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Summer 2002

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7-1-2002

# Street Legal: The Court Affords Police Constitutional Carte Blanche

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## Recommended Citation

Logan, Wayne A. (2002) "Street Legal: The Court Affords Police Constitutional Carte Blanche," *Indiana Law Journal*: Vol. 77: Iss. 3, Article 1.

Available at: <http://www.repository.law.indiana.edu/ilj/vol77/iss3/1>

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# Street Legal: The Court Affords Police Constitutional Carte Blanche

WAYNE A. LOGAN\*

## I. INTRODUCTION

To the criminal defense bar, it seemed a Fourth Amendment case nonpareil: a well-off, white, middle-aged “soccer mom,” with two kids in tow, and no contraband in her possession, arrested and hauled off to jail for not wearing a seat belt. Alleging that the arrest violated the amendment’s ban on “unreasonable” seizures, the soccer mom sued under 42 U.S.C. § 1983, naming the arresting officer, his employer, the City of Lago Vista, Texas, and the local police chief as defendants. In April 2001, the Supreme Court held by a five-four margin in *Atwater v. City of Lago Vista*<sup>1</sup> that the arrest was constitutionally reasonable, despite the fact that Texas law authorized, at most, a \$50 fine (and not jail or prison time) for failing to comply with the seat belt law.<sup>2</sup>

In so deciding, the Court resolved a crucial question that it had dodged only three Terms before,<sup>3</sup> and which had evaded definitive answer for decades: whether police, without a warrant, can make arrests for minor offenses not involving a “breach of the peace.”<sup>4</sup> Justice Souter’s majority opinion for the *Atwater* Court left no doubt about

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1. 121 S. Ct. 1536 (2001).

2. *Id.* at 1541 (citing TEX. TRANS. CODE § 545.413(d) (Vernon 2000)).

3. *See Knowles v. Iowa*, 525 U.S. 113 (1998) (avoiding judgment on constitutionality of Iowa law permitting warrantless arrests for auto violations, instead invalidating search of citizen incident to issuance of citation for speeding); *see also Ricci v. Village of Arlington Heights*, 116 F.3d 288 (7th Cir. 1997) (holding arrest for operating a business without a license, a fine-only ordinance, was reasonable within the meaning of the Fourth Amendment), *cert. granted*, 522 U.S. 1038, and *cert. dismissed as improvidently granted*, 523 U.S. 613 (1998).

4. *See Atwater*, 121 S. Ct. at 1561 (O’Connor, J., dissenting) (observing that the Court has never addressed “the constitutionality of a warrantless arrest for an offense punishable only by a fine”); *see also Maryland v. Macon*, 472 U.S. 463, 471 (1985) (stating “[w]e leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for [a] state law misdemeanor” not involving a breach of the peace); *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (stating “it seems to me that a persuasive claim might have been made in this case that a custodial arrest . . . for a minor traffic offense violated [petitioner’s] rights under the Fourth and Fourteenth Amendments. But no such claim has been made”); *Rouda v. United States*, 10 F.2d 916, 918-19 (2d Cir. 1926) (Hand, J.) (“While a peace officer might at common law arrest without a warrant for a misdemeanor committed in his presence, which was a breach of the peace, *his power to do so in other cases is at best most uncertain*. Generally, it has been held not to exist.”) (emphasis added).

Almost without exception commentators dating back many years have urged limits on such authority, based both on its modest historical support and the troubling practical consequences associated. *See, e.g.,* Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*,

police authority in this critically important area of street patrol, announcing the bright-line rule that “[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.”<sup>5</sup>

*Atwater*'s outcome, more than most five-four decisions, has a stark gut-level resonance. Prior to the decision, if asked whether it is reasonable for an officer to arrest a citizen for so menial an offense as failing to wear a seat belt while driving, most Americans would respond resoundingly in the negative.<sup>6</sup> However, it is accepted learning that reasonableness assessments by the Court do not, and need not, always align with the views of average Americans.<sup>7</sup>

Twenty-five years ago, the Court, on the basis of logic and far clearer Framing Era

75 U. PA. L. REV. 485 (1927); Thomas R. Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321 (1979); Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127; 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 (1989); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993); Horace L. Wilgus, *Arrest Without a Warrant (Part I)*, 22 MICH. L. REV. 541, 550 & n.54 (1924).

5. *Atwater*, 121 S. Ct. at 1557 (emphasis added).

6. This sentiment was evidenced in the vigorous condemnation of *Atwater* in the editorial pages, including those found in some of the nation's most conservative newspapers. See, e.g., Commentary, *Fourth Amendment Through a Shredder*, ORANGE COUNTY REG., Apr. 26, 2001, available at 2001 WL 9671289 (describing *Atwater* “as so outrageous as to defy logic and reason . . . [and an] assault on American liberties”); Bob R. Sanders, *High Court Ruling Gives Bad Cops a New Weapon*, FT. WORTH STAR-TELEGRAM, Apr. 27, 2001, available at 2001 WL 5148589 (stating that with *Atwater* “[b]ad cops . . . have been given another tool to use in their abuse of power”); Editorial, *Civil Rights Reduced*, ROCKY MOUNTAIN NEWS, Apr. 28, 2001, available at 2001 WL 7371228 (stating that with *Atwater* the “Supreme Court has gravely diluted one of our most important civil liberties”); Editorial, *An Outrageous Decision*, ARIZ. DAILY STAR, Apr. 26, 2001, available at 2001 WL 10339556 (calling *Atwater* “outrageous” and “baffling”); Commentary, *Soccer Moms Beware*, WASH. TIMES, Apr. 26, 2001, available at 2001 WL 4151936 (calling *Atwater* “surprising and depressing,” an “outrageous assault upon basic civil liberties”); Editorial, *A Third-Rate Opinion on Fourth Amendment*, TENNESSEAN, Apr. 27, 2001 (calling *Atwater* “outrageous” and asserting that the “Court has just created one whopper of a tool for police harassment”); Editorial, *Bad Precedent Ruling Gives Police Too Much Leeway*, DAILY OKLAHOMAN, Apr. 27, 2001, available at 2001 WL 18521011 (expressing concern that *Atwater* “may make a rare and admittedly unfortunate incident more common in the future”); *An Erosion of Rights*, SALT LAKE TRIB., Apr. 30, 2001, available at 2001 WL 4635864 (calling *Atwater* “a travesty of justice”).

7. See Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727 (1993) (concluding on the basis of survey data that the Court's decisions significantly differ from those of citizens on what police behaviors unreasonably infringe “privacy” or unreasonably “intrude” on citizens' physical liberty).

authority, endorsed police authority to execute warrantless arrests for felonies if supported by probable cause.<sup>8</sup> *Atwater*, on the basis of a far less convincing historical record,<sup>9</sup> reflexively transplanted this template beyond the realm of felonies. In so doing, the Court in effect made probable cause a proxy for Fourth Amendment reasonableness, rather than a necessary but not always sufficient constitutional precondition.<sup>10</sup> And importantly, the Court did so with respect to a universe of laws far greater in number and variety than felonies—for which police enforcement discretion looms largest, given the comparatively less serious nature of the violations.<sup>11</sup>

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8. See *United States v. Watson*, 423 U.S. 411, 416-17 (1976). For an extended discussion of how probable cause itself, as a justification for warrantless arrests, belatedly originated some five decades after the time of framing, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 634-40 (1999) (noting that the standard was an “English import” that first appeared in U.S. opinions in 1844 and 1850). According to Professor Davies, “modern Supreme Court opinions and commentaries have obscured the post-framing expansion of the officer’s *ex officio* authority by incorrectly asserting that probable cause was the American ‘common law’ standard for arrest at the time of the framing.” *Id.* at 639. This “myth of a historical probable cause standard,” Davies asserts,

is responsible for much of the confusion attending Fourth Amendment history. We cannot appreciate the Framers’ understanding of the problem of search and seizure unless we remove the probable cause justification for arrests and related post-framing developments from the picture. The Framers understood that justifications for warrantless arrests and accompanying searches were quite limited. Thus, they did *not* perceive the peace officer as possessing any significant *ex officio* discretionary arrest or search authority.

