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Atwater v. City of Largo Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment

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*ATWATER V. CITY OF LAGO VISTA*¹: BUCKLE-UP
OR GET LOCKED-UP: WARRANTLESS ARRESTS
FOR FINE-ONLY MISDEMEANORS UNDER THE
FOURTH AMENDMENT

*“In a society in which freedom and independence are valued, arrest is the gravest of indignities.”*²

I. INTRODUCTION

Gail Atwater unbuckled her seatbelt and it landed her in the slammer.³ This “soccer mom”⁴ drove her children home from practice and ended up handcuffed, booked, and confined in a jail cell.⁵ Her

1. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding, in a five-to-four decision, that if there is probable cause to believe that an individual has committed any crime, regardless of the ultimate punishment, the officer may arrest the offender without violating the Fourth Amendment).

2. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 264 (1989).

3. See Linda Greenhouse, *Divided Justices Back Full Arrests on Minor Charges*, NEW YORK TIMES, Apr. 25, 2001, at 1, available at 2001 WL 20055665.

4. The media characterized Gail Atwater as the “soccer mom” because she was, almost stereotypically, driving her children home from soccer practice when she was arrested. See, e.g., Laurie Asseo, *Soccer Mom Meets High Court*, ABCNEWS.COM, Dec. 4, 2000, available at: http://abcnews.go.com/sections/us/DailyNews/SCOTUS_soccermom001204.html (last visited Dec. 16, 2002); Andrea Ball, *Soccer Mom Gets Her Day in Court, Supreme Court on Monday will Hear Lago Vista Case Over Seat Belt Arrest*, AUSTIN AMERICAN-STATESMAN, Dec. 3, 2000, at A1, available at 2000 WL 7344532.

5. All of these are commonly associated with an arrest, but case law has authorized additional police activities. These additionally authorized police activities are numerous. Some examples follow. The full search of one’s person incident to arrest and the confiscation of one’s possessions. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding the search and confiscation as reasonable whenever a person is taken into custody). If the arrest involved a car, the entire cabin of an automobile may be searched incident to the arrest, including the packages within the reach of the arrestee, no matter if the containers are open or closed. *New York v. Belton*, 453 U.S. 454, 460-61 (1981). If officers are instructed by their superiors, as a matter of routine, to inventory the items found in the automobile, then pursuant to the instruction, any part of the automobile may be searched. *Florida v. Wells*, 495 U.S. 1, 4-5 (1990); see also *United States v. Lumpkin*, 159 F.3d 983, 987-88 (6th Cir. 1998) (allowing the compartments of the vehicle’s engine to be included within an inventory search); *United States v. Kordosky*, 921 F.2d 722, 723 (7th Cir. 1991) (allowing an inventory search of the locked sidewall compartment of the truck). After a

sentencing judge could have only imposed a fine, but the arresting officer demanded that she serve jail time.⁶

warrantless arrest, an individual may be held forty-eight hours in a jail before having to be taken before a judicial officer for a “determination of probable cause as a prerequisite to extended restraint of liberty following arrest” and the promptness requirement of the law will still be met. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *see also Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (stating that an arrestee must be provided “a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest”). However, if the arrestee was unable to secure bail or post the demanded bond, he or she may be held for a substantially longer time thereby having severe and potentially unconstitutional consequences for poor people. *See Tate v. Short*, 401 U.S. 395, 400 (1971).

6. In Texas, a front seat passenger must wear a safety belt if the car is equipped with belts. TEX. TRANSP. CODE ANN. § 545.413(a) (Vernon 2001). Section 545.413(a) states:

A person commits an offense if the person:

1. is at least 15 years of age;
2. is riding in the front seat of a passenger car while the vehicle is being operated;
3. is occupying a seat that is equipped with a safety belt; and
4. is not secured by a safety belt.

Id.

Additionally, the driver must secure any small child in a safety belt who is riding in the front seat of an automobile. TEX. TRANSP. CODE ANN. § 545.413(b) (Vernon 2001). Section 545.413(b) states:

A person commits an offense if the person:

1. operates a passenger car that is equipped with safety belts; and
2. allows a child who is at least five years of age but younger than 17 years of age or who is younger than five years of age and at least 56 inches in height to ride in the vehicle without requiring the child to be secured by a safety belt, provided the child is occupying a seat that is equipped with a safety belt.

Id. A violation of either of these laws is classified as a misdemeanor, subject to the payment of a fine not less than twenty-five dollars and no greater than fifty dollars. TEX. TRANSP. CODE ANN. § 545.413(d) (Vernon 2001).

Texas law also expressly grants a police officer discretion in choosing when to arrest without a warrant any person found to be violating the seatbelt laws or to issue a citation in lieu of an arrest. TEX. TRANSP. CODE ANN. §§ 543.001, 543.003 - 543.005 (Vernon 1999). Section 543.001 states, “[a]ny peace officer may arrest without warrant a person found to be committing a violation of this subtitle.” TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999). Section 543.003 states:

An officer who arrests a person for a violation of this subtitle punishable as a misdemeanor and who does not take the person before a magistrate shall issue a written notice to appear in court showing the time and place the person is to appear, the offense charged, the name and address of the person charged, and, if applicable, the license number of the person’s vehicle.

TEX. TRANSP. CODE ANN. § 543.003 (Vernon 1999). Section 543.004 states:

(A) An officer shall issue a written notice to appear if:

1. the offense charged is speeding or a violation of the open container law, Section 49.03 Penal Code; and
2. the person makes a written promise to appear in court as provided by Section 543.005.

(B) If the person is a resident of or is operating a vehicle licensed in a state or country other than this state, Subsection (a) applies only as provided by Chapter 703.

Classic search and seizure issues are no longer limited to the events that typically accompany the actions of murderers, robbers, and drug dealers.⁷ Mirroring the unbridled discretion granted to officers of the Crown via writs of assistance⁸ and general warrants⁹ which helped to

(C) The offenses specified by Subsection (a) are the only offenses for which issuance of a written notice to appear is mandatory.

TEX. TRANSP. CODE ANN. § 543.004 (Vernon 1999). Subsection (a) identifies the offenses of speeding and a violation of the open container law. *Id.* Section 543.005 states:

To secure release, the person arrested must make a written promise to appear in court by signing the written notice prepared by the arresting officer. The signature may be obtained on a duplicate form or on an electronic device capable of creating a copy of the signed notice. The arresting officer shall retain the paper or electronic original of the notice and deliver the copy of the notice to the person arrested. The officer shall then promptly release the person from custody.

TEX. TRANSP. CODE ANN. § 543.005 (Vernon 1999). Additionally, the policy of *Lago Vista* regarding the enforcement of traffic laws authorizes custodial arrests as a means of promoting the goal of traffic ordinance compliance. *Riding Without A Seatbelt is a Serious Crime in Texas*, available at http://www.forensic-evidence.com/site/Police/Pol_Atwater.html (last visited Dec. 16, 2002). *Lago Vista's* policy expressly delegates the decision of whether to place a motorist under full custodial arrest to the officer and, according to the police, encourages officers to arrest in such a situation. *Id.*

7. Justice Frankfurter once noted, “it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). Additionally, Justice Douglas observed in *Draper v. United States*, 358 U.S. 307 (1959), that:

Decisions under the Fourth Amendment, taken in the long view, have not given the protection to the citizen which the letter and spirit of the Amendment would seem to require. One reason, I think, is that wherever a culprit is caught red-handed, as in leading Fourth Amendment cases, it is difficult to adopt and enforce a rule that would turn him loose. A rule protective of law-abiding citizens is not apt to flourish where its advocates are usually criminals.

Draper, 358 U.S. at 333-34 (Douglas, J., dissenting).

8. In colonial times, the British government enacted trade restrictions on its American colonies in an effort to discourage colonial trading with any non-English entity. NELSON BERNARD LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 34 (1937). In that vein, Parliament granted colonial customs officers the “‘same powers and authorities’ and the ‘like assistance’ that officials had in England.” *Id.* at 53. Executing these laws required utilization of search warrants, which were called writs of assistance because they required all subjects of the Crown and its officers to assist in their execution. *Id.* at 53-54. Writs of assistance caused much turmoil in the colonies because they were very general in nature, required no return after a search and seizure, and remained in effect six months after the Crown who issued them passed away. *Id.* at 54. Additionally, although the law applied to both the colonies and to England, writs of assistance were much more rigorously used in the colonies, causing much resentment. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 31 (John Hopkins Press 1966). Writs were most frequently used in Boston, the colonies’ largest port, and were apparently issued by the governor without any legal authorization. *Id.* at 31; LASSON, *supra*, at 55. In October 1760, King George II died, and six months later, pursuant to law, all of the writs of assistance issued during his reign were to expire. LASSON, *supra*, at 57; LANDYNSKI, *supra*, at 33. At this time sixty-three Boston merchants retained James Otis, Jr., the Crown’s former supervisor of writs of assistance who had just resigned his position due to his personal disagreement with the use of the writs, to represent them at a hearing to

 fuel the fire of the American Revolution,¹⁰ the Supreme Court's holding

determine whether new writs should be issued. *LASSON, supra*, at 57-58; *LANDYNSKI, supra*, at 33. At the hearing, Otis denounced England's entire policy regarding its treatment of the colonies. *LASSON, supra*, at 58; *LANDYNSKI, supra*, at 33. Fifty years later, John Adams recalled that it was Otis' argument that ignited the nation and "breathed into the nation the breath of life." *LASSON, supra*, at 59; *LANDYNSKI, supra*, at 37. At the hearing, the court was distraught by Otis' argument and ordered reargument a year later. *LASSON, supra*, at 62-63; *LANDYNSKI, supra*, at 35. At the second hearing, the court allowed the issuance of the writs, but the Massachusetts legislature soon responded by passing an Act that outlawed writs of assistance. *LASSON, supra*, at 65-66; *LANDYNSKI, supra*, at 35. However, the colonial governor vetoed the Act. *Id.* Although the writs were determined to be legal, it turned out to be difficult to enforce them because custom laws were being violated with rampant smuggling and mob resistance from the colonists. *LASSON, supra*, at 67-73; *LANDYNSKI, supra*, at 35-38. See also *United States v. Chadwick*, 433 U.S. 1 (1977), where Chief Justice Burger wrote:

It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.

Chadwick, 433 U.S. at 7-8.

9. Following the advent of the printing press, the English Crown became concerned with certain publications being fraught with libel and defiant ideas. *LANDYNSKI, supra* note 8, at 20-22. Consequently, English law developed granting search and seizure power to suppress publications. *Id.* Therefore, general warrants were issued with regularity by the Crown authorizing various people the power of discretion to enter and seize colonial possessions in order to enforce the publication licensing laws. *Id.* at 23; *LASSON, supra* note 8, at 24-29. The use of general warrants continued to expand, and the infamous Star Chamber continued its enforcement of said warrants. *LANDYNSKI, supra* note 8, at 24. General warrants were granting the power to now search for and seize smuggled goods. *Id.* Meanwhile, there was some resistance to the general warrant power influx. Chief Justice Hale stated that general warrants were void because valid warrants had to be based on probable cause and have particularity. *LASSON, supra* note 8, at 35-37. Additionally, William Pitt, while a member of Parliament around 1765, stated:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail-its roof may shake-the wind may blow through it-the storm may enter-the rain may enter-but the King of England cannot enter-all his force dares not cross the threshold of the ruined tenement.

LANDYNSKI, supra note 8, at 25. Parliament was not swayed, and legislation continued to be enacted authorizing the issuance of general warrants. *LASSON, supra* note 8, at 37.

10. The Revolutionary War's roots are found in the after effects of the French and Indian War. *Background to the Campaign: Quick Revolutionary War Tour 1765-1777*, available at <http://ushistory.org/march/phila/background.htm> (last visited Dec. 16, 2002). The British had defeated the French, but the costs of winning proved to be very expensive. *Id.* Consequently, Parliament decided that the colonists should pay a part of the monies spent in the colonies' defense. *Id.* To raise this money, Parliament passed many provisions, including the Stamp Act, the Sugar Acts, and the Townshend Acts. *Id.* The colonists were outraged. *Id.* In response, they formed groups such as the Committees of Correspondence and the Sons of Liberty. *Id.* The protests of the colonialists that followed resulted in the Boston Massacre of 1770 and the Boston Tea Party of 1773. *Id.* Parliament reacted to the colonial backlash by passing the Intolerable Acts. *Id.* The mounting tension between the colonies and England resulted in the convening of the First Continental Congress in 1774 to discuss ways to mend relations between the two groups. *Id.* However, the direction of the convention quickly turned to discussions of revolution, which included encouraging others not to pay their taxes and to arm themselves. *Id.* Shortly thereafter,

in *Atwater v. City of Lago Vista*¹¹ now permits custodial¹² arrests¹³ for very minor violations of law, including those minute infractions that are occasionally committed by ordinary American citizens.¹⁴

the “shot heard round the world” was fired at Lexington, signifying the beginning of the war. *Id.* The Second Continental Congress was assembled in May 1775 where a government was declared with George Washington being chosen as the Commander in Chief of the newly formed army. *Id.* On July 4, 1776, about one year after the Battle of Bunker Hill—the first major American (colonial) victory—Congress adopted the Declaration of Independence. *Id.* The war labored on until the Battle of Yorktown in 1781, where the combined force of American and French troops defeated the British for the last time. *The Yorktown Campaign . . .*, available at <http://www.americanrevwar.homestead.com/files/York.htm> (last visited Dec. 16, 2002). On October 19, 1781, the British surrendered to Washington and the colonial army. *Id.* After much negotiation, the Treaty of Paris was signed on November 30, 1782. *The Treaty of Paris . . .*, available at <http://americanrevwar.homestead.com/files/indexz.htm> (last visited Dec. 16, 2002). America had won its independence from England. *Id.*

11. 532 U.S. 318 (2001).

12. The suggestion that arrests might be divided into custodial and non-custodial categories was first made in *United States v. Robinson*, 414 U.S. 218 (1973), and its companion case, *Gustafson v. Florida*, 414 U.S. 260 (1973). In *Robinson*, the Court used the phrases “custodial arrest” and “lawful custodial arrest” repeatedly in an apparent attempt to distinguish those “arrests” that require the officer to transport the individual to the station house for further proceedings from other forms of arrests. *See Robinson*, 414 U.S. at 236 n.6. This distinction has been acknowledged in cases that followed. *See New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that the police may search the interior of a car incident to a “lawful custodial arrest” of one of the occupants); *Knowles v. Iowa*, 525 U.S. 113, 117 (1998), quoting *Robinson*, 414 U.S. at 234-35 (helping to define and differentiate custodial arrests by stating that “a custodial arrest involves ‘danger to an officer’ because of the ‘extended exposure which follows the taking of a suspect into custody and transporting him to the police station’”). *But see Robbins v. California*, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) (“I am familiar with the distinction between a ‘stop’ and an ‘arrest,’ but I am not familiar with any difference between custodial arrests and any other kind of arrest.”).

13. Throughout this note the terms “arrest” and “custodial arrest” will be used interchangeably. However, both are referring to a custodial arrest, which has been distinguished from a simple arrest by numerous lower courts. *See, e.g., Pittman v. State*, 541 So.2d 583, 585 (Ala. Crim. App. 1989) (holding that a traffic stop that “requir[es] a motorist to sit in a patrol car while the officer contemplates [giving the motorist a ticket] does not constitute a custodial arrest”); *People v. Dandrea*, 736 P.2d 1211, 1215 n.7 (Colo. 1987) (en banc) (contrasting protective custody and custodial arrests by stating “an arrest of a person upon probable cause of having committed a crime for the purpose of taking the person to police facilities for booking is considered a ‘custodial arrest’”).

14. *Atwater* held that, unless the state statute provides otherwise, “[i]f 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.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (emphasis added). This broad language permits an arrest for even the most minor crimes. *See Ricci v. Vill. of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997) (allowing arrest for failure to obtain a license to operate a telemarketing business); *Fisher v. Washington Metro. Area Transit. Auth.*, 690 F.2d 1133 (4th Cir. 1982) (allowing arrest for eating on the subway); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (allowing arrest for littering); *Thomas v. Florida*, 614 So.2d 468 (Fla. 1993) (allowing arrest for failing to have a gong or bell on one’s bicycle); *Barnett v. United States*, 525 A.2d 197, 198 (D.C. 1987) (allowing arrest for “walking as to create a hazard”). During the oral arguments of *Atwater*, reference was made to the arrest of a twelve-year-old girl who was seen eating french fries in a Washington D.C. Metro

The first part of this note presents a brief background of the constitutional jurisprudence regarding arrests.¹⁵ The note then recites the facts that led to this case and the legal proceedings that followed,¹⁶ including the Supreme Court's decision.¹⁷ Next, the note analyzes the Court's majority opinion, remarks on changes and deviations that were made in the law, and questions some areas of the Court's analysis.¹⁸ The note concludes by addressing the significant consequences that the *Atwater* ruling may have on ordinary Americans.¹⁹

II. BACKGROUND

A United States citizen's right to be free from unreasonable seizures is found in the Fourth Amendment which protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²⁰ The Fourth Amendment's central concern is the protection of individuals from

station. Trans. of Oral Arg. at 21-22, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408). See also Petula Dvorak, *Metro Snack Patrol Puts Girl in Cuffs; 12-Year-Old Eating Fries Among 35 Cited or Arrested in Zero-Tolerance Crackdown*, THE WASHINGTON POST, Nov. 11, 2000, at A1, available at 2000 WL 25428673.

15. See *infra* Part III.

16. See *infra* Parts III.A-B.

17. See *infra* Part III.C.

18. See *infra* Part IV.B-D.

19. See *infra* Part IV.E.

20. U.S. CONST. amend. IV. The entire text of the Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. The Fourth Amendment is divided into two clauses: the unreasonable search and seizure clause and the warrants clause. See *United States v. Leon*, 468 U.S. 897 (1984):

The first Clause prohibits unreasonable searches and seizures and the second prohibits the issuance of warrants that are not supported by probable cause or that do not particularly describe the place to be searched and the persons or things to be seized

Thus, any Fourth Amendment case may present two separate questions: whether the search [or seizure] was conducted pursuant to a warrant issued in accordance with the second Clause, and, if not, whether it was nevertheless "reasonable" within the meaning of the first. On these questions, the constitutional text requires that we speak with one voice.

Id. at 960-61 (Stevens, J., dissenting) (footnotes omitted). The unreasonable clause is further divided into two groups: searches and seizures, with each being a separate constitutional event. See *Soldal v. Cook County*, 506 U.S. 56, 68 (1992); *Hortin v. California*, 496 U.S. 128, 133-34 (1990); *United States v. Jacobsen*, 466 U.S. 109, 120-25 (1984); *Segura v. United States*, 468 U.S. 796, 806 (1984). The Fourth Amendment was made applicable to the states in *Wolf v. People of the State of Colorado*, 338 U.S. 25 (1949), and *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961).

A seizure is the "taking possession" of a person so that he or she is not free to leave. *California v. Hodari D.*, 499 U.S. 621, 624 (1991).

arbitrary and oppressive official conduct.²¹ Therefore, an analysis regarding the legality of a seizure will be determined by the reasonableness of the act in question.²² In making such a determination, courts must first consider if, at the time of the Amendment's framing, the common law regarded the seizure in question to be unlawful.²³ If,

21. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) (holding “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State”); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) (“The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 613-14 (1989) (stating that “[t]he Amendment guarantees the privacy, dignity, and security of persons against *certain* arbitrary and invasive acts by officers of the Government or those acting at their direction.”) (emphasis added). It is unclear as to why, and if it was with intention, that the word “certain” was added. Therefore, because of this concern, the government always bears the burden of proving that warrantless searches or seizures are valid. See, e.g., *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that warrantless searches and seizures in a home are presumptively unreasonable); *Coolidge v. New Hampshire*, 403 U.S. 443, 478 (1971) (holding that “searches and seizures . . . without a warrant are *per se* unreasonable in the absence of one of a number of well defined ‘exigent circumstances.’”).

The Fourth Amendment protects all persons in the United States, both suspected offenders and the law-abiding, from official intrusions. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931); *Agnello v. United States*, 269 U.S. 20, 32 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914). Although the Fourth Amendment is most commonly associated with criminal law proceedings, it also applies to civil matters where there is governmental action. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985); *O’Connor v. Ortega*, 480 U.S. 709 (1987); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 312-13 (1978); *Michigan v. Tyler*, 436 U.S. 499, 504-06 (1978); *Camara*, 387 U.S. at 528. *But see Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 285 (1856) (finding the Fourth Amendment does not make reference to, and therefore does not apply to, civil actions for the recovery of money).

22. *T.L.O.*, 469 U.S. at 337 (“[T]he underlying command of the Fourth Amendment is *always* that searches and seizures be reasonable.”) (emphasis added); *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (stating that “[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions.”); *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (holding that the “fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances”).

23. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) (holding that courts should “inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed”). Prior to *Houghton*, the common law at the time of the Amendment’s framing was only one of the factors that courts considered when using a balancing test. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (“We have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing”). Additionally, this guidance is not necessarily dispositive and, therefore, it should be only one of the factors that courts consider in determining reasonableness. *Payton*, 445 U.S. at 592 n.33 (“[T]his Court has not simply frozen into constitutional law those law enforcement practices that existed at

after this historical inquiry, the common law provides sufficient guidance, then the common law controls. Conversely, if there exists significant disparity within the law, courts must then consider if probable cause existed to initiate the seizure.²⁴ Ordinarily, if probable cause had been present, the seizure will be deemed reasonable; hence, there would be no need for courts to continue with their analysis.²⁵ However, if the individual's seizure had been accomplished in an extraordinary manner, courts must proceed to a balancing test to determine the reasonableness of the seizure.²⁶ In balancing, courts must

the time of the Fourth Amendment's passage."); *Wilson*, 514 U.S. at 931 ("[O]ur effort to give content to this term *may* be guided by the meaning ascribed to it by the Framers of the Amendment.") (emphasis added); see *Garner*, 471 U.S. at 13-19 ("Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of historical inquiry."); *Houghton*, 526 U.S. at 307 (Breyer, J., concurring) ("[H]istory is meant to inform, but not automatically determine, the answer to a Fourth Amendment question."). *But see Payton*, 445 U.S. at 591 ("An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable."). In fact, in 1981, the common law at the time of the Amendment's framing was not the key question courts asked. Instead, the Court ruled that "the balancing of competing interests" was "the key principle of the Fourth Amendment." *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring)).

