opened and the contents are viewed.

By contrast, the physical movement of the Soldal's home, the court held, was analogous to the removal of luggage from an airport conveyor belt—held not to be a Fourth Amendment "seizure" in *United States v. Lovell,* 849 F.2d 910, 915-16 (5th Cir. 1988). Had the police taken over or "secured" the Soldal's residence, looking inside without actually searching it, while awaiting the arrival of a search warrant, such interference with privacy would rightly classify as a Fourth Amendment seizure. *Soldal,* 942 F.2d at 1078. According to the court, however, because the physical movement of the Soldals' home left its interior uncompromised and unobserved, it did not constitute a Fourth Amendment "seizure."

In denying the Soldals' Fourth Amendment claim, the court was also moved by the existence of adequate remedies for the Soldals under state law. The court refused to "bend" the Fourth Amendment to regulate "garden-variety commercial disputes of the sort involved in this case." *Id.* at 1076. Indeed, of particular importance to Judge Easterbrook, in concurrence, was the fact that the Soldals had an adequate remedy in local housing court for a claim of premature eviction.

Is the *Soldal* court's reliance on the distinction between property and privacy interests consistent with Fourth Amendment precedent and principles? Judge Flaum writing for the five-judge dissent, observed that the "Fourth Amendment is not concerned exclusively with privacy." *Id.* at 1083. Indeed, Judge Flaum suggested that government acts that infringe upon a property owner's possessory interests and liberty to go about his business implicate the Fourth Amendment as well.

For example, in *United States v. Place,* 462 U.S. 696 (1983), where the police detained the luggage of a suspected narcotics trafficker for 90 minutes in order to subject it to a dog sniff, the Supreme Court held that the bags had been unlawfully "seized" under the Fourth Amendment. The Court reasoned that, although no search had occurred, the police had intruded "on both the suspect's possessory interest in his luggage as well as his liberty interest in proceeding with his itinerary." *Id.* at 708. If the detention of luggage was an unreasonable "seizure" in *Place,* then shouldn't the illegal towing away of a home also be a "seizure" under the Fourth Amendment? In Judge Flaum's words,

> ...the *Soldal* majority has produced a remarkable holding. The Fourth Amendment, it maintains, governs should police intrude upon your privacy by searching your home. Should they instead intentionally eliminate your privacy by participating in the carting away of your residence, the Fourth Amendment can have no bearing.

Even as recently as 1990, the Supreme Court reaffirmed that a substantial invasion of an owner's possessory interest in an article can implicate the Fourth Amendment. In *Horton v. California,* 110 S. Ct. 2301 (1990), the Court distinguished between a search and a seizure as follows: "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." The Court subjected the seizure at issue in *Horton* to Fourth Amendment analysis, even in the absence of an invasion of privacy. *Id.* at 2306.

Analysis

The *Soldal* court's focus on privacy alone is blurred and, not surprisingly, finds little support in the case law. For example, the Soldal court cites *United States v. Lovell,* 849 F.2d 910 (5th Cir. 1988), for the proposition that "not every interference with the exclusive dominion and control over one's property is a seizure in the relevant sense because not every such interference compromises *privacy.*" *Soldal,* 942 F.2d at 1078.

Lovell involved the removal of luggage from an airport conveyor belt by officers seeking to subject it to a dog sniff. Concluding that no Fourth Amendment seizure took place, the Fifth Circuit reasoned: "The momentary delay occasioned by the bags' removal from the conveyor belt was insufficient to constitute a meaningful interference with [the suspect's] *possessory interest* in his bags." *Lovell,* 849 F.2d at 916 (emphasis added). *See also United States v. Harvey,* 1992 WL 74628 (8th Cir. April 16, 1992) (removing bags from overhead compartments on bus for brief dog sniff not a Fourth Amendment seizure "because there was no meaningful interference with appellant's possessory interests in their baggage").

The *Lovell* court distinguished *Place* on the ground that the suspect's bag in *Place* had been taken directly from his person, while the bag in *Lovell* was taken off the conveyor belt (*i.e.* from a third party). More significant, contrary to the *Soldal* court's assertion, the implication of *Lovell* is that a lengthier interference with the suspect's possessory interest might have implicated the Fourth Amendment. The Supreme Court's decision in *Place* compels that conclusion.