*Id.* at 639-40 & n.252 (emphasis added).

9. See *infra* note 159.

10. Compare *Tennessee v. Garner*, 471 U.S. 1 (1985) (concluding that mere existence of probable cause that suspect committed a felony did not render reasonable police use of deadly force), with *Winston v. Lee*, 470 U.S. 753 (1985) (holding that searches can be deemed unreasonable even if backed by probable cause) and *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (holding that mere existence of probable cause that suspect committed traffic offense does not justify warrantless arrest in suspect’s home) and *Chimel v. California*, 395 U.S. 752, 765 (1969) (stating that reasonableness depends on “the facts and circumstances—the total atmosphere of the case,” and must be assessed “in the light of established Fourth Amendment principles,” not merely probable cause).

As Judge Garza noted in dissent from the Fifth Circuit’s en banc decision in *Atwater*, “probable cause [should] never immunize a constitutional violation.” *Atwater v. City of Lago Vista*, 195 F.3d 242, 247 (5th Cir. 1999) (en banc) (Garza, J., dissenting); see also *Gramenos v. Jewel Co.*, 797 F.2d 432, 441 (7th Cir. 1986) (stating that “[i]t is important to understand that ‘probable cause’ is not always the same thing as ‘reasonable’ conduct by the police”).

11. It also bears mention that, in refusing to exercise constitutional control over warrantless misdemeanor arrests, the Court rendered citizens far more exposed to abuse without redress. At common law, police, to the extent they could execute such arrests, did so at their potential peril because the arrestee had to be proven guilty if the arrest was to be deemed justified, with civil liability for trespass otherwise threatened. See Horace L. Wilgus, *Arrest*

This Article addresses the numerous important ramifications of *Atwater*. Chief among these, to be sure, is the practical effect of affording police “constitutional carte blanche”<sup>12</sup> to execute warrantless arrests, a right that carries the per se authority to search. As will be discussed, this unfettered authority is extremely significant not only because it broadens the inherent power of police to intrude upon citizens’ liberty and privacy, but also because it affords police even more discretion to selectively enforce the law and to give effect to possible discriminatory motives.<sup>13</sup>

*Atwater*’s significance, however, extends well beyond both the day-to-day realities of street patrol and the acknowledged “pointless indignity” and “gratuitous humiliations” experienced by Gail Atwater.<sup>14</sup> For one, while the decision underscores the Court’s troubling determination to remove itself from the constitutional oversight of police, the vacuum created by *Atwater* affords states an opportunity to step in and regulate police arrest practices, true to their role as “laboratories” of social experimentation. However, as will be discussed, it remains unclear whether the political will necessary for such a federalist evolution among the states will materialize. Moreover, even should such limits on arrest authority be enacted, their constitutional consequences remain uncertain because of the Court’s ambiguous treatment of state law in its search and seizure jurisprudence. Finally, despite the seeming clarity of the bright-line rule embraced by the *Atwater* majority, the Article outlines several of the major untoward consequences of the Court’s decision to afford police unfettered arrest authority relative to “very minor criminal offenses.”

## II. THE COURT’S DECISION IN *ATWATER*

Gail Atwater’s travail began in March 1997 when, after retrieving her two children (a boy and girl, ages three and five) from soccer practice, she slowly cruised her neighborhood street in the small community of Lago Vista, Texas, in the hope of finding a cherished toy that her son had dropped from the vehicle.<sup>15</sup> As the three moved along at 15 MPH, craning their necks from the front seat of the family pickup

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*Without a Warrant (Part II)*, 22 MICH. L. REV. 673, 706 (1924). Moreover, at common law citizens enjoyed broad license to resist arrests in excess of authority, unlike today. *See* Davies, *supra* note 8, at 625. Indeed, warrants served to insulate officers from liability, providing a strong practical incentive for their use. *Id.* at 626-27. Of course, redress today is permitted under 42 U.S.C. § 1983, but this avenue is sharply limited by the doctrine of qualified immunity in suits against individual officers. *See Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1565 (2001) (O’Connor, J., dissenting). Furthermore, the availability of relief from state and local governments pursuant to § 1983 is severely restricted. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 67 (1989) (holding that states cannot be sued for monetary damages for the operation of their arrest laws); *see also Monell v. City of New York Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (concluding that a municipality can be sued only upon proof of an unconstitutional policy or practice and not pursuant to respondeat superior theory).

12. *See Atwater*, 121 S. Ct. at 1563 (O’Connor, J., dissenting).

13. *See infra* notes 117-120 and accompanying text.

14. *Atwater*, 121 S. Ct. at 1553.

15. *See* Ross E. Milloy, *Public Lives: For Seat-Belt Violator, a Jam, a Jail and Unmoved Justices*, N.Y. TIMES, Apr. 28, 2001, at A1.

truck in an effort to find the toy, police officer Barton Turek noticed that neither Atwater nor her children were wearing seat belts, in violation of Texas statutory law. After detaining Atwater at the side of the road, Turek told her “we’ve met before,” referring to a prior incident when Turek mistakenly thought Atwater’s son was not wearing a seat belt; the officer then “yelled” that Atwater was “going to jail.”<sup>16</sup>

Things then only got worse for Atwater. Turek first rejected her request that she be allowed to take her children to the nearby home of a friend, despite the fact that her children were “frightened, upset, and crying,” retorting that Atwater was “not going anywhere.”<sup>17</sup> Then, upon learning that Atwater lacked her driver’s license and insurance documentation because her purse had been stolen, a story he had “heard two-hundred times,” Turek handcuffed Atwater and drove her to the police station in his cruiser.<sup>18</sup> Alerted by the commotion, a friend eventually arrived and prevented the children from being taken away by Turek, as he had threatened.<sup>19</sup> Upon arriving at the police station, Atwater was stripped of her personal possessions, subjected to a “mug shot,” and placed in a booking cell for approximately one hour before she was brought before a magistrate and released on a \$310 bond.<sup>20</sup> Atwater eventually pled no contest to the seat belt violation, and paid a \$50 fine.<sup>21</sup>

After city officials rebuffed her request that police receive better training and closer supervision, Atwater and her husband, an emergency room physician, sued under 42 U.S.C. § 1983, alleging that the warrantless arrest for the fine-only seatbelt violation constituted an unreasonable seizure under the Fourth Amendment.<sup>22</sup> The trial court entered summary judgment in favor of the defendants, and a panel of the Fifth Circuit reversed, only to later be reversed itself by the Circuit sitting en banc.<sup>23</sup> The Supreme Court granted *certiorari*, agreeing to address whether “the Fourth Amendment, either by incorporating common-law restrictions on misdemeanor arrests or otherwise, limits police officers’ authority to arrest without warrant for minor criminal offenses.”<sup>24</sup>

By a five-four margin, the Court affirmed, with Justices Souter and O’Connor switching sides from their usual respective liberal and conservative orientations. Justice Souter’s opinion for the majority first examined early common law and Framing Era authorities to assess police power to execute warrantless arrests for

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16. See *Atwater*, 121 S. Ct. at 1541 & n.1.