24. Probable cause to conduct a warrantless arrest exists when police have, at the moment of arrest, knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to warrant a belief by a prudent person that an offense has been committed by the person to be arrested. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949); *Henry v. United States*, 361 U.S. 98, 102 (1959)); see also *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) ("It is basic that an arrest . . . must stand on firmer ground than mere suspicion."). Probable cause for a warrantless arrest is to be assessed as stringently as a magistrate would review probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975) (saying that "[t]his issue [probable cause] can be determined reliably without an adversary hearing. The standard is the same as that for arrest."); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 566 (1971) (citing *United States v. Ventresca*, 380 U.S. 102, 105-09 (1965)) (rejecting the proposition that a "reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant").

25. *Dunaway*, 442 U.S. at 208 (finding that the probable cause standard applies to all arrests "without the need to 'balance' the interests and circumstances involved in particular situations"); *Whren v. United States*, 517 U.S. 806, 816-19 (1996) (concluding that a balancing test should not be used when a traffic stop is executed as long as it is based on probable cause).

26. *Whren*, 517 U.S. at 818 (holding that if probable cause is present, the balancing analysis should only be used in those cases "involv[ing] searches or seizures conducted in an extraordinary manner that are unusually harmful to an individual's privacy or even physical interests"). Extraordinary is further determined by looking at the manner in which the seizure was executed. See *Garner*, 471 U.S. 1 (regarding seizure by means of deadly force); *Wilson*, 514 U.S. 927 (involving the unannounced entry into a home); *Winston v. Lee*, 470 U.S. 753 (1985) (regarding the physical penetration of the body); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (concerning a warrantless entry into a home); *United States v. Place*, 462 U.S. 696, 703 (1983) (involving an

weigh the level of the intrusion upon the individual's privacy interest against the extent that the action was needed to promote legitimate governmental interests.²⁷

unacceptable length of detention).

27. *Houghton*, 526 U.S. at 300 (“Where [a historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.”); *see also, e.g., Garner*, 471 U.S. at 8 (“To determine the constitutionality of a seizure [we] must balance the nature and quality of the [governmental] intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”) (quoting *Place*, 462 U.S. at 703); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (the permissibility of a certain practice “is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests”); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (holding that reasonableness in Fourth Amendment problems “depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers’”) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 875-78 (1975)). In doing so, courts should find a current balance between the interests of the individual and society by subjecting contemporary circumstances to the traditional principles of reasonableness. *See Garner*, 471 U.S. at 13 (stating that “[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of historical inquiry”). While balancing, courts should credit the government’s interest with the principle that courts should try to formulate Fourth Amendment rules to be readily applicable to police officers in the field. *New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules “ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged” and not “qualified by all sorts of ifs, ands, and buts”) (quoting Wayne R. LaFare, “*Case-By-Case Adjudication*” versus “*Standardized Procedures*”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)); *Carroll v. United States*, 267 U.S. 132, 157 (1925) (disapproving “very unsatisfactory lines” that are required to be drawn by police officers on a moment’s notice). These readily administrable rules need not be a least restrictive alternative, which may result in judicial second-guessing. *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (“A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.”). “The fact that the protection of the public might, in the abstract, have been accomplished by ‘less intrusive’ means does not, by itself, render the search unreasonable.” *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 n.12 (1976) (“The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.”). *But see United States v. Sharpe*, 470 U.S. 675, 687 (stating that “[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it”).

Additionally, while employing the balancing test, the best indicator of the state’s interest in arresting individuals suspected of committing that offense is the classification and possible punishment that the state legislature has deemed appropriate if found guilty of committing that offense. *Welsh*, 466 U.S. at 753-54 (finding the legislature’s classification to be the “best indication of the State’s interest”); *see Lewis v. United States*, 518 U.S. 322, 326 (1996) (holding “to determine whether an offense is petty [the court] must consider the maximum penalty attached to the offense. This criterion is considered to be the most relevant with which to assess the character of the offense, because it reveals the legislature’s judgment about the offense’s severity.”); *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring) (“Whether there is a reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat

III. STATEMENT OF THE CASE

A. *Statement of Facts*

On March 26, 1997, Gail Atwater drove her two children home from soccer practice in Lago Vista, Texas.²⁸ During their return, one of her children realized that a favorite toy was missing.²⁹ In an effort to find the lost toy, Atwater retraced her route and permitted her children to unbuckle themselves from their seatbelts and stand on their seats so they could have an improved view of the area where the toy may have landed.³⁰

Officer Bart Turek, a police officer with the Lago Vista Police Department, observed the unbuckled children in Atwater's truck and executed a traffic stop upon her vehicle.³¹ Turek approached Atwater's

upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.”)

28. Petitioners' Brief at 2, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408); see *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). Accompanying Atwater in her 1997 Dodge Ram pickup truck were her three-year-old son, MacKinley (Mac), and her five-year-old daughter, Anya. Gaylord Shaw, *Supreme Appeal; One Texas Arrest May Rock Law Enforcement Nationwide*, *NEWSDAY*, Feb. 5, 2001, at A7. Both children were riding in the front seat. *Id.* Lago Vista is a town of about 2,500 people located in the Texas Hill Country, approximately twenty miles northwest of Austin, Texas. *Id.*; see also Allison Pries & David Mitchell, *Going to Jail Over Seatbelts*, available at <http://www.medill.nwu.edu/docket/99-1408fx.html> (last visited Dec. 16, 2002); *Buckle Up Fight Goes To Supreme Court*, *CBSNEWS.COM*, available at <http://www.cbsnews.com/now/story/0,1597,254490-412,00.shtml> (last visited Dec. 16, 2002). She was driving on Dawn Drive, a tree-lined residential street. Shaw, *supra*. See Vin Suprynowicz, *Time to Draw the Line*, *THE LIBERTARIAN*, Dec. 6, 2000, available at <http://billstclair.com/blog/vin/001206.html> (last visited Dec. 16, 2002).

29. Petitioners' Brief at 2, *Atwater* (No. 99-1408). Mac was the first to realize that the toy was missing, screamed to his Mom that his toy was gone, and pleaded for his mommy to go back and find it. *Id.* The toy was a realistic looking winged rubber bat that had previously been affixed to the outside of the truck's window via a suction cup. *Id.* The bat delighted Atwater's children because of the way its rubbery wings would flap in the wind as the truck drove forward. *Id.* The bat had been purchased the day before, at Austin's science museum, and was a favorite of the children because the nocturnal mammals frequently roost while hanging upside down under the bridges that surround the Texas capital. Shaw, *supra* note 28, at A7. Tourists and townspeople admire the daily assembling of the bats as they prepare for the night ahead. *Id.* In fact, predictions of the exact time that the bats will assemble are published daily in the local papers. *Id.* In addition to the children, the truck also contained other motherly possessions including two tricycles, a bicycle, an Igloo cooler, a bag of charcoal, toys, food, and two pairs of the children's shoes. Petitioners' Brief at 29 n.13, *Atwater* (No. 99-1408).

30. Petitioners' Brief at 2, *Atwater* (No. 99-1408). During this back track, Atwater was driving the lone vehicle on a residential street near their home at a speed of approximately fifteen miles per hour. *Id.* at 3; *Today Show: Jonathan Wald* (NBC television broadcast, May 2, 2001). Atwater also unlocked her previously fastened seat belt to search for the missing toy. Shaw, *supra* note 28, at A7.

31. Petitioners' Brief at 3, *Atwater* (No. 99-1408). Turek had been proceeding in the opposite

truck and, after a brief exchange, informed Atwater that she was going to jail.³² Turek then arrested Atwater for the seatbelt violations,³³ and handcuffed her hands behind her back, placed her into his patrol car, and drove her to the police station.³⁴ Once there, her ‘mug shot’ was taken and she was incarcerated alone in a jail cell for about one hour. She was then taken before a part-time municipal court judge who set a bond of three hundred and ten dollars.³⁵ Atwater was immediately released after

direction down Dawn Drive. Shaw, *supra* note 28, at A7. Turek quickly turned his car around, initiated his car’s flashing lights, and Atwater obediently pulled over. *Id.* The children were standing on the front seat, leaning against the dashboard, and had their faces pressed against the windows. *Id.*

32. Petitioners’ Brief at 3, *Atwater* (No. 99-1408). Turek stood at the driver’s side window and began jabbing his finger in Atwater’s face while screaming at her. *Id.* Turek was screaming that they had had this conversation before or that they had met before. *Id.* Turek was apparently commenting on an event of just a short time prior where Turek had pulled over Atwater for an apparent seatbelt violation. *Id.* at 4. However, Turek found that Atwater’s son, Mac, had in fact been wearing a seatbelt, and therefore, no citation had been issued. *Id.* Atwater did acknowledge that Mac was seated in an unsafe location in that he had been seated on the armrest. *Id.* While accusing Atwater of this alleged past violation, Turek’s conduct and tone of voice scared both of Atwater’s children causing them to cry. *Id.* at 3. This was despite an apology offered by Atwater to Turek. Ball, *supra* note 4, at A1 (quoting the police report authored by Turek that read “[t]he driver . . . recognized me and immediately began apologizing for allowing the children to ride unsecured”). Atwater then asked Turek to lower his voice so he would not frighten her children. Petitioners’ Brief at 3, *Atwater* (No. 99-1408). Turek responded to Atwater’s request by telling her that she was going to jail. *Id.* Thereafter, while moving her truck to a safer location pursuant to Turek’s request, Atwater told her children that she was wrong, that they (her children) should have been wearing their seat belts, that the police officer was just doing his job and was trying to protect the children. *Id.* at 29.

33. Petitioners’ Brief at 4, *Atwater* (No. 99-1408). Atwater and her two children were each unbuckled, thereby constituting multiple infractions. *Id.* Turek also had the option to issue a citation for the apparent violations. See TEX. TRANSP. CODE ANN. §§ 543.003-543.005, *supra* note 6. Immediately before being arrested Atwater asked Turek if she could take her children to a friend’s residence just houses away. Petitioners’ Brief at 4, *Atwater* (No. 99-1408). Turek refused as he had planned to also take her children into custody. *Id.* Luckily, some of the neighborhood children who had gathered around Atwater’s truck summoned a friend of the family, and Atwater’s children were placed into the friend’s care. *Id.*

34. Petitioners’ Brief at 4-5, *Atwater* (No. 99-1408). Ironically, Atwater was not secured by a seat belt when escorted in Turek’s squad car to the station. *Atwater v. City of Lago Vista*, 532 U.S. 318, 369 (2001) (O’Connor, J., dissenting) (citing the Record 386). Atwater was never personally searched, and there is no complaint made about her pickup being searched. Respondents’ Brief at 2, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408).

35. Petitioners’ Brief at 5, *Atwater* (No. 99-1408). She was also required to remove her shoes, jewelry, and eyeglasses and empty the contents of her purse and pockets. *Id.* at 4. In addition to the seatbelt violations, Atwater was also charged with not carrying her driver’s license or proof of insurance. *Id.* at 5 & n.1. However, Turek had not requested said items until after he had informed Atwater that she was going to jail, so it seems unlikely that her failure to produce her license and proof of insurance was a factor in Turek’s decision to place her under arrest. *Id.* at n.1. Both of these violations are punishable by minor fines. See TEX. TRANSP. CODE ANN. §§ 521.025(c) & 601.191(b) (Vernon 1999). Section 521.025(c) states, in applicable part, “[a] person who violates [the section mandating a person to carry and exhibit a driver’s license on command]

posting her bond.³⁶ She later contacted the city manager to lodge a complaint regarding Officer Turek's actions and to request a refund of the truck's impounding fee.³⁷

B. Procedural History

In the first court proceeding on the issues of her case, Atwater pled no contest to all three of the seat belt offenses as to herself and her two children³⁸ and was fined fifty dollars for each violation, the maximum penalty allowable by law.³⁹ Three months after Atwater had initially contacted the city manager, and after consideration of several factors, the decision to bring a lawsuit was made.⁴⁰ Thereafter, Gail Atwater and her

commits an offense [that] is a misdemeanor punishable by a fine not to exceed \$200. . . ." TEX. TRANSP. CODE ANN. § 521.025(c) (Vernon 1999). Section 601.191(b) states, in relevant part, that failure to produce proof of liability insurance is a "misdemeanor punishable by a fine of not less than \$175 or more than \$350." TEX. TRANSP. CODE ANN. § 601.191(b) (Vernon 1999). Additionally, it is a defense to the prosecution if the defendant provides his/her license and proof of insurance at trial. TEX. TRANSP. CODE ANN. § 521.025(d); Petitioners' Brief at 5 n.1, *Atwater* (No. 99-1408). Therefore, because of the previous encounter between Atwater and Turek, he at least had good reason to believe that neither her license nor her insurance had expired over that short interval. *Id.* Additionally, Atwater did provide Turek her driver's license number and address as they were listed in her checkbook. *Atwater v. Texas*, available at http://www.u.arizona.edu/~llanger/case_three.htm (last visited Dec. 16, 2002). The reason Atwater did not have either is that her purse had just been stolen days prior in an Austin, Texas theater. *Id.*; Shaw, *supra* note 28, at A7.

36. Petitioners' Brief at 5, *Atwater* (No. 99-1408).

37. Marcia Coyle, *Three Who Dared The Perfect Case*, THE NAT'L L. J., Mar. 26, 2001, at A16. Upon returning to the scene of her arrest, Atwater found her truck had been towed and impounded, thereby requiring her to pay one-hundred and ten dollars to have it returned to her. *Id.* The Lago Vista city manager's name is Kelvin Knauf. Amanda Onion, *Soccer Mom at Highest Court*, ABCNEWS.COM, Dec. 3, 2000, available at <http://abcnews.go.com/sections/us/DailyNews/soccermom001201.html> (last visited Dec. 16, 2002). The infamous toy bat was never found. Shaw, *supra* note 28, at A7.

38. Petitioners' Brief at 5, *Atwater* (No. 99-1408); *Buckle Up Fight Goes To Supreme Court*, *supra* note 28. The charges of driving without a license and proof of insurance were dismissed, as Atwater was able to provide proof of each to the court. Petitioners' Brief at 5, *Atwater* (No. 99-1408).

39. Petitioners' Brief at 5, *Atwater* (No. 99-1408); *Buckle Up Fight Goes To Supreme Court*, *supra* note 28. In addition to the one hundred and fifty dollars in fines, Atwater also paid one hundred and fifty dollars in court costs, and the aforementioned one hundred and ten dollars to have her car released after being impounded. Jonathan Osborne & Bob Dart, *Lago Vista Mom Loses in High Court, Rights of Woman Jailed for Traffic Offenses not Violated, Justices Say, High Court Affirms Traffic Arrest*, AUSTIN AM.-STATESMAN, Apr. 25, 2001, at A1, available at 2001 WL 4578643.

40. Coyle, *supra* note 37. There were many reasons why the decision to bring suit was made. These included the "city's arrogance in addressing citizen concerns, a newspaper so biased to have printed article after article on the front page from the city's perspective, while relegating our point to 'letters to the editor' or not asking us for our comments . . . [a]ll of this, when I (Atwater) have lived and volunteered in this community since before Lago Vista existed." Pries et al., *supra* note

husband, Michael Haas,⁴¹ (collectively, “Atwater”) filed suit in Texas state court against Officer Bart Turek of the Lago Vista Police Department, Chief Frank Miller of the Lago Vista Police Department, and the City of Lago Vista (collectively, “City”) alleging violations of 42 U.S.C. §§ 1983⁴² and 1985.⁴³

28. Atwater became further infuriated with the City’s lack of response to her complaint and when people began stopping Atwater to tell her their own “Officer Turek stories.” Coyle, *supra* note 37. Additionally, her son, Mac, was experiencing psychological issues involving uniformed persons that caused him to hide in ditches at the sight of a police car and to fall to the floor and assume the fetal position when he saw a police officer. *Id.* Mac, and his sister, Anya, sought psychological treatment for the aftereffects of the arrest incident. *Id.* Atwater also points to three incidents within a twenty-four hour period that ultimately led to the decision to sue. *Id.* These incidents included 1.) a mayoral candidate informing Atwater that she had heard from Turek that he had previously stopped Atwater four times for seat belt violations, which was not true; 2.) when Atwater confronted the city manager inquiring why nothing had been done about the complaint she had lodged against Turek, he responded that he did not see a reason for the complaint and that the city did not have any bad officers, only ones that “need time to mature”; and 3.) on the way to their daughter’s dance class, Atwater and her husband saw that Turek had pulled over a car and was screaming at a little lady that she was going to jail. *Id.* At this point, Atwater told her husband “[t]his guy is going to hurt somebody. I can either close my eyes or do something.” *Id.* The Lago Vista Police Department is only eight members strong yet was barraged in a span of less than three months with five separate lawsuits. Dave Harmon, *Claims of Police Abuses Polarize Lago Vista; Town’s Residents – Choosing Sides After Five Suits Allege Brutality, Bullying*, AUSTIN AM.-STATESMAN, Sept. 24, 1997, at A1, available at 1997 WL 2840293. Each of the five suits involved separate incidents, and each alleged “that one or more of its officers has crossed the line into wrongful arrests, excessive force and other abuses of police power.” *Id.* Four of these suits, including Atwater’s, involved the actions of Bart Turek. *Id.* In addition to Atwater’s claim, Turek was accused of beating an arrestee with his baton, slamming a woman into a parked vehicle when she demanded that Turek produce an arrest warrant for her husband, and, similar to Atwater’s complaint, bullying and threatening two women after their children were found to be not wearing their seatbelts. *Id.*

41. Haas brought suit as next friend to the children. Petitioners’ Brief at 5, *Atwater* (No. 99-1408). Haas himself had subsequent confrontations with the law including, within the span of two weeks, twice being accused of assaulting a fireman. Jonathan Osborne, *Husband of Lago Vista Soccer Mom Arrested in 2nd Firefighter Assault*, AUSTIN AM.-STATESMAN, Mar. 22, 2001, at B3, available at 2001 WL 4577339.

42. Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2002) gives a remedy through either an action at law, a suit in equity, or other proper proceedings for redress to parties deprived of constitutional rights, privileges, and immunities by official’s abuse of his position. *Monroe v. Pape*, 365 U.S. 167 (1961). Additionally, it provides remedies for all violations of rights secured by Constitution, not only those stemming from class-based discrimination. *Blake v. Delaware City*, 441 F. Supp. 1189, 1199 (D. Del. 1977). Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The case was removed from state court to the United States District Court for the Western District of Texas.⁴⁴ There, the court granted the City's motion for summary judgment, holding that Atwater's constitutional rights had not been violated by her custodial arrest.⁴⁵ An

For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

43. Respondents' Brief at 3, *Atwater* (No. 99-1408). 42 U.S.C. § 1983 creates no substantive rights, but prohibits conspiracies to deprive persons of rights created elsewhere. *Potter v. City of Albany*, 68 F. Supp. 2d 1360, 1369 (M.D. Ga. 1999). Atwater alleged violations of the Fourth Amendment's rights to be free from unreasonable searches and seizures and excessive force and punishment, as well as her right to due process under the Fifth and Fourteenth Amendments. *Riding Without a Seatbelt is a Serious Crime in Texas*, *supra* note 6. Additionally, Atwater also brought state law claims for false imprisonment and intentional infliction of emotional distress. *Id.* A claim for intentional infliction of emotional distress was also brought on behalf of her children. *Id.* See also *Atwater v. City of Lago Vista*, 195 F.3d 242, 244 n.1 (5th Cir. 1999) (en banc). Atwater and her husband additionally sought attorney fees. *Buckle Up Fight Goes To Supreme Court*, *supra* note 28. They had spent about \$110,000 advocating their case and had consequently been forced to sell their house in Lago Vista and borrow money from their parents. *Id.*

44. Petitioners' Brief at 5, *Atwater* (No. 99-1408). It is unclear why the case was removed. See *Trans. of Oral Arg.* at 36, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408). During oral arguments, when a Justice of the Supreme Court asked Attorney Roger J. George, Jr., attorney for the respondents, why the case had been removed, he responded, "I wasn't trial counsel at that time and I do not know the reason." *Id.*

45. Petitioners' Brief at 5, *Atwater* (No. 99-1408). The Court concluded that Atwater's claim was "meritless" for two reasons. *Atwater v. City of Lago Vista*, No. A-97-CV-679 (W.D. Tex., Feb. 13, 1999). First, Atwater admitted she had "violated the law." *Id.* Second, Atwater did not make any allegation "that she was harmed or detained in any way inconsistent with the law." *Id.* After the District Court's ruling, Atwater considered dropping the case. However, the City wanted her to pay its legal fees and submit a written apology to Turek. Jake Bleed, *Ex-Greeley Woman Takes Lawsuit to High Court*, THE INDEPENDENT, June 29, 2000, available at http://www.theindependent.com/stories/062900/new_greeley29.html (last visited Dec. 18, 2002). Believing that she did not owe Turek an apology, Atwater decided to appeal. *Id.*

It should also be noted that just days after the District Court granted the City's motion for summary judgment, Atwater's then lawyer, Charles Lincoln, was barred from practicing before the Western District of Texas by the same judge who had granted summary judgment against Atwater. Dave Harmon, *Judge Throws Out 2 Suits Against Lago Vista Police, Federal Judge Bans Lawyer Who Filed Suits Alleging Brutality, Abuse, Judge Dismisses 2 Suits Against Lago Vista Police*, AUSTIN AM.-STATESMAN, Feb. 19, 1998, at A1, available at 1998 WL 3597583. At the hearing on Lincoln's expulsion, the Court referred to Atwater's case as "a lawsuit that should have never been filed and was poorly litigated once it was Suits like this are the bane of the American legal system." *Id.* Lincoln's expulsion was also based upon the results of a hearing before the Western District's grievance committee and the receipt of an angry letter by another judge who was frustrated with Lincoln's legal tactics and alleged misuse of client funds. *Id.* Additionally, federal prosecutors, the Federal Bureau of Investigation, and the State Bar Association were all solicited to investigate the possibility of criminal charges. *Id.* It was further alleged that Lincoln convinced a couple that, pending a property dispute, they should pay their mortgage payments to him. *Judge Throws Out 2 Lawsuits Against Lago Vista PD*, AUSTIN AREA NEWS, available at <http://www.thebluesnews.com/1998/Apr98/austin.html> (last visited Mar. 5, 2003). The couple became suspicious after they were given questionable receipts for the more than five thousand dollars that they had given him. *Id.* The court was "shocked by the actions of Mr. Lincoln." *Id.*

appeal was made to the United States Court of Appeals for the Fifth Circuit, where a three-judge panel reversed the District Court's ruling regarding Atwater's Fourth Amendment violation claim and held that her custodial arrest had infringed upon her right to be free from unreasonable seizures.⁴⁶ The Fifth Circuit Court of Appeals agreed to hear the case en banc; thereafter, it vacated the three-judge panel's decision while holding that Atwater's custodial arrest had been based on probable cause and, therefore, had not violated her constitutional rights.⁴⁷

C. U.S. Supreme Court Decision

The United States Supreme Court agreed to hear the case,⁴⁸ and on April 24, 2001, it rendered its decision.⁴⁹ Writing for the majority,

(quoting the comments of the presiding referee, Judge Nowlin).