Of course, not every interference with possessory rights will implicate the Fourth Amendment, because the Fourth Amendment is concerned specifically with unreasonable "seizures" (and searches) affecting property, not with mere "interference" with property. Judge Easterbrook, in his concurring opinion, voiced the concern that all interferences might be treated as Fourth Amendment violations:

> If the Fourth Amendment indeed covers all governmental action interfering with possessory interests, the implications are startling. Public employees repairing a street negligently rupture a gas main, requiring the evacuation of a city block. That action invades a possessory interest, for it deprives the householders of the practical ability to use their homes...Public utilities will be surprised to learn that turning off the water or electricity poses...a problem under the Fourth Amendment, requiring substantive federal review of the "reasonableness" of the decision —for disconnecting utilities is the step said to prevent the Soldals from using their trailer and so violate the Fourth Amendment.

Id. at 1081.

Judge Easterbrook's concern with the parade of horribles is overstated. Turning off the water is not a Fourth Amendment seizure because it is not a "seizure" at all. Surely, the courts can articulate a mean-

ingful distinction between the interference with a possessory interest depicted by Judge Easterbrook and the actual physical carting away of a mobile home *(Soldal)* or the taking into custody of a suitcase *(Place)*. In *Soldal* and *Place,* interference with property was significant, intentional, and unmistakably physical.

And if it is a parade of horribles with which courts should be concerned, consider this: Under the *Soldal* court's reasoning, officers can cart away the home and if, in so doing, they discover something of evidentiary value secreted underneath the home, the Fourth Amendment is not even implicated. Could the officers tip over the home and view the underside without offending the Fourth Amendment? *See Harvey,* 1992 WL 74628 (Lay, C.J., dissenting); *c.f. Arizona v. Hicks,* 480 U.S. 321 (1987).

Perhaps, as Judge Flaum suggested, the decision in *Soldal* can best be explained as a response to the fear of opening the floodgates of litigation. In particular, the court's unwillingness to recognize the Soldals' Fourth Amendment claim may reflect the concern that every illegal private repossession might be transformed into a Fourth Amendment claim. This fear, according to Judge Flaum, is unfounded, since government officials do not "routinely ignore the law and evict people from their homes solely at the whim of private creditors." *Soldal,* 942 F.2d at 1087.

More significant, the court's reliance on the existence of state court remedies for refusing to "bend the Fourth Amendment" is misplaced. There are a myriad of claims, brought pursuant to Section 1983 to redress constitutional violations, which also have comparable state court remedies. For example, a Section 1983 claim for excessive force under the Fourth Amendment may also be brought as a simple assault or battery action under state tort law. Yet, that fact does not, and should not, diminish or detract from the injured party's constitutional claim. The viability of a constitutional claim for unlawful "seizure" of a home should depend on traditional Fourth Amendment factors, and not on the availability of the plaintiff's remedies under state law.[1] *See Zinermon v. Burch,* 110 S. Ct. 975, 982-83 (1990) (noting, in *dicta,* that a plaintiff may bring a Section 1983 action for an unlawful search and seizure despite the existence of common law remedies).

Conclusion

When the Supreme Court reviews the Seventh Circuit's decision denying the Soldals' Fourth Amendment claim, it should consider whether the Seventh Circuit's focus on the privacy/property distinction is compatible with *Place* and *Horton.* The Court should also consider whether the Seventh Circuit's reliance on the availability of state court remedies is well-founded; perhaps the Seventh Circuit's concern that the recognition of a Fourth Amendment claim in this case would transform every garden variety housing dispute into a constitutional cause of action is exaggerated.

Of course, the Court may alternatively hold, on a more narrow ground, that the assistance provided by the Cook County deputy sheriffs in evicting the Soldals did not rise to the level of state action for purposes of a Section 1983 claim. Given the trend in recent Fourth Amendment cases, such a holding may be a blessing in disguise for civil libertarians. ■

Notes

1. The exhaustion of state law claims may, in some instances, serve as a procedural bar to the raising of a constitutional claim. *See Williamson County Regional Planning Commission v. Hamilton Bank,* 105 S. Ct. 3108 (1985) (state procedures for obtaining "just compensation" through inverse condemnation proceeding must be utilized before a constitutional Just Compensation Clause claim is ripe for adjudication).