17. *Id.* at 1541.

18. *Id.* at 1541-42. A subsequent inventory of Atwater’s truck revealed two tricycles, a bicycle, a cooler, a bag of charcoal, toys, groceries, and two pairs of children’s shoes. See Linda Greenhouse, *Divided Justices Back Full Arrests on Minor Charges*, N.Y. TIMES, Apr. 25, 2001, at A1.

19. *Atwater*, 121 S. Ct. at 1565 (O’Connor, J., dissenting).

20. *Id.* at 1542.

21. *Id.* Atwater’s other charges, driving without a license and failing to provide proof of insurance, were dismissed. *Id.* In addition to the fine, Atwater was forced to pay \$110 to retrieve her truck from the police impoundment lot. See Editorial, *An Erosion of Rights*, SALT LAKE TRIB., Apr. 30, 2001, available at 2001 WL 4635864.

22. See Milloy, *supra* note 15, at A1.

23. See *Atwater v. City of Lago Vista*, 165 F.3d 242 (5th Cir. 1999) (en banc).

24. *Atwater*, 121 S. Ct. at 1542-43.

offenses not involving a "breach of the peace." The upshot of this history, according to the majority, is that "the common law commentators (as well as the sparsely reported cases) reached divergent conclusions" on such police authority.<sup>25</sup>

Despite noting that "eminent authorities" supported the view that Framing Era warrantless arrest authority was quite limited, the majority found the record insufficient to support the conclusion that Atwater's arrest was contrary to the Fourth Amendment. In particular, Justice Souter noted a 1631 English case upholding a warrantless arrest for dice play, later cited by several eighteenth-century commentators for the proposition that nonfelony arrest authority was not limited to breaches of the peace.<sup>26</sup> Nor, for that matter, did early statutory enactments support the view that officers were categorically barred from executing arrests for non-breach-of-the-peace misdemeanors, in particular early English statutes permitting warrantless arrests of persons roaming the streets at night ("nightwalkers").<sup>27</sup>

Justice Souter, moving to the nineteenth and twentieth centuries, next evaluated whether the warrantless arrest authority of officers was clarified by subsequent authority or practice. If anything, he concluded, "the historical record as it has unfolded since the framing" showed an increasing receptiveness to broad police power to execute warrantless arrests for non-breach-of-the-peace misdemeanors.<sup>28</sup> In support, Justice Souter quoted Michigan Law Professor Horace Wilgus, who had observed in 1924 that the

states may, by statute, enlarge the common law right to arrest without a warrant, and have quite generally done so or authorized municipalities to do so, as for example, an officer may be authorized by statute or ordinance to arrest without a warrant for various misdemeanors and violations of ordinances, other than breaches of the peace, if committed in his presence.<sup>29</sup>

This receptiveness, Justice Souter observed, continued largely unabated in ensuing decades to the point that today statutes in all American jurisdictions permit officers some degree of authority to arrest for non-breach of the peace misdemeanors.<sup>30</sup> On this basis, he concluded that this "simply is not a case in which the claimant can point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.'" <sup>31</sup>

With the record inconclusive, the question thus became whether Turek's custodial arrest of Atwater comported with "traditional standards of reasonableness," requiring

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25. *Id.* at 1544 & n.2.

26. *Id.* at 1545-46 (citing *Holyday v. Oxenbridge*, 79 Eng. Rep. 805 (K.B. 1631)).

27. *Id.* The Court also noted statutes from the eighteenth century and before that targeted gamblers, peddlers, vagrants, and "negligent carriage drivers." *Id.* at 1547.

28. *Id.* at 1550-53.

29. *Id.* at 1551 (quoting Wilgus, *supra* note 4, at 550 & n.54).

30. *Id.* at 1553 & app.

31. *Id.* at 1552-53 (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (alteration in original)).



the Court to “strike a current balance between individual and societal interests.”<sup>32</sup> To the majority, this balance weighed decidedly in favor of expanded police authority, in keeping with the Court’s penchant for bright-line rules regarding searches and seizures,<sup>33</sup> and in contrast to the case-specific analysis favored by predecessor Courts.<sup>34</sup> Accordingly, the majority rejected Atwater’s suggestion that the permissibility of police arrest authority turns on what it called “sensitive, case-by-case determinations” dependent on (1) whether the underlying offense carried the threat of jail time, or (2) whether it was “necessary for enforcement of the traffic laws or . . . [constituted an] offense [that] would otherwise continue and pose a danger to others on the road.”<sup>35</sup>

To the majority, both prongs of Atwater’s proposed test, while seeming to “respect the values of clarity and simplicity,”<sup>36</sup> in reality threatened numerous problems. As for the first prong—tying arrest decisions to the gravity of the suspected offense—the majority concluded that it would unduly complicate police work because it would require difficult on-the-scene judgments about whether jail time was legally authorized:

It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes . . . but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge?<sup>37</sup>

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32. *Id.* (citing *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999), and *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995)).

33. In language echoing numerous other recent opinions of the Court endorsing similar bright-line rules, Justice Souter characterized the need as follows:

Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. 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 1553-54.

34. *See, e.g., Rios v. United States*, 364 U.S. 253, 255 (1960) (observing that “in most cases involving a claimed unconstitutional search and seizure, reasonableness . . . requires a particularized evaluation of the officers involved”); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (stating that “there is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.”).

35. *Atwater*, 121 S. Ct. at 1555 (quoting Brief for Petitioners at 46, *Atwater*, 121 S. Ct. 1536 (No. 99-1408)).

36. *Id.* at 1554.

37. *Id.* at 1554-55.

The majority also dismissed the second prong of Atwater's proposed test, which tied arrest authority to concern over scofflaw or otherwise dangerous offenders, again out of administrability concerns. Citing speeding as one possible problem area, Justice Souter asked: "[I]s it not fair to expect that the chronic speeder will speed again despite a citation in his pocket?"<sup>38</sup> Requiring police to divine whether behavior would persist would put them in an "almost impossible spot," and, significantly, "guarantee increased litigation over many of the arrests that would occur."<sup>39</sup> In the end, Justice Souter concluded that having the constitutionality of an arrest hinge on such vicissitudes, would create among police a "systemic disincentive to arrest":

An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect's risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial. Multiplied many times over, the costs to society of such under enforcement could easily outweigh the costs to defendants of being needlessly arrested and booked ....<sup>40</sup>

Finally, Justice Souter questioned whether in the end warrantless misdemeanor arrests "need constitutional attention."<sup>41</sup> For one thing, he reasoned, the Court's prior decisions establish that all warrantless arrests must be reviewed by a magistrate within forty-eight hours to ensure that probable cause supports the detention.<sup>42</sup> Constitutional protection is also afforded, on a case-by-case basis, to guard against any arrest (whether felony or misdemeanor) that is "conducted in an extraordinary manner, unusually harmful to [the citizen's] privacy or even physical interests."<sup>43</sup> Justice Souter noted that, beyond constitutional constraints, legislatures in several jurisdictions have expressly limited police authority to execute warrantless arrests for minor offenses, an alternative he deemed preferable to a broad constitutional rule.<sup>44</sup> Such statutory limits themselves, Justice Souter inferred, were "natural" because it is in the interest of law enforcement "to limit petty-offense arrests, which carry costs

38. *Id.* at 1555.