46. *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir. 1999). The other issues regarding summary judgment were affirmed. *Id.* at 389. Judge Robert M. Parker wrote:

[W]e easily conclude that an arrest for a first-time seat belt offense is indeed an extreme practice and a seizure conducted in an extraordinary manner which requires a balancing analysis to determine the reasonableness of the police activity. In conducting the analysis, we observe that the only possible governmental interest in arresting Atwater for the seat belt offense was enforcement of the seat belt law. Atwater did not pose a threat to the officer's safety; she was not a flight risk; and upon release she would not have posed a danger to society. Atwater was not a repeat offender. The seat belt law could have been enforced equally well through the issuance of a citation. With respect to the method of arrest, there was no good reason for Atwater to be handcuffed behind her back.

Id. at 387-88. Therefore, the § 1983 claims against Turek and the City were reinstated, and the claims against Chief Miller were affirmed. *Id.* at 389.

47. *Atwater v. City of Lago Vista*, 195 F.3d 242, 246 (1999) (en banc). The vote was eleven-to-six. *Id.* Judge Emil Garza wrote the court's opinion holding that "when probable cause exists to believe that suspect is committing an offense, the government's interests in enforcing its laws outweigh the suspect's privacy interests, and an arrest of the suspect is reasonable." *Id.* at 244. However, three separate dissents were filed; one by Judge Reynaldo Garza, one by Judge Wiener, and one by Judge Dennis. *Id.* at 246. Judge Reynaldo Garza did not believe that probable cause immunized a policeman's actions so that they could do whatever they please. *Id.* at 247 (Garza, J., dissenting). He further opined that probable cause would never immunize a constitutional violation. *Id.* Judge Wiener dissented because he believed that the majority's opinion allowed "[the officer on the street] . . . to be a one-person cop cum judge cum jury cum executioner: In effect, he can arrest, charge, try, convict and both assess and inflict punishment." *Id.* at 250 (Wiener, J., dissenting). Judge Dennis dissented because he did not believe that the common law at the time of the Fourth Amendment's framing allowed for warrantless arrests for activities like that which Atwater was charged. *Id.* at 254 (Dennis, J., dissenting). Judge Stewart did not pen a decision, but did dissent for the reasons set forth in the panel decision. *Id.* at 243.

48. The United States Supreme Court granted a Writ of Certiorari on June 26, 2000. *Atwater v. City of Lago Vista*, 530 U.S. 1260 (2000).

49. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). That same date the House Majority Leader, Dick Arney, issued a statement disagreeing with the Court's holding stating "[w]hen moms

Justice David Souter⁵⁰ began the Court's ruling by scrutinizing Atwater's argument that the common law at the time of the Amendment's framing did not grant authority to peace officers to execute warrantless arrests for misdemeanors that did not involve a breach of the peace.⁵¹ In rejecting Atwater's common law claim, the majority looked to three historical eras of law: the pre-founding English common law, the American colonial law, and the law's subsequent development in the United States.⁵² Thereafter, the Court concluded that the historical common law had a "decided, majority view that the police did not need to obtain an arrest warrant merely because a misdemeanor stopped short of violence or threat of it"⁵³ and, based upon this apparent

and dads can be arrested in front of their children and fingerprinted because they try to find their child's lost toy, we've all lost too much freedom." Dick Armey, *Disappointing Supreme Court Opinion April 24, 2001*, available at <http://www.freedom.gov/news/statements/seatbelt.asp> (last visited Dec. 16, 2002). Oral Arguments were heard on December 4, 2000. Trans. of Oral Arg. at 1, *Atwater* (No. 99-1408). As perhaps a telling note of the attention paid by the Justices, it was forty minutes into oral arguments that the Supreme Court issued its slip opinion to reporters sitting in the press gallery on *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). Dahlia Lithwick, *The Supremes Pull a Hamlet*, SLATE, Dec. 5, 2000, available at <http://slate.msn.com/default.aspx?id=94550> (last visited Dec. 18, 2002). See also Barton Aronson, *Why the "Soccer Mom" Should Win the Seat-Belt Case: The Problem with Custodial Arrests for Offenses that are not Punishable with Jail Time*, FINDLAW.COM, Dec. 15, 2000, available at <http://writ.news.findlaw.com/aronson/20001215.html> (last visited Dec. 17, 2002) (stating that "[t]he election ruling distracted the press' attention from the *Atwater* case – literally: they all rushed out of the courtroom"). This is the first time any one can recall an opinion being circulated in this manner. Lithwick, *supra*.

On May 21, 2001, Atwater filed a petition for rehearing that was denied on June 18, 2001. *Atwater*, 532 U.S. 318; Gaylord Shaw, *Texas Soccer Mom Tries Again; Asks Court to Revisit Custodial Arrest Case*, NEWSDAY, May 21, 2001, at A16. Atwater's petition cited a study by the University of Texas professor William Spellman. *Id.* The findings of his study suggested that custodial arrests for minor offenses were "widespread-totalling perhaps a quarter-million annually." *Id.* The study's findings were contradictory to the majority's holding that there was no evidence that custodial arrests for fine-only offenses were an "epidemic." *Id.* (citing *Atwater*). The study used the figures from the only two states that kept statistics on such matters (California and Oregon), but estimated that nationwide the number of custodial arrests for minor traffic offenses totaled about 245,000 per year. *Id.* These statistics did not include "more serious traffic offenses such as vehicular manslaughter, hit-and-run and driving under the influence of alcohol." *Id.*

50. *Atwater*, 532 U.S. 318. Justice Souter was joined by Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy. *Id.*

51. *Id.* at 327. Atwater contended that "'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except for cases of 'breach of the peace.'" *Id.* (citing Petitioners' Brief at 13, *Atwater* (No. 99-1408)).

52. *Id.* at 326-46. The Court looked to case law, statutes, and treatises for historical guidance. *Id.*

53. *Atwater*, 532 U.S. at 345. However, just pages earlier, the Court found that the "early American courts . . . [had not] embraced' an accepted common-law rule with anything approaching unanimity." *Id.* at 341 (comparing the holding of *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995), that "the common law knock and announce principle was woven quickly into the fabric of early American law"). Additionally, the Court stated that the "[g]reat commentators were not

consensus, ruled that Atwater's breach of the peace claim had failed.⁵⁴

The Court then addressed the perceived problems that would occur if it were to adopt a rule that prohibited arrests for fine-only offenses.⁵⁵ One of these concerns was the rule's apparent departure from the Court's purported policy to adopt readily administratable standards.⁵⁶ Then the Court suddenly changed its focus to the issue of probable cause and held that the standard of probable cause, as outlined in *Dunaway v. New York*,⁵⁷ was applicable in this case. As a result, the Court determined that there was no constitutional violation resulting from Atwater's custodial arrest.⁵⁸

The dissent, led by Justice Sandra Day O'Connor,⁵⁹ asserted that

unanimous." *Id.* at 330. Further, the Court declared that when a practice was an accepted custom when the Fourth Amendment was adopted, the person arguing that the custom is now constitutionally permissible bears a "heavy burden" . . . justifying a departure from the historical understanding." *Id.* at 346 n.14.

54. *Id.* at 346.

55. *Id.* at 345-51.

56. The Court first noted that, in analyzing Fourth Amendment problems, standards should not require sensitive, case-by-case determinations thereby causing every discretionary judgment to be subject to constitutional review. *Atwater*, 532 U.S. at 346. Therefore, in administering the balance test, the government's side would already be credited with "an essential interest of readily administratable rules." *Id.* at 347. Using this provision, the Court points out that many of Atwater's proposed distinctions for the formation of a bright-line rule promised very little in the way of administrability. *Id.* at 349-50. Such distinctions included jailable versus fine-only offenses and misdemeanors versus felonies. *Id.* The majority contends that complications arise between jailable and non-jailable offenses because "an officer on the street might not be able to tell" [the difference]. *Id.* It points out that courts "cannot expect every police officer to know the details of frequently complex penalty schemes." *Id.* at 348 (citing *Berkemer v. McCarty*, 468 U.S. 420, 431 n.13 (1984)). The Court alleges that penalties are sometimes difficult, if not impossible, to know at the scene of an arrest because of questions regarding whether the person is a repeat offender or the exact weight of a controlled substance that may elevate the crime from a non-jailable offense to a jailable offense. *Id.* at 346. The majority went on to point out problems in the additional provision in Atwater's proposed rule that allowed the officer to effectuate a warrantless arrest, even if it were otherwise a non-jailable traffic offense, if the arrest was "necessary for the enforcement of traffic laws, or when an offense would otherwise continue and pose a danger to others on the road." *Id.* at 349 (citing Petitioners' Brief at 46, *Atwater* (No. 99-1408)). Therefore, the Court found the proposed distinctions made "very unsatisfactory line[s]" to require police officers to draw on a moment's notice." *Id.* at 350 (quoting *Carroll v. United States*, 267 U.S. 132, 157 (1925)).

57. 442 U.S. 200 (1979). In that case, the defendant, *Dunaway*, was taken into custody without enough evidence to have been granted a search warrant. *Id.* at 203. He was told that he was not under arrest. *Id.* At the police station, the defendant was given the *Miranda* warnings and proceeded to make incriminatory statements. *Id.* The Court held that probable cause was the "minimum justification necessary" to make an arrest, and that the probable cause standard "applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular circumstances." *Id.* at 208.

58. *Atwater*, 532 U.S. at 354. The majority stated that there was no need to mint a contrary rule because there was no evidence that there was a problem of epidemic proportions concerning warrantless arrests for fine-only offenses. *Id.*

59. *Id.* at 360. Justices Ginsburg, Stevens, and Breyer joined Justice O'Connor in her dissent.

because the common law history had failed to set forth a uniform rule, the Court should have engaged in a balancing test.⁶⁰ The four dissenting Justices reasoned that authorizing a full custodial arrest when one “cannot ultimately be imprisoned for the conduct - defies any sense of proportionality and is in serious tension with the Fourth Amendment’s proscription of unreasonable seizures.”⁶¹ Based upon this conclusion, the dissent urged for the adoption of a rule that when probable cause existed to believe that a fine-only offense had been committed, an officer should issue a citation unless he or she is “able to point to specific and articulable facts which, taken together with rational inferences would reasonably warrant [the additional] intrusion’ of a full custodial arrest.”⁶² The dissent concluded by asserting that a decision in *Atwater*’s favor was required because a balancing test was appropriate and, had it been applied, the Court would have held that *Atwater*’s arrest violated the rights afforded by the Fourth Amendment.⁶³

IV. ANALYSIS

“WHILE CLARITY IS CERTAINLY A VALUE WORTHY OF CONSIDERATION

Id.

60. *Id.* at 362 (citing *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999)). Justice O’Connor engaged in no independent historical analysis of her own, but instead, simply referred to the majority’s recitation of the common law and pointed to their own admissions of inconsistency. *Id.* (citing *Atwater*, 532 U.S. at 326-45). The dissent urges that probable cause alone is not a sufficient condition for any realistic assessment of the interests implicated by warrantless arrests for fine-only offenses. *Id.* at 363.

61. *Atwater*, 532 U.S. at 364. In making this determination, the dissent notes that the legislative penalty that is assigned to a violation of the offense gives the greatest guidance as of the state’s interest in subjecting the suspect to a full-custodial arrest. *Id.* (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 754 & n.14 (1984)).

62. *Id.* at 366 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). Justice O’Connor reasoned that such a standard would not further burden law enforcement because “[o]ver the past 30 years, it appears that the *Terry* rule has been workable and easily applied by officers on the street.” *Id.* at 366.

63. The dissent stated that while the value of a clear rule is considerable, it “by no means trumps the values and liberty and privacy at the heart of the [Fourth] Amendment’s protections.” *Id.* at 366. The dissent then addressed the City’s contention that the arrest of *Atwater* furthered two governmental legitimate interests: 1.) the enforcement laws directed to protect children’s welfare and 2.) the extra assurance that *Atwater* would appear at court proceedings. *Id.* at 368-71. The dissent dismissed the protection of the children’s safety because the issuance of a citation would have taught *Atwater* to buckle up her children in the future just as an arrest would have, and it would have taught her children the importance of obeying the law, while not traumatizing and scaring them. *Atwater*, 532 U.S. at 370. Because of *Atwater*’s long residency in the small community, the dissent additionally found error with the City’s reasoning that a full custodial arrest would have helped to ensure *Atwater*’s appearance in court. *Id.* The dissent concluded with the warning that the majority’s opinion grants officers broad discretion in determining when to arrest, and that this discretion carries with it the “grave potential for abuse.” *Id.* at 372.

*IN OUR FOURTH AMENDMENT JURISPRUDENCE, IT BY NO MEANS TRUMPS THE VALUES OF LIBERTY AND PRIVACY AT THE HEART OF THE AMENDMENT'S PROTECTIONS.*⁶⁴

A. Before *Atwater*

Prior to the Court's holding in *Atwater*, the Supreme Court had not specifically addressed the constitutionality of custodial arrests for fine-only misdemeanors.⁶⁵ Because the Supreme Court had never resolved

64. *Atwater*, 532 U.S. at 366.

65. *Id.* at 340 (“[T]he Court has not had much to say about warrantless misdemeanor arrest authority”); *Id.* at 362 (“On . . . rare occasions . . . [has] this Court . . . contemplated such an arrest”). However, the Supreme Court has, in passing, addressed the issue. See, e.g., *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (“It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments.”); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (“[T]he Court has not directly considered the question whether ‘there are some constitutional limits upon the use of ‘custodial arrests’ as the means for invoking the criminal process when relatively minor offenses are involved.’”) (quoting 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2, at 290 (1st ed. 1978)); *Maryland v. Macon*, 472 U.S. 463, 471 (1985) (“We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials.”); *Welsh*, 466 U.S. at 749 n.11 (leaving open the question of whether warrantless arrests in the home for a nonjailable offense are ever reasonable, even if exigent circumstances exist). Furthermore, just three terms before deciding *Atwater*, in the case of *Ricci v. Vill. of Arlington Heights*, the Supreme Court granted certiorari on essentially the same issue presented in *Atwater*. *Ricci*, 522 U.S. 1038 (1998). In *Ricci*, the petitioner had been arrested at his place of business for operating the business without the appropriate license, and argued unsuccessfully to the Seventh Circuit that the “common law allowed an arrest for a misdemeanor committed in an officer’s presence only if that crime constituted a breach of the peace.” *Ricci v. Vill. of Arlington Heights*, 116 F.3d 288, 289, 291 (7th Cir. 1997). After full briefing on the merits and oral arguments, the Supreme Court dismissed certiorari as improvidently granted. *Ricci v. Vill. of Arlington Heights*, 523 U.S. 613 (1998). The Court’s dismissal came after it had learned that Ricci’s arrest was for a violation of a civil ordinance, not a misdemeanor. See Trans. of Oral Arg. at 14, 33, 35-37, 59-63, *Ricci* (No. 97-501). Just a few months after the dismissal of *Ricci*, the issue once again presented itself during the oral arguments of *Knowles v. Iowa*, 525 U.S. 113 (1998), when one of the Justices noted, “I hadn’t realized that you had raised the question that Justice Stewart left over in the *Gustafson* case, which was whether you could have constitutionally had a full arrest for a traffic violation.” See Trans. of Oral Arg. at 5, *Knowles* (No. 97-7597). *Knowles*’ petitioner conceded that he had not raised the issue. *Id.* at 6. But see, e.g., *United States v. Watson*, 423 U.S. 411, 418 (1976) (“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence.”); *Carroll v. United States*, 267 U.S. 132, 156-57 (1925) (“The usual rule is that a police officer may arrest without a warrant one . . . guilty of a misdemeanor if committed in his presence.”); *Bad Elk v. United States*, 177 U.S. 529, 535 n.1 (1900) (noting common law pedigree of state statute permitting warrantless arrest “for a public offense committed or attempted in [officer’s] presence”); *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885) (common law presence requirement); cf. *Welsh*, 466 U.S. at 756 (White, J., dissenting) (“‘Authority to arrest without a warrant in misdemeanor cases may be enlarged by statute.’”) (quoting EDWARD C.

the matter, lower courts that had addressed the issue had rendered varying decisions, using different types of analysis.⁶⁶ Some outside observers concluded that the Court's failure to address the issue was an implicit rejection of the argument that the Fourth Amendment imposed limitations on the power to arrest greater than that of probable cause.⁶⁷ Another approach that arose because of the Court's silence was to compare such arrests to the general warrants and writs of assistance of colonial times.⁶⁸ A final means of addressing the issue was set forth by

FISHER, LAWS OF ARREST 130 (1967)).

66. One approach was to assume, without the need for any analysis, that the rule of *Watson* which allowed warrantless arrests for felonies as long as there was probable cause also applied to warrantless arrests for misdemeanors. *Watson*, 423 U.S. at 414-24. This was the approach that was used by the en banc majority in the Appellate Court in *Atwater*. *Atwater v. City of Lago Vista*, 195 F.3d 242, 245-46 (5th Cir. 1999) (en banc) (concluding that because there was probable cause and the arrest was not conducted in an extraordinary manner, *Atwater's* arrest was reasonable under the Fourth Amendment). See *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir. 1990) ("A police officer is permitted to arrest without warrant if a *misdemeanor or a felony* is committed in the officer's presence.") (emphasis added) (citing *Watson*); *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (opting to "assume" that probable cause is the lone issue until receiving guidance from the Supreme Court that reasonableness is to be part of the inquiry); *People v. Edge*, 94 N.E.2d 359, 363 (Ill. 1950) (holding that violating municipal ordinances that prohibit "operating a motor vehicle without a safety-inspection sticker and obstructing an alley" are "criminal offenses" (grouping felonies, misdemeanors, and city ordinance violations together), and thus, a person committing the violation is subject to arrest without a warrant); *City of Milwaukee v. Nelson*, 439 N.W.2d 562, 570 (Wis. 1989) (holding that, until otherwise directed by the Supreme Court, a custodial arrest for an offense which is only punishable by civil forfeiture is assumed to be unconstitutional). *But see* *United States v. Philibert*, 947 F.2d 1467, 1469 (11th Cir. 1991) (citing *Watson* for the statement that "since these were petty offenses, not committed in the presence of the arresting officer, they were probably the subject of citation proceedings and could not have formed a valid basis for the issuance of an arrest warrant").

Another approach of lower courts was to avoid deciding the issue on federal constitutional grounds, and, instead, base their rulings on state law. See, e.g., *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1993) (refusing to "sanction an otherwise unconstitutional search on the basis of an arrest which is illegal as a matter of state law"); *Barnett v. United States*, 525 A.2d 197, 199-200 & n.6 (D.C. App. 1987) (penalizing arrests not authorized for civil infractions with only monetary sanctions). Another type of analysis was used by the Supreme Court of Washington. *State v. Hehman*, 578 P.2d 527, 528 (Wash. 1978). The Washington Supreme Court based its analysis on public policy, and ruled that custodial arrests are impermissible, even when the state statutory law does not compel such a result. *Id.* (holding "as a matter of public policy . . . [a] custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear"); see also *Thomas v. State*, 614 So.2d 468 (Fla. 1993) (holding that the Fourth Amendment was violated by a full custodial arrest rather than the issuance of a citation for the violation of a non-criminal civil ordinance).

67. See, e.g., 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(c), at 23 (3d ed. 1996) (stating that the requirement that the offense be committed in an officer's presence was not mandated by the Fourth Amendment); *Higbee*, 911 F.2d at 379 n.2 (finding that the "breach of the peace" and the "in the presence requirement" were no longer recognized as restrictions on probable cause for warrantless arrests).