39. *Id.* Justice Souter elaborated:

It is no answer that the police routinely make judgments on grounds like risk of immediate repetition; they surely do and should. But there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself.

*Id.*

40. *Id.* at 1556.

41. *Id.*

42. *Id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-58 (1991)).

43. *Id.* at 1557 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

44. *Id.* at 1556. Such an approach is preferable because "the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle." *Id.*

that are simply too great to incur without good reason.”<sup>45</sup>

Justice Souter concluded by expressing confidence that the aforementioned statutory controls—“combined with the good sense (and, failing that, the political accountability) of most lawmakers and law-enforcement officials”—provided sufficient protection to citizens.<sup>46</sup> Indeed, such protections accounted for a “dearth of horrors demanding redress,” in the form of “foolish, warrantless misdemeanor arrests.”<sup>47</sup> While acknowledging that such arrests likely occurred on occasion, Justice Souter expressed confidence that “surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests.”<sup>48</sup> Moreover, any concern that police might utilize their expansive authority to arrest, in lieu of citation, and thereby arbitrarily harass citizens, was “speculative” insofar as the record failed to indicate that such a potential “has ever ripened into a reality.”<sup>49</sup>

In sum, the Court rejected *Atwater*’s claim that her warrantless arrest and detention for a fine-only offense, as permitted by Texas statute,<sup>50</sup> violated the Fourth Amendment. The upshot of *Atwater* is that if an officer has probable cause to believe an individual “has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”<sup>51</sup> The sole limit is that the act of physical arrest itself cannot be carried out in an “‘extraordinary manner, unusually harmful to [the citizen’s] privacy or . . . physical interests.’”<sup>52</sup>

Dissenting, Justice O’Connor, joined by Justices Ginsburg, Breyer, and Stevens, criticized the majority for affording “constitutional carte blanche” to officers to arrest for any offense, no matter how insignificant.<sup>53</sup> Like the majority, Justice O’Connor noted that the common law and historical record on misdemeanor warrantless arrest authority was somewhat ambiguous,<sup>54</sup> but emphasized that prior statements by members of the Court gainsaid such authority.<sup>55</sup> More important, reasonableness considerations militated in favor of banning the use of custodial arrest for fine-only offenses. Rather than deferring to the institutional benefits of a bright-line rule in evaluating reasonableness, Justice O’Connor was more concerned about the personal and societal consequences of unlimited police authority. She catalogued the

45. *Id.*

46. *Id.* at 1557.

47. *Id.*

48. *Id.*

49. *Id.* at 1557 & n.25.

50. See TEX. CODE CRIM. PROC. ANN., art. 14.01(b) (Vernon 2000) (providing that a “peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view”); TEX. TRANSP. CODE ANN. § 543.001 (Vernon 2000) (providing that a “peace officer may arrest without a warning a person found committing a violation”).

51. *Atwater*, 121 S. Ct. at 1557.

52. *Id.* at 1557 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)).

53. *Id.* at 1563 (O’Connor, J., dissenting).

54. *Id.* at 1562 (stating that the “Court’s thorough exegesis makes it abundantly clear that warrantless misdemeanor arrests were not the subject of a clear and consistently applied rule at common law”).

55. *Id.* at 1561-62 (citing *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring); *United States v. Robinson*, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring)).

consequences of custodial arrests, which include: a search of the body and possessions of arrestees;<sup>56</sup> a search of the passenger compartment and any containers therein, if the arrestee is driving a car;<sup>57</sup> detention in a holding facility for up to forty-eight hours without judicial certification that the arrest was supported by probable cause;<sup>58</sup> the embarrassment and potential danger that attends detention;<sup>59</sup> and the social stigma associated with having an arrest record.<sup>60</sup>

In order to justify such a “severe intrusion on individual liberty,” Justice O’Connor reasoned that the governmental need must be substantial. However, in the context of fine-only offenses, this need was sufficiently served by a less onerous response—citations. Given the availability of citations, Justice O’Connor reasoned, it betrayed reasonableness to endorse a bright-line rule that “deems a full custodial arrest to be reasonable in every circumstance” solely because the officer had probable cause to believe that a violation occurred.<sup>61</sup> Such an approach defied the Fourth Amendment requirement that a police action be a “reasonable and proportional response to the circumstances of the offense,” instead giving police unfettered discretion to execute custodial arrests “without articulating a single reason why such action is appropriate.”<sup>62</sup>

In place of the majority’s bright-line rule, Justice O’Connor advocated a case-by-case constitutional analysis modeled on *Terry v. Ohio*: when an officer has probable cause to believe that a fine-only offense has been committed, the officer “should issue a citation unless the officer is ‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the [additional] intrusion’ of a full custodial arrest.”<sup>63</sup> To Justice O’Connor, such a rule would be only modestly less clear and bright than that imposed by the majority, in that it would merely require “a legitimate reason for the decision to escalate the seizure into a full custodial arrest . . . .”<sup>64</sup> Furthermore, whatever the option lacked in categorical quality and administrability, it compensated for “in fidelity to the Fourth Amendment’s command of reasonableness and sensitivity to the competing values protected by that Amendment.”<sup>65</sup> As for the majority’s concern over the “systematic disincentives” associated with potential civil rights actions for false arrest, Justice O’Connor observed that qualified immunity largely served to insulate against such claims, and, at any rate, to the extent arrest disincentives arise, they did not free the Court to “ignore the central [reasonableness] command of the Fourth Amendment

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56. *Id.* at 1563 (citing *Robinson*, 414 U.S. 218).

57. *Id.* (citing *New York v. Belton*, 453 U.S. 454 (1981)).

58. *Id.* (citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

59. *Id.* (citing *Rosazza & Cook, Jail Intake: Managing a Critical Function—Part One: Resources*, 13 AM. JAILS 35 (Mar./Apr. 1999)).

60. *Id.* (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

61. *Id.*

62. *Id.* at 1566.

63. *Id.* at 1563-64 (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)) (alteration in original).

64. *Id.* at 1564.

65. *Id.*

66. *Id.* at 1565.