68. *Salken*, *supra* note 2, at 253-54 (arguing that custodial arrests for minor traffic infractions

one leading commentator⁶⁹ who examined how other courts had analyzed warrantless arrests resulting from other relatively minor offenses, including arrests to secure material witnesses,⁷⁰ arrests of

are a violation of the Constitution because they are “identical to the unlimited and arbitrary power of the court’s messengers and customs inspectors that led to the adoption of the Fourth Amendment [which was not the] accepted practice at the time the Constitution was adopted,” and because “in all cases other than intoxication, where the driver can identify himself, the individual’s interest in being free from seizure outweighs the government’s interest in enforcing the traffic laws through the need for custodial arrest”). *But see* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1715-16 (1996) (noting that lawyers tend to overemphasize the effect that general warrants and writs of assistance had on the framers of the Fourth Amendment). The Supreme Court had previously recognized that the use of general warrants in England and writs of assistance in colonial America were the events that gave rise to the founding of the Fourth Amendment. *See, e.g.,* Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 301 (1967) (stating that the Fourth Amendment “was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies”); *Henry v. United States*, 361 U.S. 98, 100-01 (1959) (stating that the philosophy of the Fourth Amendment was reflected in the Virginia Declaration of Rights, adopted June 12, 1776, which stated that general warrants were “grievous and oppressive, and ought not be granted”); *Boyd v. United States*, 116 U.S. 616, 624-26 (1886) (recognizing that writs of assistance, and the arguments that they caused, were “fresh in the memories of those who . . . established our form of government”); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1358-59 (1992) (stating that the protections afforded by the Fourth Amendment were “largely in response to the use of general warrants and writs of assistance by the British”); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1371 (1983) (stating that the Fourth Amendment “emerged from the colonists’ experiences with general warrants and writs of assistance as tools of censorship and tyranny”); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 561-87 (1999) (discussing different scholastic interpretations of the motivations behind the Fourth Amendment). *But see* *Watson*, 423 U.S. at 429 (citing LASSON, *supra* note 8, at 79-105) (“There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables or other peace officers.”). Because of the discretionary authority that general warrants and writs of assistance purported to confer to Royal officers, colonial judges had consistently condemned these procedures as illegal. *Id.*

69. 3 LAFAVE, *supra* note 67, § 5.1(h), at 59.

70. In *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971), the court examined whether an individual may be arrested as a material witness in a federal criminal proceeding. *Id.* at 936. The court held that such an arrest was a seizure under the Fourth Amendment, and therefore “must be based on probable cause.” *Id.* at 942. However, the court further defined the meaning of probable cause in such an instance by stating that it was not enough to show that there was probable cause “that the testimony of a person is material”; it must additionally be shown “that it may become impracticable to secure his presence by subpoena.” *Id.* at 943 (citing 18 U.S.C. § 3149). Although the court used the standard found in the since repealed 18 U.S.C.A. § 3149 and Federal Rule of Criminal Procedure 46(b), it is apparent that the court’s foundation for its decision was the protections afforded by the Fourth Amendment. *See* *Stanford Daily v. Zurcher*, 353 F. Supp. 124, 132 (N.D. Cal. 1972) (holding “in order to assure that third-parties will have some meaningful protection against unlawful searches . . . the subpoena duces tecum alternative should be required”), *rev’d* *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *see also* *Boyle v. State*, 820 S.W.2d 122, 130 Tex. Crim. App. 1989) (where the defendant’s arrest “as a result of the issuance of the grand jury attachment, was illegal and unlawful for lack of probable cause” because the utilization of a

individuals on unrelated criminal charges resulting from investigatory stops,⁷¹ and arrests of persons accused of fathering illegitimate children.⁷² His analysis concluded that custodial arrests for petty

subpoena was not first attempted; a conclusion to the contrary “would in essence constitute a suspension of the Fourth Amendment”); *State v. Brady*, 388 N.W.2d 151, 155 (Wis. 1986) (the arrest of a material witness without a showing that it may become impracticable to secure his presence by subpoena was a violation of the state statute and the Fourth Amendment).

71. In *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973), agents of the Federal Bureau of Investigation stopped Ward’s car in an effort to glean information from him regarding the whereabouts of certain federal fugitives. *Ward*, 488 F.2d at 163. While speaking to Ward the agents learned that he possessed a forged selective service registration card. *Id.* The dissent stated that the agent’s stopping of Ward’s car was “an unreasonable intrusion under the Fourth Amendment” because:

[t]here were no exigent circumstances to justify the stop as when the police have founded suspicion that fresh criminal activity is afoot. Here there was no emergency situation. There was no need for immediate action. The agents were not fearful appellant would leave town. The stop was not directed at a particular crime, but was part of a general investigation that had been started months before. The agents had never sought to interview the appellant at his house or place of business although that could have been arranged. Instead they chose to contact appellant for an interview by tailing his car and pulling him over to a stop by a siren on the public street.

Id. at 166 (Trask, J., dissenting).

72. In *State v. Klinker*, 537 P.2d 268 (Wash. 1975), a civil proceeding, the court scrutinized a Washington state statute that provided that when a complaint was presented to a Justice of the Peace that accused a man of being the father of an illegitimate child, it was the duty of the Justice to issue a warrant for the accused father to be arrested in connection with the pending paternity suit. *Klinker*, 537 P.2d at 272-73. The court concluded that the statute violated the Fourth Amendment because it mandated that Justices of the Peace issue arrest warrants without assessing probable cause. *Id.* at 275-77. The court further found that the legislation was defective because it “allows persons to be deprived of liberty without adequate justification.” *Id.* at 277. The court stated:

The ultimate protection of the Fourth Amendment is against “unreasonable searches and seizures.” For an arrest to be “reasonable” it must serve some governmental interest which is adequate to justify the imposition on the liberty of the individual. The reasonableness of an arrest in a given context must be determined on the basis of the particular interests involved. . . . [I]t is “necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen” to determine if the justification is adequate. [citing *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 534-35 (1967)]. The governmental interest in filiation proceedings is the need to insure that the burden of supporting illegitimate children will be equitably shared by both of its parents and will not be unnecessarily placed on the state. This interest is substantial, and it requires that fathers of illegitimate children who are unwilling to voluntarily support their offspring be subject to legal compulsion to fulfill their moral responsibilities. But it does not require their arrest. Arrest is justified when a person may flee from the legal process, or where he may constitute a danger to the public if allowed to remain at large. . . . It is not justified simply by the fact that it is necessary to bring him into court for trial. . . . The “less drastic means” which is available to satisfy the public interest in securing the presence of defendants to filiation suits is obviously the summons and complaint procedure which is common to all civil proceedings in this state save this one, and which is mandated by our court rules even in criminal cases when the usual reasons for arrest are not present. . . . So long as such means are available, the use of an arrest warrant to

violations of law would be difficult to approve because of their inherent unreasonableness.⁷³

As a further result of the High Court's failure to address this issue, police officers in the field, when confronted with arrest decisions, would not consider it their duty to determine if custody was actually needed, but would usually only consider whether there was enough legal proof to believe that the suspect had committed a crime.⁷⁴ This law enforcement mindset had been criticized by many sources.⁷⁵

commence a filiation proceeding is unnecessary and unreasonable within the meaning of the Fourth Amendment. Only when it is shown that the legitimate state concerns would not be met through use of more conventional pleading devices can the arrest procedure be sanctioned. Here, where the defendant was a long-time resident of the trial court's jurisdiction, presumably highly unlikely to flee to avoid service of process, the need for arrest was not shown to exist and the arrest itself was therefore improper.

Id. at 277-79 (citations omitted). *See also* J.E.G. v. C.J.E., 360 N.E.2d 1030, 1033 (Ind. Ct. App. 1977) (following *Klinker* while holding the Fourth Amendment reasonableness standard is met in paternity proceedings, and an arrest is justified, only when it has been determined by an impartial judicial officer that there is probable cause to believe that the named defendant is the father *and* that he will not respond to conventional civil process). However, the *Klinker* court went on to expound that it believed that its holding would be inappropriate regarding a defendant in a criminal case stating:

Where grounds exist to believe a person has committed a crime, the public interest in law enforcement is assumed to outweigh the individual's interest in liberty and to justify an arrest of that person, just as the same public interest outweighs the right of privacy invaded by a criminally-related search warrant.

Klinker, 537 P.2d at 278. *See also* Higbee v. City of San Diego, 911 F.2d 377, 379 (9th Cir. 1990) (holding that the "state is constitutionally permitted to detain all misdemeanor arrestees for the usual post-arrest procedures" instead of releasing them after issuing a field citation); *Dobbs v. Huff*, 446 F. Supp. 35, 38 (N.D. Ga. 1977) (finding no Fourth Amendment violation when persons were arrested "pursuant to a lawful arrest warrant (even though plaintiffs would have voluntarily turned themselves in) searched and shackled . . .").

73. 3 LAFAVE, *supra* note 67, § 5.1(h), at 63 (stating "[i]f it was unreasonable to seize Bacon, Ward, and *Klinker*, then it is difficult to see how a physical taking into custody can be accepted as an inherently reasonable means for invoking the criminal process even in the instance of petty violations").

74. Wayne R. LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L. F. 8, 12 (1965) ("In the usual case, a police officer making an arrest decision considers only the probability of guilt issue; he does not view it as his function to evaluate the need for custody.").

75. The American Bar Association has adopted the following position on the issue:
[I]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. A law enforcement officer having grounds for making an arrest should take the accused into custody or, already having done so, detain him further only when such action is required by the need to carry out legitimate functions, to protect the accused or others where his continued liberty would constitute risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

American Bar Association Project on Standards of Criminal Justice, *Standards Relating to Pretrial Release* § 2.1, at 31 (1968). *See also* National Advisory Commission of Criminal Justice Standards

*B. Atwater: the Majority's Decision*⁷⁶ – *the Ignoring and Changing of Precedent*

The majority's decision, although appearing to be learned and lawyerly, is actually burdensome and non-analytical.⁷⁷ It is ironic that in its attempt to form bright-line rules for law enforcement officers,⁷⁸ the Supreme Court has managed to dim the already faded lines of Fourth Amendment jurisprudence for judges and lawyers.⁷⁹ As a result of the *Atwater* decision, it is now unclear where a Fourth Amendment analysis is to begin⁸⁰ and what standards will be applied.⁸¹

1. Where the analysis is to begin

Just two years prior to the Court's holding in *Atwater*, the Supreme Court revolutionized the procedure for deciding Fourth Amendment

and Goals, Police 83 (1973) (suggesting that police agencies should make maximum effective use of their ability to issue citations); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 104-05 (stating that "[i]t is incumbent on police departments to define precisely as possible when arrest is possible when arrest is a proper action and when it is not"). The exception in the A.B.A.'s provision stating that the arrestee should "detain him further only when such action is required by the need to carry out legitimate investigative functions" recognizes that arrest is not only a tool used to ensure the suspect's appearance at future proceedings, but also is used to advance various investigative techniques, such as the search incident to arrest. ABA, *supra*. See, e.g., *State v. Sassen*, 484 N.W.2d 469, 473 (Neb. 1992) (finding the arrest of a suspect for possession of drug paraphernalia to be lawful despite the fact that the infraction usually was dealt with by the issuance of a citation; the "legitimate investigative function" exception of the statute applied because of the desirability of the search incident to arrest so the officer can see what the defendant is trying to hide from them).

76. The Court's majority opinion can be broken into two portions. The first addresses *Atwater's* contention that the common law did not permit a warrantless arrest for an offense that was not a breach of the peace. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-47 (2001). The second section deals with *Atwater's* proposed rule that would constitutionally prohibit arrests for fine-only offenses as a violation of the Fourth Amendment. *Id.* at 347-55.

77. See Akhil Reed Amar, *An Unreasonable View of The 4th Amendment*, LOS ANGELES TIMES, Apr. 29, 2001, at 1, available at 2001 WL 2482488 (stating that Souter's opinion "provides a magisterial exposition of early English and American cases and commentary concerning warrantless arrests for petty offenses. It surveys a broad range of modern legal scholarship, including some of my own. But it misses the point: The cop's alleged behavior was obviously unreasonable and thus unconstitutional.").

78. See *infra* note 129 and accompanying text.

79. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The fourth amendment is the Supreme Court's taraby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck."); see also Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (referring to Fourth Amendment holdings as "a body of doctrine that is unstable and unconvincing").

80. See *infra* Part IV.B.1.

81. See *infra* Part IV.B.2.

issues when it established an additional step in the Amendment's reasonableness analysis, directing courts to "inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."⁸² The *Atwater* Court, however, did not follow its own precedent.⁸³ Instead of looking exclusively to the

82. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). In *Houghton*, an officer of the Wyoming Highway Patrol stopped an automobile for speeding and driving with a faulty brake light. *Id.* at 297. The officer noticed that the driver had a hypodermic syringe in his shirt pocket and, once ordered outside of the car, the driver admitted to using it to take drugs. *Id.* at 298. Houghton, a female riding in the backseat was ordered out of the car. *Id.* Because the driver admitted to using drugs, the officer searched the interior of his car, which included Houghton's purse because it had been left in the backseat. *Id.* The search of Houghton's purse yielded drug paraphernalia and a syringe for which she was arrested. *Id.* The Court allowed the search and ruled that a passenger's personal belongings are "in" the car and that the officer had probable cause to search for contraband that was in the car. *Id.* at 302. For an in depth discussion of why this additional step is unnecessary and ineffectual see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000). Sklansky suggests that a common law analysis "will do little to make [the understanding of Fourth Amendment law] more principled or predictable, in part because common-law limits on searches and seizures were thinner, vaguer, and far more varied than the Court seems to suppose." *Id.* at 1739.

83. Despite the fact that all of the Justices that heard *Atwater* also heard *Houghton*, and five of the Justices had joined in the majority decision, the *Atwater* Court appears to have again changed the procedure for analyzing Fourth Amendment problems. Justice Scalia authored the *Houghton* opinion and was joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas. *Houghton*, 526 U.S. at 296. Justice Breyer concurred in the opinion, but specifically rejected the Court's procedure for analyzing by stating, "history is meant to inform, but not automatically determine, the answer to a Fourth Amendment question." *Id.* at 307 (Breyer, J., concurring). The dissent of *Houghton* scolded the majority's two step Fourth Amendment analysis. *Id.* at 312 n.3 (Stevens, J., dissenting) ("[W]e have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.'" (quoting *Houghton*, 526 U.S. at 299).

Interestingly, the majority opinion in *Atwater* did not cite *Houghton*, its most recent holding that gave guidance to courts when analyzing an unreasonable search or seizure claim. *Houghton*, 526 at 299. Instead, the Court cited its earlier holdings of *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (directing courts to be guided by "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the [amendment's] framing") and *Payton v. New York*, 445 U.S. 573, 591 (1980) ("[A]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers have thought was reasonable."). This is noteworthy because these cases state that the common law is more of a guide, whereas *Houghton* commands that common law to be followed. It is also interesting to note that the Court was made aware of its prior decision in *Houghton* in that it had been cited as the controlling authority for analyzing Fourth Amendment issues by the *Atwater* lower court and in the briefs submitted to the Court. See *Atwater v. Lago Vista*, 195 F.3d 242, 253-54 (5th Cir. 1999) (en banc) (Dennis, J., dissenting); Petitioners' Brief at 6, *Atwater* (No. 99-1408); Respondents' Brief at 32, 36, *Atwater* (No. 99-1408); Petitioners' Reply Brief at 6, *Atwater* (No. 99-1408); Brief of Amici Curiae American Civil Liberties Union et al. at 19, *Atwater* (No. 99-1408); Brief of Amici Curiae National Association of Criminal Defense Lawyers et al. at 14, 18, *Atwater* (No. 99-1408). Therefore, the Court's best and most timely argument was ignored, and it instead relied on a less stringent standard. See, e.g., *Gerstein v. Pugh*,

common law at the time of the Amendment's framing for guidance,⁸⁴ the *Atwater* Court examined the common law at three different eras of Anglo-American history: at the pre-founding English common law,⁸⁵ at

420 U.S. 103, 114 (1975) (holding that "the common law . . . has guided interpretation of the Fourth Amendment"). Some scholars have expressed frustration with the Court's history of giving great weight to history when it is beneficial and ignoring it when it does not support their argument. See, e.g., Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 926-27 (1997) (asserting "[t]he Supreme Court has not been consistent in juxtaposing the history of the Amendment with modern law enforcement techniques. In one case, history provides the driving force behind a ruling; in another it is neglected even though the challenged police conduct is contrary to historical practice").

84. *Atwater*, 532 U.S. at 326-46.

85. *Id.* at 326-35. The Court found that common law commentators had reached differing results when discussing an officer's ability to make warrantless arrests for misdemeanors. *Id.* at 328-29. Some opined that the ability to arrest for warrantless misdemeanors was confined to those that involved a breach of the peace. *Id.* at 329, citing JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 193 (1883) and Glanville Williams, *Arrest for Breach of the Peace*, 1954 CRIM. L. REV. 578, 578 (1954). Other commentators of the time said that any act that breached the peace was sufficient to trigger the warrantless arrest for a misdemeanor, but such a breach was not a vital necessity. *Id.* at 330, citing SIR WILLIAM BLACKSTONE, 4 BLACKSTONE 289 ("The constable . . . hath great original and inherent authority with regard to his arrests" and addressing misdemeanor offenses "[h]e may, without warrant, arrest any one for breach of the peace, and carry him before a justice of the peace.") and SIR EDWARD EAST, 1 PLEAS OF THE CROWN § 71, at 303 (1803) (stating in 1803, just years after the Fourth Amendment's adoption, that "[a] constable or other known conservator of the peace may lawfully interpose upon his view to prevent a breach of the peace, or to quiet an affray"). However, other commentators found that there was unlimited power to arrest without a warrant, even if it was a misdemeanor that did not involve a breach of the peace. *Atwater*, 532 U.S. at 330-31 (citing SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 88 (1736); *THE COMPLEAT PARISH-OFFICER* 11 (1744) ("[T]he Constable . . . may for Breach of the Peace, and some Misdemeanors less than Felony, imprison a Man."); RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARRISH OFFICER* 271 (28th ed. 1837) ("A constable . . . may at common law, for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender without any warrant."); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 20 (5th ed. 1847) ("[A constable] may for treason, felony, breach of the peace, and some misdemeanors less than felony, committed in his view, apprehend the supposed offender *virtute officii*, without any warrant."); 1 W. RUSSELL, *CRIMES AND MISDEMEANORS* 725 (7th ed. 1909) (officer "may arrest any person who in his presence commits a misdemeanor or breach of the peace")). One element of particular note in a traditional-historical analysis is "divers Statutes." *Id.* at 333, citing MICHAEL DALTON, *COUNTRY JUSTICE* ch. 170, § 4, at 582 (1727). These statutes were enacted years prior to the founding of America and allowed for the warrantless misdemeanor arrest without reference to any type of breach of the peace. *Id.* Included in these "divers Statutes" are the "nightwalker" statutes that authorized night watchmen to arrest any stranger that may be walking the streets during darkness and hold them until the morning. *Id.* (citing 13 Edw. 1, ch. 4 §§ 5-6, 1 STATUTES AT LARGE 232-33 and 5 Edw. 3, ch. 14, 1 STATUTES AT LARGE 448 (1331) (confirming and extending the powers of watchmen)). These powers were not made in spite of the common law, but instead were made in conformity with the common law of the time. *Atwater*, 532 U.S. 318 (citing 2 Hawkins, ch. 13, § 6, at 130). In the time leading up to the framing of the United States Constitution, Parliament continuously granted warrantless arrest power to various misdemeanor level offenses that did not involve a breach of the peace. Such offenses included: 1.) playing "[u]nlawful game[s] like bowling, tennis, dice, and cards" (33 Hen. 8, ch. 9, §§ 11-16, 5 STATUTES

the time of the Amendment's framing,⁸⁶ and, finally, American law since the Amendment's framing.⁸⁷ Consequently, it is now unclear whether

AT LARGE 84-85 (1541)); 2.) persons who "profusely swear or curse" (19 Geo. 2, ch. 21, § 3, 18 STATUTES AT LARGE 445 (1746)); and most notably, 3.) negligent carriage drivers (27 Geo. 2, ch. 16, § 7, 21 STATUTES AT LARGE 188 (1754)). *Id.* at 334-35 (citing internal citations). Therefore, even if there could be construed to be a common law rule limiting warrantless arrests to those constituting breach of the peace offenses, it was contradicted by numerous statutes.

The Court's analysis was void of recognizing certain decisions that furthered Atwater's contention from England that were closer in time to the Amendment's framing than many of the Court's citations. *See Cook v. Nethercote*, 172 Eng. Rep. 1443, 1445 (1835).

If . . . there had been an affray, and that affray were over, then the constable had not and ought not have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of peace; and where a breach of the peace has been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from the magistrate.

Id. The distinction between those offenses that breached the peace and those that did not was "mostly for the purpose of separating combatants and detaining them to prevent further violence." FISHER, *supra* note 65, at 189.

86. *Atwater*, 532 U.S. at 335-40. The majority found after examining the perceived intent of the framers of the Fourth Amendment that it was difficult to locate any evidence that they sought to limit the authority of peace officers to execute warrantless misdemeanor arrests to those involving a breach of the peace. *Id.*; *see, e.g.*, LEONARD WILLIAMS LEVY, ORIGINS OF THE BILL OF RIGHTS 150-79 (1999); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-93 (1969); LANDYNSKI, *supra* note 8, at 19-48; LASSON, *supra* note 8, at 79-105; Davies, *supra* note 68; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Gerald V. Bradley, *Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817 (1989). Indeed, to the extent these modern histories address the issue, their conclusions are to the contrary. *See* LANDYNSKI, *supra* note 8, at 45 (Fourth Amendment arrest rules are "based on common-law practice," which "dispensed with" a warrant requirement for misdemeanors "committed in the presence of the arresting officer"); Davies, *supra* note 68, at 551 (asserting that "the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions; thus, they never anticipated that 'unreasonable' might be read as a standard for warrantless intrusions"). Additionally, the legislative actions occurring around the ratification of the Bill of Rights regularly authorized peace officers to make warrantless arrests without the limitation that the offense must be one that breaches the peace. *Id.* Such offenses included unnecessarily traveling on the Sabbath day (FIRST LAWS OF THE STATE OF CONNECTICUT 214-15 (Cushing ed. 1982) (1784 compilation; exact date of Act unknown)), cockfighting (LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 177-83 (1810) (1794 Act)), and lying (COLONIAL LAWS OF MASSACHUSETTS 139 (1889) (1646 Act)). *See also* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 63 (1996) (interpreting the Fourth Amendment to require that warrantless searches and seizures be reasonable, not necessarily based on probable cause, because the purpose of the Fourth Amendment was to stop overly broad warrants, not to limit warrantless search and seizure powers).

87. *Atwater*, 532 U.S. at 339-46. An analysis of the American common law also did not express a unanimous viewpoint. Some cases tended to propound that there was no authority to arrest without a warrant if the misdemeanor did not breach the peace. *See id.* at 341, *citing* Commonwealth v. Carey, 66 Mass. 246, 250 (1853) (stating that "the old established rule of the common law" was that "a constable . . . could not arrest one without a warrant . . . if such crime were not an offence amounting to a felony;" however, this rule could "be altered by the legislature"); *see also id.*, *citing* Pow v. Beckner, 3 Ind. 474, 478 (1852). However, there is case law that found otherwise, often against a constitutional challenge. Some legal commentary of the

courts are to analyze Fourth Amendment issues under three different eras of English common law, as was done in *Atwater*,⁸⁸ or merely under the common law at the time of the Amendment's framing, as dictated in its prior holding.⁸⁹

2. What standards are to be applied

After researching the common law from the three separate eras of legal history, the majority explicitly concluded that the common law had consistently rendered differing opinions regarding the legality of warrantless arrests for offenses that did not constitute a breach of the peace.⁹⁰ Irrespective of its own specific findings, the Court concluded that *Atwater*'s common law argument had failed because "history, if not

past century seems to recognize the constitutionality of a warrantless arrest for any misdemeanor, including those that do not involve a breach of the peace. *Atwater*, 532 U.S. at 342 (citing *Mayo v. Wilson*, 1 N.H. 53 (1817) (upholding a statute authorizing warrantless arrests of those unnecessarily traveling on Sunday against challenge based on state due process and search and seizure provisions); *Holcomb v. Cornish*, 8 Conn. 375 (1831) (upholding a statute permitting warrantless arrests for "drunkenness, profane swearing, cursing or sabbath-breaking" against the argument that "[t]he power of a justice of the peace to arrest and detain a citizen without complaint or warrant against him, is surely not given by the common law"); *Jones v. Root*, 72 Mass. 435 (1856) (rebuffing constitutional challenge to statute authorizing officers "without a warrant [to] arrest any person or persons whom they may find in the act of illegally selling, transporting, or distributing intoxicating liquors"); *Main v. McCarty*, 15 Ill. 441 (1854) (concluding that a law expressly authorizing arrests for city ordinance violations was "not repugnant to the constitution or the general provisions of law"); *White v. Kent*, 11 Ohio St. 550 (1860) (upholding municipal ordinance permitting warrantless arrest of any person found violating any city ordinance or state law); *Davis v. Am. Soc'y for Prevention of Cruelty to Animals*, 75 N.Y. 362 (1878) (upholding a statute permitting a warrantless arrest for a misdemeanor violation of the cruelty-to-animals prohibition)).

88. *Atwater*, 532 U.S. at 326-47. If courts conclude that they are to follow the format of *Atwater*, and therefore analyze Fourth Amendment issues under all three eras, it also remains unclear which historical era is the most, and the least, persuasive if a conflict of laws arises.

89. See *supra* note 82 and accompanying text. Interestingly, two other Fourth Amendment cases that were decided in the same term as *Atwater* also failed to make historical inquires regarding the common law at the time of the Amendment's framing. See *Illinois v. McArthur*, 531 U.S. 326 (2001) (holding that the police may prevent a person from entering his or her home until a warrant is secured if the police believe the person will destroy evidence); *Kyllo v. United States*, 533 U.S. 27 (2001) (concluding that the use of thermal imaging on the home was a search under the Fourth Amendment, and therefore unreasonable without a warrant). However, *Kyllo* did briefly discuss the law of trespass as understood in eighteenth century England, but this precedent did not control. *Kyllo*, 533 U.S. at 31-32.

90. See *Atwater*, 532 U.S. at 328 ("[T]he common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power."); *Id.* at 329. ("On one side of the divide there are certainly eminent authorities supporting *Atwater*'s position."); *Id.* at 330 ("The great commentators were not unanimous."); *Id.* at 332 ("We thus find disagreement, not unanimity, among both the common-law jurists and the text writers who sought to pull the cases together to summarize accepted practice."); *Id.* at 341 ("[I]t is not the case here the 'early American courts . . . embraced' an accepted common-law rule with anything approaching unanimity.") (quoting *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995)).

unequivocal, ha[d] expressed a decided, majority view” contrary to Atwater’s position.⁹¹ Then, tucked away in a footnote, the Court declared that those contesting the legality of a practice that was tolerated at time of the Fourth Amendment’s framing bore a “heavy burden” in persuading courts to find in their favor.⁹² This ‘heavy burden’ terminology is similar to the language used by the Court in other decisions where the strict scrutiny test⁹³ was to be applied.⁹⁴ Such a challenge rarely succeeds.⁹⁵ Consequently, if courts interpret this phrase

91. *Atwater*, 532 U.S. at 345. The entire quote reads: “[w]hile it is true here 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, Atwater does not wager all on history.” *Id.* In making this statement, the Court appears to be clarifying the standard to be used in such an analysis. *Id.* at 345-46.

92. *Id.* at 346 (quoting *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O’Connor, J., dissenting)). “[C]laims that [a] practic[e] accepted when the Fourth Amendment was adopted [is] now constitutionally impermissible’ . . . [bear a] ‘heavy burden’ of justifying a departure from the historical understanding.” *Id.*

93. The phrase “strict scrutiny” was first used in *Skinner v. Oklahoma*. 316 U.S. 535 (1942). There the Court used the standard to invalidate a law that allowed for the sterilization of a male criminal by stating that it “involve[d] one of the basic civil rights of man.” *Id.* at 541. *See also* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” and therefore “courts must subject them to the most rigid scrutiny”). Although the doctrine developed in equal protection jurisprudence, strict scrutiny is now used in many areas of constitutional law. *See, e.g.*, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to a content based speech regulation under the First Amendment’s Free Speech Clause); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532 (1993) (applying the strict scrutiny test under the Free Exercise Clause of the First Amendment to a law whose object was the suppression of religious conduct); *see generally also* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1 (2000).

94. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Organization for Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973); *see also* R. Johan Conrod, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007, 1020 (2001) (referring to the strict scrutiny burden as a “heavy burden”). Other commentators have interpreted the Court’s use of the phrase “heavy burden” to mean that strict scrutiny is to be used. Charles E. Borden, *Primary Elections*, 38 HARV. J. ON LEGIS. 263, 272 (2001).

95. *See* Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (finding the use of strict scrutiny to be “‘strict’ in theory and fatal in fact”); *see also* *United States v. Salerno*, 481 U.S. 739, 745 (1987) (finding such a challenge to be “the most difficult challenge to mount successfully”); Gitanjali S. Gutierrez, *Taking Account of Another Race: Reframing Asian-American Challenges to Race-Conscious Admissions in Public Schools*, 86 CORNELL L. REV. 1283, 1295 (2001) (stating that, based upon recent case law, courts rarely determine that the strict scrutiny test is satisfied). In fact, since strict scrutiny’s formulation in 1942, only in a handful of instances has the Supreme Court found that governmental actions have satisfied strict scrutiny’s requirements. Michael Scaperlanda, *Partial Membership, Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 749 (1996) (calling the ability to successfully survive a strict scrutiny analysis “an insurmountable task”). *See*

to invoke a strict scrutiny analysis, future Fourth Amendment decisions, that will set the standards of twenty-first century jurisprudence, will most likely be decided using eighteenth century legal principles.⁹⁶

C. *Where the Majority went Wrong*

1. Atwater's arrest was extraordinary

If the Supreme Court would have concluded that the common law did not provide adequate guidance,⁹⁷ and because probable cause was admittedly present,⁹⁸ the Court then should have determined whether Atwater's warrantless arrest was extraordinary.⁹⁹ Extraordinary seizures

Burson v. Freeman, 504 U.S. 191 (1992); Austin v. Michigan State Chamber of Com., 494 U.S. 652, 666 (1990); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978); Burns v. Fortson, 410 U.S. 686 (1973) (per curiam); Marston v. Lewis, 410 U.S. 679 (1973); Roe v. Wade, 410 U.S. 113, 163 (1973); *Korematsu*, 323 U.S. 214. Others have argued that the strict scrutiny test should be otherwise used in Fourth Amendment analysis by placing the burden on the state to prove that a warrantless search was necessary to serve a compelling governmental interest. See, e.g., Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 566 (1997) (proposing a strict scrutiny inquiry that "would require the government to prove that a warrantless search was necessary to the achievement of a compelling government interest and was the least intrusive alternative reasonably available"); cf. Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1176 (1988) (noting that when the Court had used a balancing test in other situations, it gave consideration to the "least restrictive alternative" component of strict scrutiny while balancing, but had not considered it in its Fourth Amendment balancing).

96. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 212-14 (1993) (asserting that the "common law rules are insufficient for deciding current Fourth Amendment cases"); David M. Zlotnick, *Justice Scalia and his Critics: An Exploration of Scalia's Fidelity to his Constitutional Methodology*, 48 EMORY L.J. 1377, 1394 (1999) (finding fault in a historical analysis because that type of "approach more often results in no protection for a modern practice, either because that practice was condemned under the religious or moral precepts of that earlier time, or because the modern situation was unknown to the Framers"); Michael C. Dorf, *Washington Yankees on King Arthur's Court: The Supreme Court Journeys to Eighteenth Century England to Define the Rights of Twenty-First Century Americans*, FINDLAW.COM, May 2, 2001, available at <http://writ.news.findlaw.com/dorf/20010502.html> (last visited Dec. 18, 2002) (finding the majority's decision in *Atwater* to be disturbing because the decision's "crucial factor" was determined based on eighteenth century English and American law).

97. See *supra* note 90.

98. See Trans. of Oral Arg. at 5-6, *Atwater* (No. 99-1408) (where Atwater's counsel conceded that if a warrant had been obtained, her arrest would have been reasonable, and therefore based on probable cause).

99. *Whren v. United States*, 517 U.S. 806, 818 (1996). The Court had previously held that when probable cause exists, there usually is no need to subject the seizure to a balancing test. *Id.* The only situations where courts should proceed to a balancing test when probable cause is present are those seizures that were "conducted in an extraordinary manner." *Id.* (stating that "the only

are those that are “unusually harmful to an individual’s privacy or even physical interests.”¹⁰⁰ Some of the types of seizures that the Court had previously found to be extraordinary include: seizure by use of deadly force,¹⁰¹ unannounced entry into a suspect’s home,¹⁰² use of excessive force,¹⁰³ warrantless entry into a suspect’s home,¹⁰⁴ and physical

cases in which we have found it necessary actually to perform the ‘balancing’ analysis involved searches or seizures conducted in an extraordinary manner”); *see also supra* note 26 and accompanying text. The Court had adopted this standard to assure that seizures remain reasonable. *See Payton v. New York*, 445 U.S. 573, 585 (1980) (asserting that “the warrantless arrest of a person is a species of seizure required by amendment to be reasonable”).

100. *Whren*, 517 U.S. at 818.

101. *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, police responded to a call of a suspected break-in. *Id.* at 3. When the police arrived at the home in question they saw a man, later known to be Garner, attempting to flee but halted by a six foot high chain link fence. *Id.* A police officer, with the aid of his flashlight, was able to see Garner’s hands and face and was “reasonably sure” that he was unarmed. *Id.* at 3. The officer called out “police, halt.” *Id.* at 4. However, Garner began to climb over the fence. *Id.* Convinced that if the suspect were to successfully scale the fence he would avoid arrest, the officer shot his gun, and the bullet hit Garner in the back of the head. *Id.* Garner later died in the hospital. *Id.* Under Tennessee law, the officer was permitted to use deadly force in that situation. *Id.* at 4-5. The Court ruled:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.

Id. at 11.

102. *Wilson v. Arkansas*, 514 U.S. 927 (1995). In *Wilson*, the police applied for a warrant to search the home of Wilson and her housemate after an informant had made controlled purchases of drugs from Wilson. *Id.* at 929. After receiving the warrant, the police went to Wilson’s home and, finding the main door open and screen door unlocked, they entered the home while identifying themselves as police officers and stating that they had a warrant. *Id.* The Supreme Court found the search unreasonable and held that the common law knock and announce principle is to be a part of the reasonableness inquiry under the Fourth Amendment. *Id.* at 930. *See also Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (finding “[i]n order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under particular circumstances, would be dangerous or futile, or that it would inhibit the investigation of the crime”).

103. *Graham v. Connor*, 490 U.S. 386 (1989). In *Graham*, Dethrone Graham was a diabetic and, feeling an insulin reaction coming on, he asked a friend to drive him to a convenience store so that he could buy some orange juice to help counteract the reaction. *Id.* at 388. Graham rushed into the store, but found a long line and quickly left the store to be taken to a friend’s house. *Id.* at 388-89. A police officer saw Graham hastily enter and exit the store and made an investigatory stop of his car after following it for one half of a mile. *Id.* at 389. The driver told the officer of his friend’s “sugar reaction,” but the officer ordered the men out of the car until the officer could find out what, if anything, had happened at the convenience store. *Id.* Graham got out of the car, ran around the car twice, sat down on the curb, and then passed out. *Id.* at 389. Backup officers, who had arrived on the scene, tightly cuffed Graham behind his back and threw him, head first, into a patrol car despite the pleas from the driver that Graham was a diabetic and to check his wallet for a diabetic card. *Id.* The police officers additionally refused the driver’s attempts to give Graham some orange juice to help his condition. *Id.* After receiving a report that Graham had done nothing wrong at the convenience store, he was released. *Id.* As a result of the confrontation, Graham suffered a broken

penetration of the body.¹⁰⁵

Subjecting Atwater to a custodial arrest and time in jail, was extraordinary.¹⁰⁶ Numerous legal organizations,¹⁰⁷ legislatures,¹⁰⁸ and

foot, lacerations on his wrists, bruises on his forehead, an injured shoulder, and continuous loud ringing in his ear. *Id.* at 390. The Court held that “all claims that law enforcement officers ha[d] used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” *Id.* at 395 (citing *Garner*, 471 U.S. 1).

104. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, a concerned citizen witnessed Welsh’s car swerve about the road and finally come to a rest in a field. *Id.* at 742. The witness pulled his car behind Welsh’s car to block it in until the police arrived. *Id.* Welsh emerged from his car before the police arrived and walked home. *Id.* Upon arriving, the police established Welsh’s identity and residence and were told by the witness that Welsh was either sick or very inebriated. *Id.* At around 9:00 p.m., without first securing a warrant, the police went to Welsh’s home, went into his house when his stepdaughter answered the door, and went to Welsh’s bedroom on the second floor where they found him naked in bed. *Id.* at 743. The officers placed Welsh under arrest and charged him with driving under the influence. *Id.* The Supreme Court ruled that because of the lack of exigent circumstances and because of the special protection afforded an individual while in his home, Welsh’s arrest was invalid. *Id.* at 754. *See also Steagald v. United States*, 451 U.S. 204 (1981) (saying that a search warrant is required for an arrest in another’s home).

105. *Winston v. Lee*, 470 U.S. 753 (1985). In *Winston*, a shop owner was closing his store when he saw someone with a gun approaching the store from across the street. *Id.* at 755. The shop owner, who was also armed, drew his gun. *Id.* The other individual told the shop owner to freeze and, upon hearing that, the shop owner fired at the individual who, in turn, returned fire. *Id.* The shop owner was shot in the leg and the individual retreated. *Id.* The shop owner was taken to the hospital. *Id.* at 755. About twenty minutes later, the police found Lee eight blocks from the aforementioned shop with a gunshot wound in the left part of his chest. *Id.* at 756. Lee told the police that he had been shot while being robbed. *Id.* Lee was taken to the same hospital that the shop owner was being treated, and when the shopkeeper saw Lee, he identified Lee as the man who had shot him. *Id.* After an investigation, the police charged Lee with the attempted robbery of the store. *Id.* The state then attempted to compel Lee to have surgery to remove the bullet from his chest for evidentiary purposes. *Id.* The Court held that the search of Lee’s body for the bullet was unreasonable unless there was a showing of “a more substantial justification.” *Id.* at 767. The Court used a two part test to make its conclusion. *Id.* at 761. The first part requires courts to conclude whether or not the search would endanger the life or health of the suspect, because if there was endangerment, the search would be unjustifiable. *Id.* The Court cites many decisions that have recognized the importance of this inquiry. *Id.* at 767 n.4 (citing *Bowden v. State*, 510 S.W.2d 879, 882 (Ark. 1974) (refusing to order surgery because of medical risk); *People v. Smith*, 362 N.Y.S.2d 909 (1974) (same); *State v. Allen*, 291 S.E.2d 459 (S.C. 1982) (same)). The second part considers “the extent of intrusion upon the individual’s dignity interests in personal privacy and bodily integrity.” *Winston*, 470 U.S. at 761.

106. Atwater’s arrest was particularly invasive and intrusive because it took place in front of her two children. Petitioners’ Brief at 28-30, *Atwater* (No. 99-1408). The officer yelled and mortified Atwater in front of her children, and now the children blame themselves for their mother’s arrest because she had been looking for their lost toy. *Id.* at 30 n.14.

107. *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE §§ 10-2.1 – 10-2.2 (2d ed. 1980) (stating that citations are to be used “to the maximum extent consistent with the effective enforcement of the law” but recognizing exceptions allowing an arrest, including when “necessary to prevent imminent bodily harm to the accused or another,” when the accused fails to identify himself or herself, when the offender fails to sign a promise to appear, there is a “substantial likelihood that the accused will refuse to respond to a citation,” and when the accused

scholars¹⁰⁹ have recommended that minor misdemeanants be issued a citation in lieu of arrest unless additional circumstances are present. Therefore, because Atwater's arrest involved no such circumstance,¹¹⁰ her seizure was unusually harmful to Atwater's privacy interest.¹¹¹

had intentionally failed to appear previously); AMERICAN LAW INSTITUTE: A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURES § 120.2 (1975) (stating that regulations regarding citation should "be designed to provide the maximum use of citations so that persons believed to have committed offenses will be taken into custody only when necessary in the public interest"); UNIFORM VEHICLE CODE & TRAFFIC ORDINANCE §§ 16 – 203-206 (Rev. 1971) (recommending a requirement of release without citation for all drivers except those charged with certain offenses, who fail to furnish satisfactory identification, and those whom the officer has "reasonable and probable grounds to believe" the person will not honor a promise to appear in court); UNIF. R. CRIM. P. 211(c) (1974) (recognizing four exceptions to the mandatory citation rule, including when the offense involves risk of bodily injury, when the offense will purposely continue to be committed unless the offender is arrested, when the charge is punishable by incarceration and the offender would not respond to the citation, and when the arrest is necessary to protect the offender or to bring him medical attention); NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 45.2, at 140-41 (2d ed. 1991) (stating that citations are to be used as frequently as possible while remaining consistent with the goals of effective law enforcement and public safety).

108. Such statutes may require a reasonable belief that the suspect 1.) will not be apprehended unless immediately arrested, 2.) may cause personal injury or property damage to himself or others, 3.) will destroy evidence, or 4.) will persist in the refusal to identify himself or herself and therefore, a summons cannot be issued. *See, e.g.*, CAL. PENAL CODE § 853.6(i) (West 1996); DEL. CODE ANN. tit. 11, § 1904(a)(2) (1999); KAN. STAT. ANN. §§ 22-2401(c)(2)(A)-(C) (1999); ME. REV. STAT. ANN. tit. 17-A §§ 15(1)(a)(5)-(8) (West 1999); MONT. CODE ANN. § 46-6-311(1) (1999); NEB. REV. STAT. § 29-404.02(2) (1999); N.H. REV. STAT. ANN. § 549.10(1)(c) (1999); N.C. GEN. STAT. § 15A-401(b)(2)(b) (2000); R.I. GEN. LAWS § 12-7-3 (1999); UTAH CODE ANN. § 77-7-2(3) (1999); VT. R. CRIM. P. 3(a)(3)-(4) (2000); WYO. STAT. ANN. § 7-2-102(b)(iii) (Michie 2000). Some statutes require both particularly dangerous offenses and the risk of flight or injury, etc. *See* D.C. CODE ANN. § 23-581(a)(1)(C), (2) (1996).

109. 3 LAFAVE, *supra* note 67, § 5.2(g), at 94 (noting that a rule that would impose some constitutional limitations on the use of custodial arrests when minor offense were involved would be "most desirable"); Salken, *supra* note 2, at 249 (stating that the best solution to the pretextual search problem is to limit the power to arrest for a traffic violation); Arthur Mendelson, *Arrest for Minor Traffic Offenses*, 19 CRIM. L. BULL. 501, 503 (1983) (suggesting that rules delineate when to issue a citation and when an arrest is essential to "protect citizens from arbitrary arrests"); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416-19 (1974) (imploing the enactment of police regulations and state legislation to help guide police and the courts to avoid Fourth Amendment problems of the past); *see generally* Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972).

110. Atwater had been a sixteen year resident of the small town of Lago Vista, and therefore, was "not likely to abscond." *Atwater*, 532 U.S. at 370. Additionally, Atwater's identity was not in issue because, although she was unable to produce her driver's license because it had just been stolen, Officer Turek knew who she was from a previous encounter. *Id.* Finally, Atwater was not likely to continue to violate the law nor place herself or her children in harms way because, had the officer simply issued a citation, it is likely that she would have secured herself and her children in their safety belts. *Id.* (concluding "there was every indication that Atwater would have buckled herself and her children if she had been cited and allowed to leave").