Applying her *Terry*-based test, Justice O'Connor concluded that neither "law nor reason" supported Turek's decision to arrest Atwater.<sup>67</sup> Atwater, a mother of two who had lived in the area for sixteen years, whose only previous violation was ten years before for failing to signal a lane change while driving, immediately accepted responsibility and apologized to Turek for her misbehavior.<sup>68</sup> It was thus likely that she thereafter would have complied with the seat belt law, and be available for a court appearance if necessary, making a citation a tenable and less restrictive option. Nor did custodial arrest serve the interests of Atwater's young children as the City of Lago Vista suggested on appeal. Turek's decision to arrest Atwater traumatized the children, leaving them distraught and fearful of police.<sup>69</sup> Instead of serving as a lesson in legal responsibility, as would be achieved by a citation, the arrest "taught the children an entirely different lesson: that 'the bad person could just as easily be the policeman as it could be the most horrible person they could imagine.'"<sup>70</sup>

Finally, Justice O'Connor turned her sights to the broader implications of the majority's bright-line rule. O'Connor did not question the principal authority of governments to enact public welfare-related laws punishable only by fine.<sup>71</sup> Rather, her concern lay with the enormous discretion enjoyed by police regarding such laws, now augmented by the clear authority to arrest, and not merely ticket, citizens. With such authority, she observed, comes "grave potential for abuse," particularly because the Court's 1996 decision in *Whren v. United States* made the subjective motivations of police in detaining persons irrelevant for Fourth Amendment purposes.<sup>72</sup> To Justice O'Connor, precisely because subjective motivations cannot now be considered, the Court must "vigilantly ensure" that police behaviors—"which are properly within our purview—comport with the Fourth Amendment's guarantee of reasonableness."<sup>73</sup>

### III. THE RAMIFICATIONS OF CARTE BLANCHE

#### *A. The Practical Consequences*

Despite the Court's insouciant view that there is no "epidemic of unnecessary minor-offense arrests,"<sup>74</sup> and "no evidence of widespread abuse,"<sup>75</sup> in reality considerable evidence exists of widespread police resort to arrest for low-level violations, and *Atwater* surely will do nothing to diminish the practice.

67. *Id.*

68. *Id.* at 1565-66.

69. *Id.*

70. *Id.* at 1566. Justice O'Connor added that Turek's actions were "disproportionate" to Atwater's wrongdoing and that "[t]he majority's assessment that 'Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,' is quite correct. In my view, the Fourth Amendment inquiry ends there." *Id.*

71. *Id.*

72. *Id.* at 1567 (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

73. *Id.*

74. *Id.* at 1557.

75. *Id.* at 1557 n.25.

One source of evidence is the reported case law. To be sure, the fact that a police behavior triggers little decisional law, as Justice O'Connor noted in her *Atwater* dissent, constitutes an unreliable gauge of constitutional concern.<sup>76</sup> This is because constitutionally dubious practices can occur with some regularity yet not be challenged by citizens for a variety of reasons, including the effort and expense associated with constitutional litigation,<sup>77</sup> and the natural disincentive to pursue claims when no long-term deprivation of physical liberty occurs.<sup>78</sup> However, even assuming that the *Atwater* majority is correct in suggesting that an abusive practice must be "widespread" to warrant attention—itsself a highly questionable premise<sup>79</sup>—the reality is that even the reported case law suggests a markedly expansive use, and apparent abuse, of the misdemeanor arrest power.

The occurrence is most salient in decisions addressing motions to suppress

76. *Id.* at 1566 (O'Connor, J., dissenting).

77. In this regard, Gail Atwater is a notable exception. Although at first reluctant to sue, Atwater eventually filed suit to vindicate what she saw as the broader civil liberties ramifications of her arrest by Turek. Atwater told one reporter, "[I]f someone like me, a soccer mom, can be humiliated and handcuffed in front of her children, what happens to the poor migrant worker or minority when they're stopped?" Milloy, *supra* note 15, at A1. She also was inspired by the memory of her father, a World War II veteran, and "just couldn't sit back" while the civil liberties he fought for were "taken away." *Id.* To finance the case, Atwater and her husband, a physician, sold their house and incurred legal costs in excess of \$100,000. *Id.* In the wake of the Court's holding, Atwater acknowledged that her lawsuit involved a "large sacrifice," but added that "you don't live in a free society for free." *Id.*

78. *See* *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (noting that "invasion of personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating . . ."); *see also* *Rawlings v. Kentucky*, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting) ("Because we are called on to decide whether evidence should be excluded only when a search has been 'successful,' it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society.").

79. Such a premise is analogous to saying that problems arising in the context of minor offenses do not merit constitutional concern, a premise expressly rejected by the Court:

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless . . .

*Sibron v. New York*, 392 U.S. 40, 52-53 (1968).

Indeed, assuming the correctness of the majority's assertion that such arrests are "rare," it could be argued that this empirical reality supports the Fourth Amendment unreasonableness of the practice. *Cf.* *Coker v. Georgia*, 433 U.S. 584 (1977) (citing paucity of affirmative jury decisions to impose death on defendants convicted of rape as evidence supporting view that the death penalty in such situations constitutes cruel and unusual punishment).

evidence seized in searches conducted incident to arrest, as permitted by the Court's 1973 decision in *United States v. Robinson*.<sup>80</sup> Even courts prior to *Atwater*, for instance, condoned warrantless arrests, and searches incident, for: illegal parking,<sup>81</sup> littering;<sup>82</sup> riding a bicycle on a sidewalk<sup>83</sup> or without a headlight,<sup>84</sup> civil contempt (based on a civil bench warrant);<sup>85</sup> juvenile curfew violations;<sup>86</sup> eating food on a subway;<sup>87</sup> truancy;<sup>88</sup> speeding;<sup>89</sup> driving with a broken taillight;<sup>90</sup> possessing drug paraphernalia;<sup>91</sup> violating an alcohol open container law;<sup>92</sup> public drinking;<sup>93</sup> underage possession of alcohol;<sup>94</sup> "pedestrian interference";<sup>95</sup> urinating in public;<sup>96</sup> and possessing a suspended driver's license while operating a bicycle (on reasoning that the document permitted misidentification).<sup>97</sup> Subsequent to *Atwater*, courts already have approved arrests, and hence searches, for walking in a roadway,<sup>98</sup> driving with an expired vehicle registration sticker,<sup>99</sup> making an illegal turn while driving,<sup>100</sup> and violating a city ordinance for remaining in a public park after hours.<sup>101</sup> The Supreme

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80. 414 U.S. 218, 236 (1973).

81. *Williams v. State*, 726 S.W.2d 99 (Tex. Crim. App. 1986).

82. *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999); *State v. Sparks*, 422 S.E.2d 293 (Ga. Ct. App. 1992); *State v. Ranson*, 511 N.W.2d 97 (Neb. 1994); *People v. Whitted*, 718 N.Y.S.2d 162 (City Ct. 2000).

83. *United States v. McFadden*, 238 F.3d 198 (2d Cir. 2001) (interpreting New York law).

84. *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995) (interpreting Iowa law).

85. *People v. Allibalogun*, 727 N.E.2d 633 (Ill. 2000).

86. *In re Charles C.*, 90 Cal. Rptr. 2d 430 (Ct. App. 1999); *In re J. M.*, 995 S.W.2d 838 (Tex. App. 1999).

87. *Fisher v. Wash. Metro. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982) (interpreting D.C. law).

88. *In re Humberto O.*, 95 Cal. Rptr. 2d 248 (Ct. App. 2000); *In re R. D.*, 749 So. 2d 802 (La. Ct. App. 1999).

89. *United States v. Lugo*, 170 F.3d 996 (10th Cir. 1999) (applying Utah law); *Kearse v. State*, 986 S.W.2d 423 (Ark. Ct. App. 1999).

90. *State v. Hehman*, 544 P.2d 1257 (Wash. Ct. App. 1976).

91. *State v. Thompson*, No. 23805-5-II, 2001 WL 30058 (Wash. Ct. App. Jan. 12, 2001).