111. Ensuring the identity of the offender and assuring his appearance in court are the primary reasons for arrests. *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) ("The purpose of an arrest at common law, in both criminal and civil cases, was 'only to

However, despite the privacy intrusion that resulted from the arrest¹¹² and the absence of additional circumstances, the majority contends that Atwater's arrest was not extraordinary because it was no different than any other custodial arrest.¹¹³ This analysis, however, is incorrect as it is subjective to Atwater and consequently fails to focus on the more fitting objective inquiry of whether a custodial arrest for a fine-only offense is extraordinary.¹¹⁴ If the Court had framed the issue in such a manner, the majority would have most likely concluded that Atwater's arrest was extraordinary and, the Court would have proceeded to a balancing test.¹¹⁵

compel an appearance in court' . . .") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES at *290); Salken, *supra* note 2, at 266 ("The government's interest in ensuring the defendant's presence at the trial is strong and legitimate."); Horace L. Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 541, 543 (1924) (defining arrest as "the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime"). *But see* State v. West, 20 S.W.3d 867, 872 (Tex. Crim. App. 2000) (citing Richards v. State, 743 S.W.2d 747, 749 (Tex. Crim. App. 1987)) (holding that the "Texas seat belt law serves the public safety and welfare by enhancing a driver's ability to maintain control of his vehicle, and by reducing injuries not only to himself, but also to others"); State v. Hartog, 440 N.W.2d 852, 858 (Iowa 1989) (stating that "the seat belt law promotes the public interest [by] reducing the public costs associated with serious injuries and deaths caused by automobile accidents").

112. For a more in depth discussion of the privacy intrusion that results from an arrest and the subsequent confinement in jail see *infra* Part IV.E.2.

113. *Atwater*, 532 U.S. at 354 (holding that "Atwater's arrest was . . . no more 'harmful to . . . [her] privacy or . . . physical interests' than the normal custodial arrest").

114. *See* *Graham v. Connor*, 490 U.S. 386, 397 (1989) (concluding that reasonableness under Fourth Amendment is to be determined by looking to what is "'objectively reasonable' in light of the facts and circumstances"). Subjective inquiries should play no part in Fourth Amendment analysis. *See id.* at 397 (asserting that subjective inquiries have no "bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment"); *Whren v. United States*, 517 U.S. 806, 813 (1996) (saying that subjective inquiries "play no role in . . . Fourth Amendment analysis"). If *Atwater's* method of phrasing the issue were proper, then the question *Tennessee v. Garner*, 471 U.S. 1 (1985), would have asked would have been "Was the killing of Garner more harmful to his privacy interests than a normal killing?" *Id.* The suggestion that one type of killing is more harmful or less harmful than another type of killing is contrary to the undercurrent of *Garner*, which recognizes the value of all human life, even those suspected of crimes. *Id.* at 9 ("The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon."); *see* Melissa Helen Hill, Note, *Tennessee v. Garner – The Use of Deadly Force to Arrest as an Unreasonable Search and Seizure*, 65 N.C. L. REV. 155, 163-64 (1986) (stating that *Garner* "involved an individual's interest in avoiding a serious or deadly bodily injury"); Alan Bolden, Case Note, *Constitutional Law – The Fourth Amendment Protective Order For Non-Violent Fleeing Felons: Tennessee v. Garner*, 29 HOW. L.J. 625, 637 (1986) (concluding that the killing of non-violent, unarmed felony suspects is unreasonable). Instead of using a subjective analysis, as *Atwater* had, *Garner* used broad language throughout its decision stating, "[a] police officer may not seize an unarmed, non dangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11.

115. The majority concluded, "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Atwater*, 532 U.S. at 353. Therefore, because incidences such as *Atwater's* were not occurring on a regular basis, what happened to her had to have been

2. A balancing test results in a conclusion that is favorable to Atwater

Since the common law analysis did not provide adequate guidance,¹¹⁶ and Atwater's seizure was extraordinary,¹¹⁷ the Court then should have performed a balancing test.¹¹⁸ This test would weigh the resulting privacy intrusion upon the individual against the importance of the governmental interest.¹¹⁹ In Atwater's case, a balancing test would result in a finding in her favor because the intrusion on her privacy

"unusually harmful" to Atwater's privacy. *Id.* at 354. The Court further acknowledged that what happened to Atwater was humiliating. *Id.* The Court concluded that:

If we were to derive a rule exclusively to address the uncontested facts in this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off without a citation. In her case, the physical incidents of arrests were merely gratuitous humiliations imposed by a police officer who was (at best) exercising poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

Id. at 46-47. Therefore, because such incidents were not 'epidemic' and Atwater was subjected to 'gratuitous humiliations' and 'pointless indignity,' the Court could have found, after making an objective inquiry, that Atwater's arrest was extraordinary. *See id.* at 347-55.

116. *See supra* note 90 and accompanying text.

117. *See supra* Part IV.C.1.

118. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999) (asserting that when the historical inquiry yields no answer, courts "must evaluate the search or seizure under traditional standards of reasonableness by assessing, on one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests").

119. *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)) (holding that in evaluating the reasonableness of a seizure the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1980) (stating that the Fourth Amendment establishes a "practical compromise between the rights of the individuals and the realities of law enforcement"); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Place*, 462 U.S. 696, 703 (1983); *see also Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Winston v. Lee*, 470 U.S. 753, 758-63 (1985); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 534-35 (1967). The intrusion on the person must also actually further the government's stated interests. *See Garner*, 471 U.S. at 9 (recognizing the government's interest in "effective law enforcement"); *Prouse*, 440 U.S. at 654 (stating that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"); *Forrester v. City of San Diego*, 25 F.3d 804, 813-14 (9th Cir. 1994) (finding the use of nonchakus and other forms of force in effectuating an arrest as a nonefficient means of accomplishing a legitimate arrest).

greatly outweighed any important governmental interests.¹²⁰

The Supreme Court has long recognized that a custodial arrest is a “serious personal intrusion,” and therefore, a severe infringement on the privacy interests of the arrestee.¹²¹ The Court has further recognized that there are numerous intrusions and indignities that accompany a custodial arrest.¹²² Many scholars also have acknowledged the effects that an arrest may have upon an individual.¹²³ Therefore, because of the profound consequences that may follow, a custodial arrest is a significant intrusion upon an individual’s liberty interests, much greater than that of a routine traffic stop.¹²⁴

120. See *infra* notes 121-35 and accompanying text.

121. *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (stating that an arrest “is a serious personal intrusion regardless of whether the person seized is guilty or innocent”). See also *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citing *Henry v. United States*, 361 U.S. 98, 100 (1959)) (referring to an arrest as the “quintessential seizure”).

122. An arrest is “abrupt, is effected with force or the threat of it and often in demeaning circumstances, and . . . results in a record involving social stigma.” *United States v. Dionisio*, 410 U.S. 1, 10 (1973). The Court has further described an arrest as “a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.” *United States v. Marion*, 404 U.S. 307, 320 (1971). The affects of arrest are further described in *U.S. v. Watson*. 423 U.S. 411, 428 (1976) (stating that “[a]lthough an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, . . . no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred”). Lower courts have also recognized the effects a custodial arrest may have on an individual. See, e.g., *Gramenos v. Jewel Comps., Inc.*, 797 F.2d 432, 441 (7th Cir. 1986) (saying “[m]ost reports of misdemeanors will not produce a sentence of custody . . . so a custodial arrest becomes a substantial part on the punishment”); see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 46-47 (1979). For other intrusions and indignities that accompany an arrest, see *infra* notes 177-78 and accompanying text.

123. See, e.g., William A. Schroeder, *Warrantless Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 797-800 (1993) (concluding that “[i]f a person charged with a misdemeanor is subjected to a custodial arrest, that arrest is likely to be the major consequence suffered by the person”); Salken, *supra* note 2, at 264 (stating that the events that follow an arrest for a traffic violation result in a complete intrusion on the person’s privacy).

124. A traffic stop “is a relatively brief encounter and ‘is more analogous to a so-called “Terry stop” . . . than to a formal arrest.’” *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)). Traffic stops usually entail the motorist to “be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, . . . [who may then be] given a citation, but [the motorist’s expects] that in the end he most likely will be allowed to continue on his way.” *Berkemer*, 468 U.S. at 437. But see *Wilson*, 519 U.S. at 422 (asserting that “[t]raffic stops, even for minor violations, can take upwards of 30 minutes”). See also Robert R. Rigg, *The Objective Mind and “Search Incident to Citation”*, 8 B. U. PUB. INT. L.J. 281, 290 (1999) (finding that when the police initiate a traffic stop “the process of being arrested involves the greatest intrusion into a citizen’s privacy in the continuum of invasiveness”).

This privacy interest is to be weighed against the legitimate governmental interests that would be furthered by a custodial arrest.¹²⁵ The best indicator of these governmental interests is the legislature's classification of the offense.¹²⁶ Consequently, because the Texas legislature opted to not allow for the possibility of jail time for a violation of the seat belt law,¹²⁷ the State's interest in the enforcement of their seat belt laws is shown to be minimal.¹²⁸

125. See *supra* note 118 and accompanying text.

126. *Lewis v. United States*, 518 U.S. 322, 326 (1996) (holding that "legislature's judgment about the offense's severity" is the "the most relevant with which to assess the character of an offense" because it gives an "objective indication[] of the seriousness with which society regards the offense"); *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (finding that the state's penalty classification for an offense is "the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest"); *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969) (suggesting that the need for custody is a relevant factor in assessing reasonableness); *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968) (asserting that "[t]he Fourth Amendment proceeds as much by limitation upon the scope of governmental action as by imposing preconditions upon its initiation"); *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring) ("Whether there is a reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of attempting to reach it.").

127. TEX. TRANSP. CODE ANN. § 545.413(d) (Vernon 2001). Decisions about what is appropriate punishment are to be decided by a representative, politically accountable body. See *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (discussing the prerogative of the legislature in determining the appropriate punishment levels); *Blanton v. Las Vegas*, 489 U.S. 538, 541 (1989) (stating that "[t]he judiciary should not substitute its judgment for that of a legislature, which is 'far better equipped to perform the task'"); William J. Stuntz, *Terry and Legal Theory: Terry's Impossibility*, 72 ST. JOHN'S L. REV. 1213, 1217 (1998) (stating that courts cannot measure or evaluate many factors in Fourth Amendment law such as: the culture of a community, its relationship with the local police, and the cultural and racial makeup of the police force). Despite the statute, it is contrary to Texas' historical backdrop to allow warrantless arrests. See Gerald S. Reamey, *Arrests in Texas's "Suspicious Places": A Rule in Search of Reason*, 31 TEX. TECH L. REV. 931, 932-33 (2000) (stating the "preference in Texas law that arrests be made pursuant to a warrant is long-standing and strong").

128. See *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 134 (Tex. 1994) (stating that the fine imposed by the legislature was meant to be "the sole legal sanction for the failure to wear a seat belt"). See also Peter Scaff, Comment, *The Final Piece of the Seatbelt Evidence Puzzle*, 36 HOUS. L. REV. 1371 (1999) (discussing the Texas courts' rulings regarding the civil interpretation of the seat belt statute). In other areas of constitutional interpretation, the Court has deferred to the legislature's classification of offenses as fine-only or not in aspects of rights such as the right to counsel. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the right to counsel under the Sixth and Fourteenth Amendments exists only when the offenses charged subject that individual to incarceration). Suspects do not get the right to counsel even if they are subjected to enormous fines or other serious consequences not involving incarceration. See *Argersinger*, 407 U.S. at 37 (Powell, J., concurring). The Court has also deferred to the legislature's classification of an offense regarding the right to a jury trial. See *Baldwin v. New York*, 399 U.S. 66 (1970) (deciding that a defendant has the right to a jury trial if the offense, that is to be tried, is punishable by at least six months of incarceration).

Additionally, the state's interest is shown to be minimal because when issuing a citation, the

The *Atwater* majority contends that the adoption of bright-line rules is a legitimate governmental interest to be considered in balancing because, when addressing reasonableness, the Court has “recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.”¹²⁹ However, this purported interest is shown to be minimal because the Court has not consistently

threat to officer safety is far less than it would be if the officer were to make an arrest. *Knowles*, 525 U.S. at 117 (stating that “[t]he threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest”).

129. *Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001) (citing *United States v. Robinson*, 414 U.S. 218, 234-35 (1973)). “Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government’s side with an essential interest in readily administrable rules.” *Id.* at 347. See *New York v. Belton*, 453 U.S. 454, 458 (1981) (rules regarding the Fourth Amendment “ought to be expressed in terms that are readily applicable by the police in the context of law enforcement activities in which they are necessarily engaged” and not “qualified by all sorts of ifs, ands, and buts”) (quoting *LaFave*, *supra* note 27, at 141). In asserting its position, the Court simply posed hypothetical questions that law enforcement officers may face if *Atwater*’s proposed rule were to be adopted. *Atwater*, 532 U.S. at 348 (including such questions as how officers were to determine if the arrest was a suspect’s first offense or if he or she was a repeat offender and how officers in the field were to determine the weight of marijuana, thereby rendering the act of possession jailable or fine-only). The Court also attempts to dispose of a tie-breaker rule that would instruct officers, if there was doubt whether the offense was jailable, to not arrest. *Id.* at 350-51. The Court analogized such a provision to be kindred to a “least-restrictive-alternative limitation” thereby rendering such a provision unworkable. *Id.* at 350. Other arguments the Court made that could be construed as propositions for the importance of governmental interests include the Court’s rationalization regarding the formation of a tie-breaker rule requiring police to not arrest when there is a question of whether the jailable offense is inappropriate because “[m]ultiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked. . . .” *Id.* at 351. The Court then listed other reasons why it believed that *Atwater*’s proposed rule would fail, including the lack of an “epidemic” like problem, the entitlement of an arrestee to a magistrate’s review within forty-eight hours, the legislature’s ability to impose “more restrictive safeguards,” and the fear that such a ruling may lead to many “colorful arguments” that an arrest was extraordinary. *Id.* at 352-54.

In fact, while interpreting the Fourth Amendment the Supreme Court has adopted many bright-line rules: private residences may not be entered into without a warrant, except for in an emergency (*Payton v. New York*, 445 U.S. 573 (1980)); automobiles may be searched without a warrant if there exists probable cause (see *Pennsylvania v. Labron*, 518 U.S. 938 (1996)); *California v. Acevedo*, 500 U.S. 565 (1991); warrantless arrests in public places of suspected felons are permitted if based on probable cause (*United States v. Watson*, 423 U.S. 411 (1976)); an arrestee may be searched without a warrant (*Robinson*, 414 U.S. 218); if a suspect is arrested while in a car, the interior of the car is automatically subject to a search (*Belton*, 453 U.S. 454). See generally *Wyoming v. Houghton*, 526 U.S. 295 (1999) (adopting a bright-line rule allowing searches of passenger’s containers found in the car when the car itself is subject to search because of probable cause); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (forming a bright-line rule permitting the police to order the driver out of a lawfully stopped vehicle); *Maryland v. Wilson*, 519 U.S. 408 (1997) (forming a bright-line rule permitting the police to order passengers out of a lawfully stopped vehicle).

recognized a need for bright-line rules.¹³⁰ Additionally, the majority contends that if the Court did not adopt a bright-line rule regarding fine-only offenses, police officers would be unable to distinguish those offenses that may carry jail time from those that may not.¹³¹ However, this argument is also shown to be immaterial because it contradicts the Court's prior holding in *Welsh v. Wisconsin*¹³² where the Court found that the state legislature's classification of an offense "is one that can easily be identified both by the courts and by officers faced with the decision to arrest."¹³³ Therefore, the interest of the government in adopting bright-line rules is shown to be limited because of the Court's

130. "This Court has consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette*, 519 U.S. 33, 34 (1996). The full quote of Chief Justice Rehnquist states that reasonableness depends upon "the totality of the circumstances," and that "in applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.* Avoiding the formation of bright-line rules has its own well-established case law, as noted by the Chief Justice in his citations in *Robinette*. See *id.* (citing *Florida v. Bostick*, 501 U.S. 429 (1991) (rejecting a flat prohibition of suspicionless questioning of passengers on board inter-city buses); *Michigan v. Chesternut*, 486 U.S. 567 (1988) (rejecting a "bright-line" rule that any investigatory pursuit amounts to a seizure); *Florida v. Royer*, 460 U.S. 491 (1983) (declining to rule that a "drug courier profile" alone cannot provide basis for investigatory stop); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (rejecting a rule that valid consent to search can be given only by a suspect who knows that he or she has the right to refuse consent). See also *Maryland v. Wilson*, 519 U.S. 408, 413 n.1 (1997) (rejecting the suggestion of adopting "bright-line rules"); *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting) (stating that "any search for 'bright lines' . . . is apt to be illusory because attorneys are "trained to attack 'bright lines' the way hounds attack foxes"); see generally Daniel T. Gillespie, *Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops*, 31 LOY. U. CHI. L.J. 1 (1999) (giving a brief history of the use of bright-line rules by the Supreme Court when interpreting the Fourth Amendment).

131. *Atwater*, 532 U.S. at 347-48. The Court states that "[t]he trouble with th[e] distinction [between jailable and fine-only offenses], of course, is that an officer on the street might not be able to tell." *Id.* at 348 (citing *Berkemer v. McCarty*, 468 U.S. 420, 431 n.13 (1984)). The Court tries to bolster its decision by asking hypothetical questions such as "[i]s this the first offense or is the suspect a repeat offender?," "[i]s the weight of the marijuana a gram above or a gram below the fine-only line?" and "[w]here conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge?" *Id.* at 348-49.

132. 466 U.S. 740 (1984).

133. *Id.* at 754. There the Court apparently recognized, not only that police officers are trained to know the law so they can enforce it, but also recognized that the technology available to police while in their patrol car allows them to confirm suspect's identities, run warrant checks, and, if they do not know if a crime carries the potential for jail time, to radio in, and find out if the offense is jailable. See *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (stating that "[b]ecause of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be mistaken literalism that ignores the purposes of historical inquiry"); *State v. Walker*, 12 S.W.3d 460, 468 (Tenn. 2000) (invalidating an arrest that resulted from the failure to show proper identification because the suspect had given the officer his name, driver's license number and birthday and the officer was able to verify this information, check the ownership of the car the suspect had been driving, and confirm the car's license plate number by radioing dispatch).

prior, contradictory findings.

Furthermore, lower courts that had used a balancing test in addressing this issue had found warrantless arrests for minor offenses to be unreasonable intrusions under the Fourth Amendment.¹³⁴ Therefore, because the purported governmental interests are clearly outweighed by the level of intrusion on the individual's privacy interests, Atwater would have prevailed if the Supreme Court had employed a balancing test in her case.¹³⁵

D. What the Court Should Have Done

1. The *Terry* Standard is Workable and Preferable

In *Terry v. Ohio*,¹³⁶ the Supreme Court ruled that an officer could briefly stop an individual as long as the officer's concern was based on "specific and articulable facts."¹³⁷ The *Atwater* dissenters urged for the

134. See, e.g., *State v. Jones*, 727 N.E.2d 886, 892-95 (Ohio 2000) (finding that the common law provided no "clear practice" and, therefore, a balancing test was applied which found an arrest for a minor misdemeanor was unconstitutional under the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution). But see *State v. Harmon*, 910 P.2d 1196, 1201-04 (Utah 1995) (applying a balancing test to an arrest for driving on a suspension charge and finding the arrest to be reasonable because of "the governmental interest in removing unlicensed drivers from the road for public safety reasons").

135. Had the majority determined Atwater's arrest to be extraordinary and therefore performed a balancing test, it is likely that the majority would have found that her privacy interest would have outweighed the state's governmental interest. See *Atwater*, 532 U.S. at 321 ("Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case."); see also Madelyn Daley Resendez, *Police Discretion and the Redefinition of Reasonable Under the Fourth Amendment: Maryland v. Wilson*, 519 U.S. 408 (1997), 23 S. ILL. U. L.J. 193, 219 (1998) (stating that the best approach to prevent police abuses is to recognize that some offenses, like seat belt law violations, are too trivial to warrant even a traffic stop).

136. 392 U.S. 1, 27 (1968). In *Terry*, a police officer stopped and frisked three men who were loitering in front of a store and acting in a suspicious manner. *Id.* at 6-7. The officer feared that the individuals were "casing a job, a stick up." *Id.* at 6. The officer's pat down yielded pistols on two of the three men. *Id.* at 7. The pat down of Terry consisted of the officer patting the outside of the clothing during which the gun was felt in Terry's left breast pocket of his overcoat. *Id.* In court, Terry argued that because the officer lacked probable cause to arrest him, the search was per se unconstitutional. *Id.* at 25. The Supreme Court disagreed and found the "stop-and-frisk" to be reasonable because the police officer reasonably believe that the detainee was dangerous. *Id.* at 27. The Court, accordingly, held that a reasonable belief that a danger is present, not probable cause, was the standard in analyzing a stop-and-frisk under the Fourth Amendment. *Id.*

137. *Terry*, 392 U.S. at 21. These "specific and articulable facts" must be "taken together with the rational inferences from those facts" to reasonably warrant an intrusion. *Id.* This standard was necessary because a subjective "good faith" standard would have put the protections afforded by the Fourth Amendment at the mercy of police discretion. *Id.* at 22 (citing *Beck v. Ohio*, 379 U.S. 89,

adoption of a similar test that would require officers to issue citations for fine-only offenses unless they were “able to point to specific and articulable facts” to justify an arrest.¹³⁸ The majority rejected this proposition because it believed that such a standard would be less guiding for law enforcement than the traditional probable cause standard,¹³⁹ however that is not true.¹⁴⁰

First of all, the probable cause standard is not the firm, fixed standard that the majority contends.¹⁴¹ Instead, it is a “fluid concept – turning on the assessment of probabilities in particular factual contexts;” therefore, it is not very guiding.¹⁴² Additionally, if the *Terry* standard

97 (1964)). This good faith standard was the first prong of the Court’s analysis to determine reasonableness. *Id.* at 20. The second prong was that the scope of the resulting search or seizure had to be narrowly tailored to reflect the original reason for the stop. *Id.* at 20. In other words, the search had to “be strictly circumscribed by the exigencies which justify its initiation.” *Id.* at 26 (citing *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 310 (Fortas, J., concurring) (1967)). The Court recognized that the primary exigency in such an analysis was officer’s safety and such an intrusion was reasonable if “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.* at 27. Therefore, the Court ruled that the officer’s search of *Terry* was reasonable because he “confined his search strictly to what was minimally necessary to learn whether the men were armed.” *Id.* at 30.