92. *People v. Pantusco*, 484 N.Y.S.2d 321 (App. Div. 1985); *State v. Pallone*, 613 N.W.2d 568 (Wis. 2000).

93. *State v. Thompson*, 536 So. 2d 388 (Fla. Dist. Ct. App. 1989).

94. *Commonwealth v. Moscat*, 731 N.E.2d 544 (Mass. App. Ct. 2000), *rev. denied*, 737 N.E.2d 467, 547 (Mass. 2000).

95. *State v. Greene*, 983 P.2d 1190 (Wash. Ct. App. 1999).

96. *Commonwealth v. Williams*, 568 A.2d 1281 (Pa. Super. Ct. 1990); *McConnell v. State*, No. 14-99-897-CR, 2001 WL 8344 (Tex. App. Jan. 4, 2001).

97. *Caraballo v. State*, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000).

98. *Collins v. State*, No. 14-00-00814-CR, 2001 LEXIS 3918 (Tex. App. June 14, 2001).

99. *Nicholson v. State*, No. 05-00-01401-CR, 2001 WL 515919 (Tex. App. May 16, 2001).

100. *People v. Fennell*, No. B144396, 2001 Cal. App. LEXIS 1131 (Ct. App. Oct. 1, 2001).

101. *Hudson v. State*, No. CACR00-1013, 2001 WL 541069 (Ark. App. May 23, 2001).

Court itself, shortly after deciding *Atwater*, upheld an auto inventory conducted after a warrantless arrest for speeding, driving without registration and insurance documentation, and having an improperly tinted auto windshield, citing the case for support.<sup>102</sup>

Another data source pertains to arrests alone. The most recent national data, from 1999, indicates that 2,300,100 arrests were executed for low-level offenses in categories vaguely denominated "liquor," "drunkenness," "disorderly conduct," "vagrancy," "suspicion," "curfew and loitering law violations," and "runaways."<sup>103</sup> The catch-all misdemeanor category "all other offenses (except traffic)" contains an estimated 3,728,100 arrests.<sup>104</sup> In New York City alone, in 1998, there were 215,157 adult misdemeanor arrests, up sharply from 129,404 in 1993.<sup>105</sup> More recent data from New York further underscores this trajectory: in 1999, there were 227,889 misdemeanor arrests, and 11,049 violation arrests; in 2000, there were 253,704 misdemeanor arrests, and 12,422 violation arrests.<sup>106</sup> Unfortunately, these statistics do not indicate how many arrests were executed without warrants or involved non-breach-of-the-peace offenses.<sup>107</sup> However, the empirical reality that the overwhelming proportion of arrests are in fact executed without warrants<sup>108</sup> provides a gauge of the major numbers at issue, as do the descriptive categories.<sup>109</sup>

The data, while impressive, become even more so when conceived in terms of the

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102. *Arkansas v. Sullivan*, 121 S. Ct. 1876 (2001) (applying Arkansas law). Justices O'Connor, Ginsburg, Breyer, and Stevens concurred, with Justice Ginsburg writing for her colleagues. She acknowledged the *Atwater* majority's perception that there was a "dearth of horrors demanding redress" and expressed "hope" that the majority would reconsider its holding in *Atwater* if "experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests.'" *Id.* at 1878 (citing *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1557 (2001)). *Cf. Williams v. Jaglowski*, 269 F.3d 778, 784 (7th Cir. 2001) (citing *Atwater* for support, upholding the warrantless arrest of suspended police officer for violation of police internal rules).

103. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000 tbl. 4.1 (Kathleen Maguire & Ann L. Pastore eds., 2001).

104. *Id.*

105. N.Y. State Div. of Criminal Justice Servs., *Selection for Criminal Justice Indicators*, available at <http://criminaljustice.state.ny.us/crimnet/ojsa/areastat/areast.htm>; see also Kevin Flynn, *Lower Morale, Yes. But Apathy? Police Say They Are Diligent as Ever, and the Numbers Agree*, N.Y. TIMES, June 18, 2000, at 25 (noting that arrests increased by 12% in 2000 over 1999).

106. Letter to author from Maureen Casey, Deputy Commissioner of Policy and Planning, City of New York Police Department (dated August 23, 2001) (on file with *Indiana Law Journal*).

107. For decades, no less than today, commentators have bemoaned the dearth of reliable statistics on arrests, especially with regard to "low-visibility," minor offenses. See, e.g., Caleb Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16, 20-21 (1957); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936).

108. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1184 (1999).

109. See *supra* notes 103-104 and accompanying text.



actual human consequences of arrest. Arrests, as noted by Justice O'Connor in her dissent, subject individuals to the risks of often dangerous and threatening jail environments for up to forty-eight hours without judicial review.<sup>110</sup> Arrestees suffer separation from work and family, and are forced to endure the embarrassment and the intrusiveness of being physically seized by a government agent.<sup>111</sup> And once the custodial detention is over, the arrest persists, ignominiously, as a matter of public record,<sup>112</sup> with long-term consequences.<sup>113</sup> These consequences are not in the least mitigated because of the minor nature of the underlying offense,<sup>114</sup> nor by the empirical reality, recognized for decades,<sup>115</sup> that most often misdemeanor arrests do

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110. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1563 (2001) (O'Connor, J., dissenting); see also THE NAT'L SHERIFFS' ASS'N, *JAIL CLASSIFICATION AND DISCIPLINE* 34 (1988) (urging that booking officers be "acutely aware that being arrested or incarcerated, especially for the first time, can be extremely traumatic for many persons").

111. *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as "a serious personal intrusion regardless of whether the person seized is guilty or innocent"); see also *United States v. Robinson*, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (stating that a "custodial arrest is the significant intrusion of state power into the privacy of one's person"); *United States v. Marion*, 404 U.S. 307, 320 (1971) (describing arrest as "a public act that may seriously interfere with the defendant's liberty, ... 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"); *Gouled v. United States*, 255 U.S. 298, 304 (1921) (noting that arrest deprives persons of physical freedom, "the very essence of constitutional liberty"); AMERICAN LAW INSTITUTE, *MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE* § 120.1, cmt. at 290-91 (1975) (observing that "[b]eing arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening").

112. *Atwater*, 121 S. Ct. at 1563 (O'Connor, J., dissenting).

113. See, e.g., 20 ILL. COMP. STAT. 2630/3(A) (2000) (requiring preservation of arrest histories and their dissemination to government officials as necessary); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 520-21 (1985) (noting that applicants for professional licenses usually must acknowledge all arrests, regardless of their ultimate disposition).

114. See, e.g., David Rohde, *Police Arrest Smokers in Subways, and Lawyers Object*, N.Y. TIMES, June 11, 2000, at 48 (discussing police resort to arrests for menial offenses and the many negative personal consequences to individuals). As Malcolm Feeley recognized several decades ago, under such circumstances "the process itself is the punishment." MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199 (1979); see also *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 441 (7th Cir. 1986) (noting that most minor misdemeanor arrests do "not produce a sentence of custody ... so a custodial arrest itself becomes a substantial part of the penalty").