138. *Atwater*, 532 U.S. at 366 (quoting *Terry*, 392 U.S. at 21).

139. *See id.* at 345-53 (applying “the standard of probable cause” because *Atwater*’s proposed rule was not readily administratable because of “complications [that arose when trying to] . . . draw[] a line between minor crimes with limited arrest authority and others not so restricted”).

140. *See id.* at 366 (“Over the past 30 years, it appears that the *Terry* rule has been workable and easily applied.”); George M. Dery III, *Sanctioning “Thousands Upon Thousands of Petty Indignities”*: *The Supreme Court’s Creation of a Constitutional Free Zone for Police Seizure of Innocent Passengers in Maryland v. Wilson*, 54 WASH. & LEE L. REV. 1419, 1458 (1997) (finding the *Terry* standard to be “apparently workable”); Stephen A. Saltzburg, *Terry and the Fourth Amendment: Marvel or Mischief?* *Terry v. Ohio, A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 957 (1998) (finding that the *Terry* standard – reasonable suspicion – has proved to be “a workable yardstick for police and has assured that the police must have specific facts to justify any forcible encounters with the public”).

141. Probable cause is determined by examining the “totality of the circumstances.” *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (reaffirming a totality of the circumstances analysis); *see also Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) (citing *Winston v. Lee*, 470 U.S. 753, 760 (1985); *United States v. Place*, 462 U.S. 696, 703 (1983); *Hayes v. Florida*, 470 U.S. 811, 814 (1985); *Florida v. Royer*, 460 U.S. 491, 500 (1983); *Cupp v. Murphy*, 412 U.S. 291, 296 (1973); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 531 (1967); *Schmerber v. California*, 384 U.S. 757, 767 (1966); and *Ker v. California*, 374 U.S. 23, 33 (1963) (cases where “the question was whether the totality of the circumstances justified a particular sort of search or seizure”).

142. *Gates*, 462 U.S. at 232. The Court further defined probable cause as a “‘practical, non-technical conception’ . . . [that] deal[s] . . . with probabilities.” *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)); *Wong Son v. United States*, 371 U.S. 471, 479 (1963) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)) (asserting that “[t]he quantum of information which constitutes probable cause – evidence which would ‘warrant a man of reasonable causation in the belief’ that a [crime] has been committed – must be measured by the facts of the particular case”). *See also Llanguno v. Mingey*, 763 F.2d 1560, 1564-66 (7th Cir. 1985) (indicating

were applied in cases such as *Atwater's*, it would not have been an unreasonable restraint on law enforcement because the probable cause standard is simply a minimum.¹⁴³ Finally, the *Terry* standard should be easily ascertainable to every law enforcement agent because it has also been applied to traffic stops, which are routine occurrences in law enforcement.¹⁴⁴ Consequently, the standards of probable cause and

the appropriateness of a vacillating standard of probable cause in criminal investigations depends in some instances on the seriousness of the alleged conduct); Albert W. Altshuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 252 (1984) (proposing that what satisfies the probable cause requirement for one situation may not meet the threshold in another).

143. See *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (holding that the probable cause requirement is “the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest ‘reasonable’ under the Fourth Amendment”). Higher standards than that of probable cause (or a stricter interpretation of probable cause) have been recommended when the Fourth Amendment activity is highly intrusive. See, e.g., *Berger v. New York*, 388 U.S. 41, 69 (1967) (Stewart, J., concurring) (asserting that “[o]nly the most precise and rigorous standard of probable cause should justify an intrusion of [the kind involved here]”); *Gramenos v. Jewel Comps., Inc.*, 797 F.2d 432, 441 (7th Cir. 1986) (stating that when an arrest or other seizure takes place in a private place at night, there is an “elevated standard” and perhaps a need of showing of “haste or stealth”). Conversely, other cases and scholars have opined that when a more serious offense is concerned, a lower degree of probable cause should be used. See, e.g., *Llaguno*, 763 F.2d at 1564-66 (opting to employ a reasonableness standard in assessing probable cause that varies based on the seriousness of the alleged offense); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. L. REF. 465, 503-04 (1984) (discussing how probable cause can be assessed by looking to the government’s need for immediate action, the nature of the intrusion, and the availability of other alternatives). Because the standard is simply a minimum, additional factors may be added to probable cause to regulate an action without undue hindrance. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 327 (1990) (holding that a protective sweep after an arrest that occurred in the individual’s house was permissible if the officers had a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted” the officer to believe that there was danger) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)); *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (holding the *Terry* standard applied to a search of the passenger compartment of a vehicle); *State v. Walker*, 12 S.W.3d 460, 465 (Tenn. 2000) (citing *People v. Monroe*, 16 Cal. Rptr. 2d 267, 286 (Cal. Ct. App. 1993)) (invalidating an arrest because the officer was unable to point to a “specific articulable reason” to doubt the identity of the person who was stopped).

144. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (applying the Court’s rationale in *Terry* to affirm the suppression of evidence seized after a random traffic stop based on no suspicion); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (analogizing a traffic stop to a “*Terry* stop”); *Knowles v. Iowa*, 535 U.S. 113, 117 (1998) (stating “[a] routine traffic stop . . . is a relatively brief encounter and ‘is more analogous to a ‘*Terry* stop’ . . . than to a formal arrest”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (restricting border patrols’ authority to execute traffic stops without awareness of “specific articulable facts” adequate to merit a reasonable suspicion that the occupants of the vehicle may be illegal aliens). But see *Whren v. United States*, 517 U.S. 806, 810 (1996) (stating “the decision to stop an automobile is reasonable when the police have probable cause to believe that a traffic violation has occurred”).

In *Berkemer*, the Court ruled that “detention . . . pursuant to a traffic stop is presumptively temporary and brief,” and does not involve the physical transportation of the individual to the police station, and therefore, does not make “the motorist feel[] completely at the mercy of the police.”

“specific and articulable facts” are equally recognizable and enforceable in the field.¹⁴⁵

Berkemer, 468 U.S. at 438. However, the Court in *Berkemer* did attempt to qualify its analogy in a footnote. *Id.* at 439 n.29 (explaining that “[n]o more is implied by this analogy than most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment.”). Lower courts and scholars have likewise treated traffic violation stops as *Terry* stops. *See, e.g.*, *United States v. Hensley*, 469 U.S. 221, 229 (1985) (holding that a *Terry* stop may be used to investigate completed felonies) (emphasis added); *Lanigan v. Vill. of E. Hazel Crest*, 110 F.3d 467, 473 (7th Cir. 1997) (stating “we believe that Officer Wasek had specific and articulable facts sufficient to give rise to a reasonable suspicion that Lanigan made an improper right turn”); *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992) (applying the *Terry* standard to determine whether an officer had a reasonable suspicion to justify the stopping of a vehicle to search for drugs); 4 LFAVE, *supra* note 66, § 9.2(c), at 28-33 (arguing that a *Terry* stop is limited to serious offenses). *But see* David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L.REV. 1143, 1157-58 (2000) (arguing that the analogy between traffic violation stops and *Terry* stops is improperly founded). However, over time, the second prong of the *Terry* test - that the subsequent search or seizure has to be reasonably related in scope to the original reason for the stop - has eroded significantly. *See* Chris K. Visser, Comment, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car*, 35 HOUS. L. REV. 1683, 1691-99 (1999). As a result of that erosion, the police were able to perform protective searches of both the driver and the automobile, seize any items that were in “plain view,” search the motorist incident to the arrest, run background checks, inquire about unrelated criminal activity, perform consensual searches of the automobile, and use drug-sniffing dogs to smell the car and seek out illegal drugs. *Id.* However, a majority of the courts have held that questions during a traffic stop must be limited to the purpose of the traffic stop or to issues related to suspicion reasonably raised during the stop. *See United States v. Pruitt*, 174 F.3d 1215, 1221 (11th Cir. 1999); *United States v. Holt*, No. 99-7150, 2000 U.S. App. LEXIS 21430 (10th Cir. Aug. 24, 2000); *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995); *United States v. Baron*, 94 F.3d 1312, 1319 (9th Cir. 1996); *United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1994); *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir. 1999); *United States v. Ramos*, 42 F.3d 1160, 1163 (8th Cir. 1994); *United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998); *United States v. Finke*, 85 F.3d 1275, 1278-79 (7th Cir. 1996); *Mitchell v. United States*, 746 A.2d 877, 887-90 (D.C. 2000); *Almond v. State*, 530 S.E.2d 750, 752 (Ga. Ct. App. 2000); *State v. Chapman*, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *Lockett v. State*, 720 N.E.2d 762, 771 (Ind. Ct. App. 1999); *State v. McNaughton*, 924 S.W.2d 517, 523 (Mo. Ct. App. 1996); *State v. Myers*, 798 P.2d 453, 457 (Idaho Ct. App. 1990); *State v. Taylor*, 973 P.2d 246, 252 (N.M. Ct. App. 1998). The remainder of the courts have allowed an officer to ask any question that he pleases so long as the duration of the stop is not prolonged by the officer’s questions. *See United States v. \$404,905.00 in Currency*, 182 F.3d 643, 648 (8th Cir. 1999); *United States v. Palomino*, 100 F.3d 446, 450 (6th Cir. 1996); *United States v. Davis*, 61 F.3d 291, 300 (5th Cir. 1995); *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994); *United States v. Shabazz*, 993 F.2d 431, 436-37 (5th Cir. 1993); *People v. Brown*, 72 Cal. Rptr. 2d 793, 796 (Cal. Ct. App. 1998); *Powell v. State*, 5 S.W.3d 369, 376 (Tex. Crim. App. 1999); *State v. Gualrapp*, 558 N.W.2d 696, 700 (Wis. Ct. App. 1996).

145. *See People v. Peters*, 219 N.E.2d 595, 599 (N.Y. App. Div. 1966) (finding that the reasonable suspicion standard of *Terry* was a familiar term and that it would prove no more difficult to use than probable cause); David J. Sachar, Article: *Overview of Arkansas Warrantless Search and Seizure Law*, 23 U. ARK. LITTLE ROCK L. REV. 423, 453 (2001) (stating “[I]aw enforcement officers regularly utilize the investigative stop, or *Terry* stop, exception to the warrantless requirement”).

2. Fine-only offenses should be treated similarly to the approach that applies to warrantless searches and seizures in the home

The Supreme Court has stated that, in some situations, warrantless governmental actions that occur inside a suspect's home are unlawful even though probable cause had existed.¹⁴⁶ In *Payton v. New York*¹⁴⁷ the Supreme Court held that the Fourth Amendment prohibits warrantless, non-consensual entries into suspects' homes for routine felony arrests unless exigent circumstances¹⁴⁸ exist.¹⁴⁹ Lower courts have, therefore, held that a warrantless seizure of a suspect while in his or her home is presumptively unreasonable.¹⁵⁰ In general, the only circumstances that

146. See *Chimel v. California*, 395 U.S. 752, 773 (1969) (White, J., dissenting) (stating that a warrantless search of the home may require probable cause and exigent circumstances); *People v. Higbee*, 802 P.2d 1085, 1085 (Colo. 1990) (stating that probable cause and exigent circumstances must be present before the police could lawfully enter a residence without a warrant). However, probable cause is always required. *United States v. Winsor*, 846 F.2d 1569, 1574 (9th Cir. 1988) (finding that probable cause was still required to search a room, even though exigent circumstances were present); *United States v. Scott*, 520 F.2d 697, 700 (9th Cir. 1975) (stating that "exigencies . . . cannot . . . excuse lack of probable cause" in performing searches of apartments).

147. 445 U.S. 573 (1980). In *Payton*, the police had obtained what they felt to be enough evidence to arrest Payton for the murder of a gas store clerk. *Id.* at 576. The police had not obtained a warrant, but went to Payton's apartment to arrest him. *Id.* The police knocked on the door and, despite light and music coming from the residence, were not greeted with a response. *Id.* After thirty minutes of waiting, the police used crowbars and broke open the door to Payton's apartment. *Id.* Once inside, the police found no people but did find, in plain view, a shell casing that was later admitted as evidence in Payton's trial. *Id.* at 576-77.

148. Exigent circumstances has been defined as those situations "that demand[] unusual or immediate action and that may allow people to circumvent the usual procedures . . ." BLACK'S LAW DICTIONARY 236 (7th ed. 1997). One scholar categorized the Supreme Court's use of the category of "exigent circumstances" as a method for allowing "a warrantless search or seizure where there is a compelling need for immediate official action and time does not permit the procurement of a warrant." Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283, 287 n.20 (1988).

149. *Payton*, 445 U.S. at 590. The holding in *Payton* is founded in the special Fourth Amendment protection that individuals possess while in their home. *Id.* at 589. The Court stated that "an entry to arrest and an entry to search for and seize property implicate the same interest in preserving the privacy and the sanctity of the home . . ." *Id.* at 588. In *Minnesota v. Olson*, 495 U.S. 91 (1990), the Court also extended this protection to overnight guests staying in the host's home. *Id.* at 96-98. But see *Lewis v. United States*, 385 U.S. 206, 212 (1966) (stating that a warrantless search is valid when the suspect consented to the search after the suspect invited an undercover agent into his home to sell him drugs).

150. See *Buenrostro v. Collazo*, 973 F.2d 39, 43 (1st Cir. 1992) (holding that the warrantless arrest of a wanted person in his home is not justified based on the existence of a wanted person request circulated by an out of state police department); *United States v. Campbell*, 945 F.2d 713, 715 (4th Cir. 1991) (holding that the warrantless arrest of a suspect in his home was not justified by exigent circumstances when police were told by a previously arrested coconspirator that the suspect in the house would become suspicious at his late appearance when the police had waited for an hour

justify the warrantless entry into a suspect's home are hot pursuit,¹⁵¹ immediate threats to the public safety or to officers,¹⁵² imminent destruction of evidence,¹⁵³ or fires or other emergencies.¹⁵⁴

The Court has adopted this special method of analyzing

before making the arrest and not obtained a warrant); *United States v. Bradley*, 922 F.2d 1290, 1295 (6th Cir. 1991) (holding that a warrantless arrest of a person while in his home pursuant to an indictment when officers could have easily obtained a warrant was not justified); *United States v. Anderson*, 981 F.2d 1560, 1567-68 (10th Cir. 1992) (holding warrantless seizures inside one's home are presumptively unreasonable absent exigent circumstances; therefore a lapse in the surveillance of one's home is not enough to give rise to a reasonable belief that someone has entered home to destroy evidence); *United States v. Lynch*, 934 F.2d 1226, 1233 (11th Cir. 1991) (holding that police concerns, not based on factual support, that the suspect in his house would grow suspicious because his coconspirator, who had just been arrested, had not yet returned, were not enough to constitute exigent circumstances to justify the warrantless entry into the suspect's home). *But see* *United States v. Berkowitz*, 927 F.2d 1376, 1386 (7th Cir. 1991) (holding that a warrantless arrest is valid when the officer used his voice to convey the message of the arrest from outside the home); *United States v. Hunt*, 893 F.2d 1028, 1032 (9th Cir. 1990) (holding that a warrantless arrest in a home is valid when police had a good faith belief that there was a warrant outstanding for the suspect's arrest).

151. *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (allowing for the hot pursuit of fleeing felons); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967) (same).

152. *Hegarty v. Somerset County*, 53 F.3d 1367, 1379 (1st Cir. 1995) (holding an arrest in a suspect's cabin was valid because the police knew of the suspect's history of erratic and violent behavior, that he was armed, and that he could become violent); *United States v. MacDonald*, 916 F.2d 766, 770 (2d Cir. 1990) (holding that a warrantless entry into a home was valid because of the presence of loaded weapons); *United States v. Rico*, 51 F.3d 495, 504 (5th Cir. 1995) (holding that a warrantless entry into a house was justified when residents were suspected drug ring members and may have been alerted because of a potential search when the search of a nearby house had just been executed that involved the same drug ring).

153. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (destruction of evidence); *United States v. Marshall*, 157 F.3d 477, 482-83 (7th Cir. 1998) (holding that a warrantless entry is justified when it is reasonably certain that the suspect knew of the police's activities and was preparing to destroy the evidence); *United States v. Scroger*, 98 F.3d 1256, 1259-60 (10th Cir. 1996) (holding that a warrantless entry into home was valid because of the probability of the destruction of the evidence when the suspect answered the door while preparing drugs for use); *United States v. Mikell*, 102 F.3d 470, 476 (11th Cir. 1996) (holding that a warrantless entry into house was permissible when the person was seen leaving the house while speaking on cellular phone, possibly alerting those in the house to destroy the evidence). Police may also prevent a person from entering his or her home if the law enforcement officers believe that the person may destroy evidence. *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (holding that the police may briefly prevent a person from entering his or her home until a warrant is secured if the police believe the person will destroy evidence).

154. *Michigan v. Clifford*, 464 U.S. 287, 293 (1984) (plurality opinion) (dealing with the emergency of an ongoing fire); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (same); *United States v. Echegoyen*, 799 F.2d 1271, 1278-79 (9th Cir. 1986) (same). *But see* *United States v. Warner*, 843 F.2d 401, 404 (9th Cir. 1988) (holding the warrantless entry was not justified despite the fact that the premises contained a volatile substance even though the police knew the suspect was not home and that the substances had been there for at least two weeks without incident). What specifically is an emergency to justify warrantless intrusion has been defined broadly to include turning down loud music in a residential neighborhood late at night. *See* *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996).

governmental actions that occur in persons' homes because of the inherent privacy intrusions that are involved.¹⁵⁵ Accordingly, because of the significant privacy intrusion that accompanies a custodial arrest,¹⁵⁶ the same deference should be granted to persons suspected of fine-only offenses.¹⁵⁷ Requiring the presence of some "exigent" circumstance to justify a custodial arrest for a fine-only offense would neither be the pronouncement of a new rule nor be unduly burdensome on law enforcement because the rule is already in place regarding warrantless arrests in a person's home.¹⁵⁸ Circumstances authorizing warrantless arrests for fine-only offenses could include an offender's refusal to sign a citation, failure to provide satisfactory evidence of one's identity, and the necessity of medical care all of which are easily recognizable and justifiable reasons upon which law enforcement may rely.¹⁵⁹ Many

155. See *Payton*, 445 U.S. at 589 (stating that "[t]he Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . ."); Jason S. Marks, *Mission Impossible?: Rescuing the Fourth Amendment from the War on Drugs*, 11 CRIM. JUST. 16, 16 (1996) ("The autonomy and inviolability of the person and the home stand as the first principle in natural law."); Henry Lawrence Huser, "Balancing on the Brink of the Chasm:" *The Exigent Circumstances Exception and the Fourth Amendment's Categorical Balancing Test in State v. Welsh*, 1983 WIS. L. REV. 1023, 1055 (1983) (stating "[t]here is strong theoretical support for the proposition that arbitrary and capricious invasions of private residences to arrest a suspect are substantial evils that impose significant costs upon a free society"). As Justice Powell noted, "physical entry into the home is the chief evil against which the wording of the fourth amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972); see also *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (stating "[t]he right of officers to thrust themselves into a home is . . . a great concern . . .").

156. See *supra* notes 121-24 and accompanying text.

157. The Court has also addressed the combination of governmental actions in the home that involved suspected minor offenses and found because the action occurred in the home and because of the insignificance of the offense, that the intrusion was unreasonable. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (holding that the "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed"); *Howard v. Dickerson*, 34 F.3d 978, 982 (10th Cir. 1994) (finding that a warrantless arrest in one's home is not validated because of the existence of outstanding misdemeanor charges); *State v. Guertin*, 461 A.2d 963, 970 (Conn. 1983) (stating that "[t]he [exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded").

158. See *supra* notes 146-55 and accompanying text.

159. Ohio has adopted such a law in OHIO REV. CODE ANN. § 2935.26 (Anderson 1999) and the Supreme Court of Ohio has recognized these conditions to be acceptable and not burdensome on law enforcement. See *State v. Jones*, 727 N.E.2d 886 (Ohio 2000). OHIO REV. CODE ANN. § 2935.26(A) provides, in relevant part that an officer

[S]hall issue a citation unless one of the following applies: (1) The offender requires medical care or is unable to provide for his own safety; (2) The offender cannot or will not offer satisfactory evidence of his own identity; (3) The offender refuses to sign the

states have already embraced such requirements; therefore, their police officers have made said standards workable while serving in the field.¹⁶⁰

E. *The Aftereffects of Atwater*

The decision in *Atwater* allows for a litany of problems, both from its holding and from its reasoning.¹⁶¹ As a result of *Atwater*'s majority opinion, a traffic stop for even the most trivial infraction may result in a custodial arrest.¹⁶² Therefore, because of the frequency of minor violations of the law,¹⁶³ virtually every American may now be arrested without any constitutional recourse.¹⁶⁴ Ordinary Americans now face, in addition to the prospect of arrest: 1) the increased possibility of being subjected to an invasive search,¹⁶⁵ 2) the possibility of being forced to endure the mental and physical trauma associated with an arrest and the subsequent confinement in a jail cell,¹⁶⁶ and 3) the increased possibility

citation; (4) The offender has previously been issued a citation for the commission of that misdemeanor and has failed to do one of the following: (a) Appear at the time and place stated in the citation; (b) Comply with division (C) of this section.

Id. Division (C) provides a means of pleading guilty and paying the fine without a court appearance. See OHIO REV. CODE ANN. § 2935.26(C).

160. See *Campos v. State*, 870 P.2d 117, 120 (N.M. 1994) (holding that in the state of New Mexico warrantless arrests in public places must be based on probable cause and sufficient exigent circumstances). “Exigent circumstances” means those emergencies requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or the destruction of evidence.” *State v. Copeland*, 727 P.2d 1342, 1346 (N.M. Ct. App. 1986). See also Wendy F. Jones, *Trends in New Mexico Law: 1993-94 Note: State Constitutional Law-New Mexico Requires Exigent Circumstances for Warrantless Public Arrests*: *Campos v. State*, 25 N.M. L. REV. 315 (1995).