115. See Hall, *supra* note 107, at 359-62 (surveying data showing widespread resort to arrest for minor crimes without ultimate prosecution). In 1927, Professors Bohlen and Shulman observed that "[t]he privilege to arrest without a warrant will undoubtedly lead to officers taking into custody persons for offenses which, though actually committed and in the presence of the officer, are subsequently deemed too insignificant to warrant prosecution." Bohlen & Shulman, *supra* note 4, at 490.

not result in actual prosecution.<sup>116</sup>

By affording *carte blanche* to police, the Court thus subjected millions of American motorists to the highly questionable discretion of police officers like Barton Turek.<sup>117</sup> But one need not be driving a car to come within *Atwater's* reach: if probable cause exists that even a "*very minor criminal offense*" was committed, police can arrest.<sup>118</sup> This power, in turn, is amplified immeasurably by the Court's prior decisions, in particular *Robinson*, which affords police the *per se* right to search upon arrest,<sup>119</sup> and *Whren*, which allows police to use menial offenses as bases for pretextual seizures, raising the additional specter of discriminatory applications of the law.<sup>120</sup>

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116. See *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"). See generally Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 41, 49-58 (2000) (reviewing data indicating that fewer than half of all misdemeanor arrests result in prosecution). In New York City, the flood of misdemeanor arrests has far surpassed the adjudicative capacity of the local criminal courts, resulting in extremely high dismissal rates. Ford Fessenden & David Rohde, *Dismissed Before Reaching Court, Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999, at A1. Cf. *Michigan v. DeFillippo*, 443 U.S. 31, 46 n.3 (1979) (Brennan, J., dissenting) (noting with respect to "stop-and-identify" laws that localities, wishing to avoid challenges to such laws, might eschew prosecutions under the laws and "use them merely as investigative tools to gather evidence of other crimes through pretextual arrests and searches").

Professor Brady suggests that "low prosecution rates have become part of a criminal justice 'culture' in many of the largest jurisdictions, where better outcomes are not expected." Brady, *supra*, at 43. The low prosecution rates themselves, Brady argues, cast significant doubt on whether the government's action comports with Fourth Amendment reasonableness requirements. *Id.* at 49-84.

117. Because of the broad array of potential violations associated with driving, and complying with motor vehicle laws, motorists are easy targets for police stops, arrests, and searches. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (recognizing that motorists are subject to a "multitude of applicable traffic and equipment regulations"); see also LAWRENCE TIFFANY ET AL., *DETECTION OF CRIME* 131 (1967) (quoting one officer as stating that "[y]ou can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made"); David A. Harris, "*Driving While Black*" and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 558 (1997) (noting that police officers "have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation").

118. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1557 (2001) (emphasis added).

119. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

120. *Whren v. United States*, 517 U.S. 806 (1996). Under *Whren*, any allegation of selective enforcement would ostensibly find remedy in the Equal Protection Clause, not the Fourth Amendment. This is because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. Equal protection claims, however, face notoriously formidable obstacles. See Harris, *supra* note 117, at 550-54; see also *Brown v. City of Oneonta*, 235 F.3d 769 (2d Cir. 2000) (denying equal protection claim brought by black residents, in predominantly white town, based on police exclusively targeting blacks, resulting

The Court's recent decision in *Knowles v. Iowa*,<sup>121</sup> requiring that police actually arrest, not merely cite, a suspect in order to justify a search incident,<sup>122</sup> provides officers yet more incentive to arrest<sup>123</sup> in the name of achieving broader investigatory goals.<sup>124</sup> This incentive, it bears mention, is not diminished by the willingness of states<sup>125</sup> and the Court<sup>126</sup> to downplay the aged common law requirement that a

in encounters with over two hundred of the three hundred blacks residing in town), *cert. denied* 122 S. Ct. 44 (2001).

121. 525 U.S. 113 (1998).

122. *Id.* at 118-19.

123. This outcome is ironic given that the Iowa statute addressed by the *Knowles* Court permitted police to search citizens that they cite but do not actually arrest, and was enacted as part of broader law reform efforts designed to lessen the number of custodial arrests experienced by citizens. See ABA STANDARDS FOR CRIMINAL JUSTICE §§ 10-2.1 to 10-2.3 (1968); AM. LAW INST., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.2, at 304-06 (1975). According to one commission of the era, "[e]very police agency [should] immediately ... make maximum effective use of State statutes permitting police agencies to issue written summonses and citations in lieu of physical arrest or prearrest confinement." NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, THE POLICE 83 (1973).

124. See *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989) (stating that "[t]he potential benefits to be derived from a search of the person ... provide the police with the incentive to employ the [search incident] exception as a potent investigatory tool").

This propensity has been recognized for years. See, e.g., ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880, at 180-81 (1989) (quoting a local city judge, alarmed at increasing resort to arrests for minor offenses, who warned police to discontinue their "constant habit of arresting parties in order to search them"). More recently, Professor LaFave noted that the search incident to arrest power affords an incentive to police to make custodial arrests for extremely minor crimes whenever, because of a whim or suspicion, they would like to be able to make a full search of a person or the passenger compartment of the vehicle in which he was riding. . . . [A] need exists for limits upon the power of the police to resort to the custodial arrest alternative.

Wayne R. LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 441 (1984).

125. See Schroeder, *supra* note 4, at 784 n.18 (noting that seven states have disavowed the common law rule, deeming it to be of nonconstitutional magnitude). See generally WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(b), (c) (3d ed. 1996 & Supp. 2001) (discussing evolution of rule and various interpretations of "presence").

126. The *Atwater* majority expressly avoided the question of whether the "presence" requirement for misdemeanor arrests was of constitutional magnitude, seeing no need to "speculate" on the question—presumably because Turek witnessed *Atwater*'s seatbelt violation. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1550 n.11 (2001). However, the majority signaled its view that the requirement does not enjoy Fourth Amendment stature, citing a prior dissent by Justice White. *Id.* at 1550 ("[T]he requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment.") (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984) (White, J.,

misdemeanor occur in an officer's "presence" in order to justify a warrantless arrest.

In short, as we enter the twenty-first century, American police enjoy unprecedented power to arrest, and hence search, individuals for any and all violations. This power has grown dramatically over the years, spurred by the growth of professional police forces starting in the 1830s,<sup>127</sup> and the perception that in an increasingly urbanized nation more substantive criminal laws were needed,<sup>128</sup> backed by increases in warrantless authority to enforce such laws.<sup>129</sup> As noted by Professor Barbara Salken:

Prior to the mid 1800s ... the summons was the rule ... Not until the advent of the professional police force did arrest rules begin to change. Legislatures

dissenting)); *see also* *Schmidt v. City of Lockport*, 67 F. Supp. 2d 938, 942 (N.D. Ill. 1999) (noting that four U.S. Circuits have concluded that the Fourth Amendment does not incorporate the common law presence requirement). Precisely why the Court felt itself at liberty to disregard an accepted common law practice, but otherwise proclaim fealty to majority practice, itself remains a troublesome question.

127. The City of Boston assembled the nation's first professional police force, in 1838. *See* ROGER LANE, *POLICING THE CITY: BOSTON 1822-1885*, at 34-38 (1967). On the increasing role of police in exerting social control, and their professional development in the increasingly urbanized settings of America, *see*, for example, LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27-30, 66-68 (1993); *CRIMINAL JUSTICE IN CLEVELAND* 590-620 (Roscoe Pound & Felix Frankfurter eds., 1922); Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 578-90 (1936); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-38 (1994).