161. For problems that may arise because of the majority’s reasoning see *supra* Part IV.B.

162. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (holding that “[i]f an officer has probable cause to believe that an individual has committed even a very minor offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”).

163. Because of the panoply of traffic laws in the United States today, it is almost impossible for a person to drive any significant distance without committing a traffic violation of some kind. See, e.g., 1 LAFAVE, *supra* note 67, § 1.4(e), at 123 (describing how the impossibility of complying in full with the traffic code gives officers arbitrary power to conduct arrests and searches for offenses that usually do not require such measures); Salken, *supra* note 2, at 223 (finding that “[t]he innumerable rules and regulations governing vehicular travel make it difficult not to violate one of them at one time or another”). See also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1651 (1998) (noting the frequency of traffic violations).

164. See, e.g., *United States v. Smith*, 80 F.3d 215, 219 (7th Cir. 1996) (condoning a traffic stop based on the officer’s belief that an air freshener hanging from a rear view mirror of a car constituted a material obstruction between the driver and the windshield in violation of Illinois law).

165. See *infra* Part IV.E.1.

166. See *infra* Part IV.E.2.

of becoming a victim of racial profiling.¹⁶⁷

1. Searches

The holding in *Atwater* eviscerates the Court's previous holding in *Knowles v. Iowa*.¹⁶⁸ There, the Court ruled that while executing a traffic stop, once an officer had made his or her decision to issue a citation and, therefore, not arrest, the officer could not thereafter search the stopped motor vehicle unless there was probable cause to suspect other wrongdoing or the motorist had consented to the search.¹⁶⁹ The *Atwater* decision now encourages arresting officers to circumvent these safeguards by merely opting to not make their decision to issue a citation known until the last possible moment.¹⁷⁰ Therefore, by leaving the

167. See *infra* Part IV.E.3. Racial profiling has been defined as "the use of race as a factor in determining which offender to prosecute." Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1411 (2000).

168. 525 U.S. 113 (1998). In *Knowles*, a police officer had stopped Knowles for speeding. *Id.* at 114. The police officer issued a citation for the infraction, although under state law he did have the authority to arrest Knowles. *Id.* After issuing the citation and without consent or probable cause to conduct a search, the officer searched Knowles' car which produced a bag of marijuana and a drug pipe. *Id.* In conducting the search, the officer was relying upon state statutory law that seemed to allow the search of the vehicle. *Id.* at 115. The search resulted in drug charges being filed against Knowles. *Id.* at 114.

169. *Knowles*, 525 U.S. at 118. The Supreme Court, in a unanimous opinion, declined to grant the officer the power to search when not arresting in traffic cases because the need for officer safety was "not present to the same extent" and the need to preserve evidence "is not present at all." *Id.* at 119. The Court had previously decided that consent to search must be voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1997). Police coercion may also not be the basis of a search. *Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968). Additionally, police may search the car if the officer has a reasonable suspicion that the motorist is armed, and then the officer may only then intrude no more than necessary to discover weapons immediately within the reach of the motorist. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968).

170. Even two years before *Knowles*, Professor LaFave noted:

There is a much more powerful reason for being concerned about the unquestioned application to traffic violation cases of the "general authority" to search incident to arrest. "There is," as the *Robinson* dissenters properly emphasized, "always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search." Given the fact, as they noted, that "in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer," and that "very few drivers can transverse any appreciable distance without violating some traffic regulation," this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search. Nor is one put at ease by what evidence exists as to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects

option available to arrest the motorist, officers have at their disposal the same arsenal of undertakings that they may have used in arresting individuals suspected of committing the most serious of offenses, including subjecting the individual to an invasive search of their person and a search of their vehicle.¹⁷¹ Because courts have held it constitutionally irrelevant whether a search of the person occurs before or after the individual is placed under arrest, the police can now further elude constitutional protections by simply choosing to utilize all the options they would have had available if they had arrested before actually deciding whether to issue a citation or to arrest.¹⁷² Therefore, the reasoning and protections of *Knowles*¹⁷³ can be completely gutted by a knowledgeable officer who may simply opt to search the motorist and his car and thereby look for possible contraband before declaring his or her intentions regarding the motorist's arrest.

2. Arrests/Confinement in Cell

The Court had previously characterized a custodial arrest as the “quintessential seizure.”¹⁷⁴ Accordingly, the Court has long acknowledged that an arrest is a “serious personal intrusion,”¹⁷⁵ even

who could not be lawfully arrested for the crimes for which they are suspected.

3 LAFAVE, *supra* note 67, §5.2(e), at 85-86 (citing e.g. *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968)); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *Diggs v. State*, 345 So.2d 815 (Fla. Dist. Ct. App. 1977); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985)); WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 151 (1965); LAWRENCE P. TIFFANY, DONALD M. MCINTYRE & DANIEL L. ROTENBERG, *DETECTION OF CRIME* 141, 136 (1967).

171. See *supra* note 4 for a list of additional options available to arresting officers.

172. *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (search incident to arrest need only be justified by probable cause to arrest and need not occur after formal arrest); *Peters v. New York*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring) (“If the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden. There is no case in which a defendant may validly say, ‘Although the officer had a right to arrest me at the moment he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.’”); *United States v. Lugo*, 170 F.3d 996, 1003 (10th Cir. 1999) (holding a legitimate search incident to arrest does not need to occur after the arrest); *Williams v. State*, 726 S.W.2d 99, 99-101 (Tex. Crim. App. 1986) (stating “[t]he fact that the search incident to the arrest preceded the formal custodial arrest by a few moments is of no consequence . . .”).

173. *Knowles*, 525 U.S. 113.

174. *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (citing *Henry v. United States*, 361 U.S. 98, 100 (1959)).

175. *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring). The ALI Model Code of Pre-Arrest Procedure, states that “[b]eing arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening.” AMERICAN LAW INSTITUTE: A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1, cmt., at 291 (1975). See also *United States v. Dionisio*, 410 U.S. 1, 10 (1973) (observing that an arrest “is abrupt, is effected

greater than the intrusion that accompanies a search.¹⁷⁶ Additionally, the speculation, conjecture, and codification that follow an arrest are particularly damning to the arrestee.¹⁷⁷ The arrest process itself is also

with force or the threat of it and often in demeaning circumstances, and . . . results in a record involving social stigma”).

176. *Watson*, 423 U.S. at 428. Powell’s full quote recognizes the differences between a search and a seizure. *Id.* (“A search may cause only annoyance and temporary inconvenience to the law-abiding citizen . . . An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. . . . [N]o decision that [the arrestee] should go free can come quickly enough to erase the invasion of his privacy that already will have occurred.”). Other judges and scholars have recognized the extreme deprivation of liberty that is inherent in a custodial arrest. *See, e.g.,* *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., concurring) (stating that “[t]he invasion and disruption of a man’s life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises”); Edward L. Barnett, Jr., *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 46-47 & n.2 (1960) (comparing an arrest and a search and concluding that an arrest is “a significant invasion of personal liberty even though the individual’s innocence is ultimately established,” while a search is simply a property interest and, therefore, comparatively “minor”).

177. *See Dowling v. United States*, 493 U.S. 342, 344-45 (1990) (recognizing that an acquittal does not necessarily render evidence of that offense inadmissible in the prosecution’s case-in-chief in a later prosecution for another offense); *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (stating “[a]n arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained”); *United States v. Marion*, 404 U.S. 307, 320 (1971) (stating an “[a]rrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends”); *Terry v. Ohio*, 392 U.S. 1, 26 (1968) (noting that a custodial arrest “is inevitably accompanied by future interference with the individual’s freedom of movement, whether or not trial or conviction ultimately follows”); *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947) (pointing out that “[t]he stigma [of an arrest] cannot be easily erased . . . [and] is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after acquittal”); *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (“An indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.”); *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1166-69 (E.D. Pa. 1971) (discussing how a not guilty finding of a former security guard of charges of employee theft nonetheless rendered him unable “to obtain employment in the security field”), *rev’d*, 476 F.2d 471 (3d Cir. 1973); *Smith v. State*, 409 So.2d 455, 457 (Ala. Crim. App. 1981) (holding the same as *Dowling*); *see also* *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) (recognizing that several employers will not hire applicants who have arrest records for anything other than minor traffic offenses); *Schroeder*, *supra* note 123, at 797 (recognizing the public sentiment of an arrest that when “there’s smoke, there’s fire”); *Salken*, *supra* note 2, at 264 (discussing generally the nature of the intrusion that accompanies an arrest); *Surell Brady, Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 63 (2000) (noting that an arrest record can follow a person regardless if the case was dismissed); Lawrence G. Newman, Note, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 864-65 (1971) (noting the use of arrest records outside of the criminal justice system). In Texas, tort law discourages persons from hiring applicants with arrest records. *See Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734-35 (Tex. 1998) (affirming a jury’s award of \$160,000 against a company that did not perform a background check on an applicant who, after being hired and while on the job, sexually assaulted a potential customer). Also, in applications for many professional licenses, including becoming an attorney, individuals must disclose all arrests, regardless of their final disposition. *See generally* Deborah L. Rhode,

very invasive of one's personal privacy.¹⁷⁸ After one is arrested one is generally booked¹⁷⁹ and then locked in a jail cell.¹⁸⁰ This confinement can be particularly demoralizing to most persons.¹⁸¹ Therefore, allowing

Moral Character as a Professional Credential, 94 YALE L.J. 491, 520-21 (1985) (discussing the use of criminal convictions and charges by law schools and bar examiners in determining an applicant's character qualifications).

178. The beginning of the arrest customarily features some sort of constraint, usually accompanied by the perceived use of force by the arresting officer. See AMERICAN LAW INSTITUTE: A MODEL CODE OF PRE-ARRAIGNMENT, § 120.1, cmt. at 291 (1975) (noting that arrests are ordered "on the spot" by a police officer who is "ready then and there to backup [the order] with force"). The booking process follows the arrest. See *Wainwright v. City of New Orleans*, 392 U.S. 598, 605 (1968) (Warren, C.J., dissenting) (recognizing that booking is required in most jurisdictions and depicting the booking process as "an administrative record of an arrest . . . made on the police arrest book indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense or which he was arrested, and other information"). See also WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 379-82 (1965) (discussing the procedure and problems of the booking system). The booking process typically involves fingerprinting (see, e.g., N.Y. CRIM. PROC. LAW § 160.10 (McKinney's 1992)); photographs (see, e.g., *State v. Klinker*, 537 P.2d 268, 275 (Wash. 1975) (finding that persons are routinely photographed as a matter during booking); 20 ILL. COMP. STAT. ANN. 2630/2 (1993) ("The Department [of State Police] shall procure and file for record . . . photographs, . . . measurements, descriptions and information of all persons who have been arrested [in this state]."); see also Newman, *supra* note 176, at 850-51 ("The practice of taking fingerprints, photographs, and other identification data of every person arrested by local, state, and federal law enforcement officers . . . is well established.")); and subjection to a more invasive search than that which accompanied the initial arrest (see, e.g., *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (upholding a search in the police station that occurred after an arrest for disorderly conduct)). But see *State v. Jetty*, 579 P.2d 1228, 1230 (Mont. 1978) (holding unconstitutional a search of an arrestee for weapons and other contraband before placed in a jail cell where the arrestee was a local resident who had been arrested at 3 A.M. "for failure to pay an overdue one dollar parking ticket"). Strip searches for minor offenses have been ruled unconstitutional in *Hill v. Bogan*, 735 F.2d 391 (10th Cir. 1984) (arrest for traffic offense), and *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (arrest for non-dangerous misdemeanor). See also Gabriel Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239 (2001). Even waiting for the booking process itself can be stressful to an arrestee. See Neil Strassman, *Jail Stealing Their Time, Officer's Say*, FORT-WORTH STARTELEGRAM, Nov. 4, 1998, at B1 (reporting that in Tarrant County, Texas booking delays may be as long as two hours).

179. As one correctional professional stated "[n]o other criminal justice activity can claim the convergence of such potentially dangerous people or circumstances which are present at [jail] intake." Thomas Rosazza, *Jail Intake: Managing a Critical Function; Part One: Resources*, AMERICAN JAILS, Mar.-Apr. 1999, at 108. "Intake presents the most potential for injury to staff and prisoners because of the instability to certainty of the prisoners or the circumstances in which they find themselves." *Id.*

180. In the initial holding cells inmates have no yet been separated into groups involving offense, risk, etc., and therefore, someone who has been arrested for a minor offense can be confined with those persons who are accused of murders, rapes, and other violent acts, as well as mentally unstable persons and those with infectious diseases such as hepatitis and AIDS. See ARTHUR WALLENSTEIN, INTAKE AND RELEASE IN EVOLVING JAIL PRACTICE, in PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 50 (Peter M. Carlson & Judith Simons eds., 1999).

181. Some arrestees arrive at the jail with an elevated suicide risk that increases during the first hours of custody. THOMAS WINFREE, JR. & JOHN D. WOOLDREDGE, *Exploring Suicides and*

the arrest and incarceration of individuals for minor violations of law unnecessarily subjects Americans to the possibility of serious physical and mental suffering.

3. Racial Profiling

As the dissent acknowledges, the majority's holding serves to tolerate and further those officers that participate in racial profiling.¹⁸² It is the exception to the rule if an individual can drive any significant length of distance and not violate at least one traffic regulation.¹⁸³ This, coupled with the Court's holdings in *Whren v. United States*¹⁸⁴ and now *Atwater*, allows officers to arrest almost any individual without ever

Deaths by Natural Causes in America's Jails, in AMERICAN JAILS: PUBLIC POLICY ISSUES 64 (Joel A. Thompson & G. Larry Mays eds., 1991). Almost thirty percent of all jail suicides occur within three hours of intake, and half of all jail suicides occur within the first 24 hours of admission. See LINDSAY M. HAYS & BARBARA KAJDAN, AND DARKNESS CLOSES IN, in FINAL REPORT TO THE NATIONAL INSTITUTE OF CORRECTIONS ON THE NATIONAL STUDY OF JAIL STUDIES (1981). Additionally, those persons who are just "passing through" and short term detainees are the groups most likely to commit suicide. WINFREE ET AL., *supra*, at 78.

182. *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (stating "[s]uch unbounded discretion carries without the grave potential of abuse . . . as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual"). For a discussion of the foreseen effects of the movement to enact laws requiring the use of seatbelts on minorities see Elisabeth R. Calcaterra & Natalie G. Mitchell, *Subtracting Race from the "Reasonable Calculus": An End to Racial Profiling?* *United States v. Montero-Comargo*, 208 F.3d 1122 (9th Cir. 2000), cert. denied *sub nom.*, 6 MICH. J. RACE & L. 339, 339 (2001).

183. See 3 LAFAVE, *supra* note 67, at § 5.2(e) (citing B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 65 (1969) (noting that "[v]ery few drivers can transverse any appreciable distance without violating some traffic regulation")); see also *supra* note 163 and accompanying text.

184. 517 U.S. 806 (1996). In response to the petitioner's argument that officers may use illegitimate factors in determining what infractions to prosecute the *Whren* Court rationalized that practical realities prevented any meaningful limitations in officer's discretion. *Id.* at 819 (stating "we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure"). In *Whren*, undercover policemen, while patrolling a "high drug area," observed a truck idling at a stop sign for an unusually long time. *Id.* at 808. When the police approached the vehicle it sped off and chase was given until the vehicle was forced to stop behind another car stopped at a traffic light. *Id.* As the officer approached the vehicle, he saw large plastic bags, apparently containing crack cocaine, in Whren's hands. *Id.* at 808-09. Whren, along with the other passengers, was arrested and was charged with violating numerous federal drug laws. *Id.* at 809. Whren argued that the stop and seizure were illegal because it was pretextual and based on his African American status. *Id.* The Court ruled that the subjective intentions of the officers "play no role in ordinary, probable cause Fourth Amendment analysis." *Id.* at 813. But see Patricia Leary & Stephanie Rae Williams, *Emerging Issue in State Constitutional Law; Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1038 (1996) (noting that "[p]retext is, by definition, a false reason used to disguise real motives. Thus, what is needed is a test that tests real motives. Motives are, by definition, subjective").

having to justify his or her reason for the arrest.¹⁸⁵ Although legally irrelevant, an officer's motivation for executing a traffic stop on minority driven vehicles may be driven by less than virtuous incentives, such as a suspicionless hunt for unrelated crime,¹⁸⁶ to obtain the forfeiture of automobiles,¹⁸⁷ or other less desirable motivations, including harassment.¹⁸⁸ Racial profiling is no longer a hypothetical problem; it is a real problem.¹⁸⁹ Other governmental bodies have recognized patterns of racial profiling and have taken steps to rectify the

185. Despite the fact that *Whren* ruled that the subjective intents of officers are irrelevant, some courts have expressed a duty to see that officers do not abuse their seemingly unbridled power. *United States v. Mesa*, 62 F.3d 159 (6th Cir. 1995). *Mesa* cautioned officers:

We [have given] the green light to police officers to stop vehicles for any infraction, no matter how slight, even if the officer's real purpose was to hope that narcotics or other contraband would be found as a result of the stop[, and because] . . . we have extended this authority to the broadest extent possible, . . . we have a duty to see that it is not abused.

Id. at 162.

186. *Johnson v. United States*, 333 U.S. 10, 13 (1948) (stating that an officer's interest is "the often competitive enterprise of ferreting out crime"); *Black v. State*, 739 S.W.2d 240 (Tex. Crim. App. 1987) (finding that pretextual traffic arrests also occur to facilitate investigation).

187. See Eric Blumenson & Eva Nilsen, *Policing for Profit: the Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 76-84 (1998) (noting the impact of forfeiture laws on prosecutorial patterns).

188. See *United States v. Freeman*, 209 F.3d 464, 467-70 (6th Cir. 2000) (Clay, J., concurring) (noting a systematic pattern of police perjury and questionable traffic stops by a drug interdiction team in its efforts to search automobiles had no basis to suspect it contained contraband); see also David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, June 1999, available at www.aclu.org/profiling/report (noting one incident where a black man was stopped for not wearing his seatbelt and the police officers dismantled his car in their search for contraband, and upon finding none, left the driver with only a screwdriver to repair his car).

189. See *Illinois v. Wardlow*, 528 U.S. 119, 133 nn. 9 & 10 (2000) (Stevens, J., dissenting) (citing both the perceived and studied presence of racial profiling); *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (noting the police were targeting African-American and Latino drivers); *Nat'l Congress of Puerto Rico Rights v. City of New York*, 191 F.R.D. 52 (S.D.N.Y. 1999) (finding the use of *Terry* stops targeting African-American and Latino individuals on the basis of race and national origin); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 95 F. Supp. 2d 723, 737 (N.D. Ohio 2000) (finding that a prima facie case had been satisfied that the Ohio State Highway Patrol discriminated against Hispanic motorists in its immigration questioning); David Cole, *Race, Policing, and the Future of Criminal Law*, 26 HUM. RTS. Q. 2 (1999) (noting the difference of opinion between the African-American and the Caucasian races regarding the police and their tactics); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999) (discussing examples, statistics, and how the law encourages racial profiling practices); see also Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999) (discussing how race relates with police practices and arrests under vague and "order maintenance" policies); see generally DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

situation.¹⁹⁰ Despite this, the *Atwater* holding does nothing to prevent, rather, it furthers the practice by which officers disproportionately stop and search minority motorists with no suspicion of wrongdoing outside of an ordinary traffic violation.¹⁹¹

V. CONCLUSION

The ruling in *Atwater* should frighten normal law-abiding citizens across America. In holding that almost every American may now be subjected to a custodial arrest, the Supreme Court has also increased the possibility that individuals will be forced to endure invasive searches, has elevated the likelihood that Americans will be forced to deal with the physical and psychological problems that are associated with arrest and confinement in a cell, and has increased the possibility of racial profiling. The Court managed to accomplish all of this while on a self-professed mission to form bright-line rules for law enforcement officers. However, in doing so the Supreme Court has managed to further confuse the already uncertain methodology of analyzing Fourth Amendment issues for judges and lawyers. The Court could have avoided many of these problem had it opted to establish a standard such as one mimicking *Terry* or one similar to warrantless searches and seizures while in the home. Instead, the Court decided to allow custodial arrest for even the most minor of infractions as long as probable cause was present. By not constitutionally prohibiting warrantless arrests for minor violations of law, all Americans may now find themselves at the whim and fancy of a vindictive or punitive officer. So remember the next time you find yourself in a vehicle, buckle up or you may be locked up.

Jason M. Katz

190. In New Jersey, the Department of Justice and the New Jersey State Police entered into a consent decree that prohibited the New Jersey State Police from permitting drug sniffing dogs to sniff the exterior of automobiles unless there was a basis for using the dog and further prohibited that officer from requesting consent to search for drugs unless there existed a reasonable suspicion that drugs may be discovered. *Consent Decree*, United States v. New Jersey, Civ. No. 99-5970, at ¶¶ 28, 32-33 (MLC) (D.N.J. 1999), available at <http://www.usdoj.gov/crt/split/documents/jerseysa.htm> (last visited Dec. 22, 2002); see also Oliver, *supra* note 167, at 1475-79.

191. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 341-54 (1998) (noting “the objective evidence that police officers seize black and Hispanic motorists . . . at a highly disproportionate rate”); David A. Harris, “*Driving while Black*” and *All Other Traffic Offenses: The Supreme Court and PreTextual Stops*, 87 J. CRIM. L. AND CRIMINOLOGY 544, 560-69 (1997) (discussing specific instances of racial profiling throughout the country); see also LaFave, *supra* note 27, at 158-62 (the most straightforward and efficient control in an area with a high potential for abuse is to limit the circumstance under which an arrest is permissible).