128. For discussion of the impact on police authority of the nation's increasing urbanization, and on the substantive criminal law more generally, *see* Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001). *See also* PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920* (1978); Eric H. Monkkonen, *A Disorderly People? Urban Order in the Nineteenth and Twentieth Centuries*, 68 J. AM. L. HIST. 539 (1981).

129. Acting on this perceived need, numerous nineteenth-century cities invoked their home rule authority to adopt ordinances addressing new forms of social disorder and providing broadened misdemeanor warrantless arrest authority to their police. *See, e.g.*, *Main v. McCarty*, 15 Ill. 441 (Ill. 1854); *White v. Kent*, 11 Ohio St. 550 (Ohio 1860). The states also took measures. Recognizing what it called the "necessities of metropolitan life," the Missouri Supreme Court upheld a statute providing broadened arrest authority, stating that "[a]nyone at all familiar with civil conditions in cities as contradistinguished from the country, realizes that greater power should be given peace officers to preserve the peace and arrest offenders in cities than is given to police officers elsewhere." *Hanser v. Bieber*, 197 S.W. 68, 70 (Mo. 1917); *see also* Hall, *supra* note 107, at 363 (noting that "[recent statutes] have brought within the area of legal arrest, a vast number of misdemeanors which were not breaches of the peace at common law, and hence not subject to arrest without warrant even though committed in the presence of an officer"); Sam B. Warner, *Modern Trends in the American Law of Arrest*, 21 CAN. BAR REV. 192, 201-02 (1943) (discussing examples of new laws); Wilgus, *supra* note 11, at 706 (stating "[i]t is impossible to ... enumerate the great number of ... misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence").

then adopted statutes granting sweeping arrest powers. Without considering whether the taking of immediate custody was necessary, legislatures began to authorize custodial arrests for minor crimes. This change appears to have been aimed at making it easier to arrest without a warrant, but the effect was to authorize custodial arrests for many offenses, such as ordinance and regulatory violations, that had previously not been subject to arrest at all.<sup>130</sup>

The combined expansion of substantive law and arrest authority prompted Harvard Law Professors Francis Bohlen and Harry Shulman in 1927 to write that the development even then was of major concern:

The legislative mill turns out a steady addition to the list of misdemeanors. These are oppressive enough if administered with the deliberation inherent in the requirement of a warrant or summons. They become doubly intolerable if every over-zealous peace officer, actuated by a lofty but inconvenient crusading spirit, is permitted to take up, on sight, every person whom he detects in the act of committing a misdemeanor.<sup>131</sup>

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130. Salken, *supra* note 4, at 258-59; see also FLOYD FEENEY, *THE POLICE AND PRETRIAL RELEASE* 13 (1982) (noting that “[i]n the mid-1800s, as police departments were first being formed and new minor crimes began to be created, the arrest rules for misdemeanors and minor crimes began to change. Statutes and ordinances establishing the new minor crimes often specifically authorized arrest without a warrant.”). On the codification movement in the mid-nineteenth century more generally, see KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 126-27 (1989).

This major augmentation in police power, in turn, was supplemented by the historically novel, mid-nineteenth century judicial notion that probable cause justified warrantless arrests, as discussed *supra* note 8. As Professor Thomas Davies has noted, this shift

constituted a revolution in criminal justice authority and resulted in warrantless felony arrests displacing the previous reliance on arrest warrants. Additionally, the expansion of *ex officio* felony arrest authority expanded the opportunity for officers to make warrantless searches incident to arrest, making that power far more significant than it had been at framing.

In sum, the recognition of probable cause alone as a justification for a warrantless arrest marked a drastic departure from the common-law regime familiar to the Framers. The enlarged *ex officio* authority of the officer, coupled with the organizational might of the new police departments, fundamentally changed arrest and search practice. The modern police officer and aggressive policing had become realities by the end of the nineteenth century; the warrant ceased to be the usual mode of arrest, and the “ministerial” label disappeared from the literature on law enforcement officers.

*Id.* at 638, 639; see also *id.* at 741 (stating “[m]odern statutes and court rulings that confer substantial *ex officio* authority on police officers...provide a level of discretionary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal”).

131. Bohlen & Shulman, *supra* note 4, at 491.

Courts in earlier times expressed grave misgivings about granting such blanket warrantless authority to police, despite the existence of legislative imprimatur.<sup>132</sup> Subsequent decades, however, have evidenced an increasing receptiveness<sup>133</sup> to the point that today, as noted in *Atwater*, all American jurisdictions afford such authority to some degree.<sup>134</sup> With *Atwater*, the movement has finally benefitted from clear-cut constitutional endorsement, putting to rest the modern uncertainty regarding the authority of police to execute warrantless arrests for minor offenses.<sup>135</sup> Both as a result of and in tandem with such developments, policing strategies have shifted, manifested today in aggressive “zero tolerance” and “quality of life” policing, premised on the belief that minor offense arrests head off more serious but still incipient criminal activity.<sup>136</sup> With such authority, unfortunately, comes the “power,”

132. See, e.g., *In re Kellam*, 41 P. 960, 961 (Kan. 1895) (invalidating statute affording warrantless arrest authority for non-breaches of the peace, stating “[t]he liberties of the people do not rest upon so uncertain and insecure a basis as the surmise or conjecture of an officer that some petty offense has been committed”); *Robison v. Haug*, 37 N.W. 21, 25 (Mich. 1888) (invalidating statute, reasoning that “[t]he manifest purpose of this statute is to bring certain things that are not breaches of the peace within that denomination to avoid the necessity of a warrant. But ... the constitution cannot be so evaded.”).

133. See, e.g., *Butolph v. Blust*, 5 Lans. 84 (N.Y. 1871) (prohibiting such arrests), superseded by N.Y. CRIM. CODE § 177 (1930) (permitting such arrests).

134. See *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1552 & app. (2001). Cf. AM. LAW INST., CODE OF CRIMINAL PROCEDURE 232-33 (Official Draft, 1930) (noting that statutory law at the time in 38 states authorized warrantless arrests regarding all misdemeanors).

Dicta in the Court’s 1925 decision *Carroll v. United States* served as a major influence in this evolution. See *Carroll v. United States*, 267 U.S. 132, 156 (1925) (stating without qualification, in case involving an automobile search, that an officer “‘may’ arrest without a warrant one guilty of a misdemeanor ... if committed in his presence”). According to Professors Bohlen and Shulman,

[u]ntil the case of *Carroll v. United States*, the statements both of judicial decisions and textbooks were substantially unanimous to the effect that there was no privilege to arrest without a warrant for a misdemeanor other than a breach of the peace, except in the case of a few misdemeanors such as “night walking” and “riding armed.”

Bohlen & Shulman, *supra* note 4, at 485. In addition, *Carroll*’s precedential value as support for broad arrest authority is undercut by the fact that such authority, to the extent it existed, derived from the National Prohibition Act, not the common law. See *id.* at 489 (noting same). For extended critical commentary on *Carroll*, and its subsequent misuse, see Davies, *supra* note 8, at 731-34.

135. See *supra* notes 3-4 and accompanying text. Professors Bohlen and Shulman offered in 1927 that “[a]t least let us be thankful that [*Carroll*] does not suggest a common law privilege to arrest on sight for any public offense. This would include breaches of municipal ordinances as well as statutory misdemeanors.” Bohlen & Shulman, *supra* note 4, at 491. With *Atwater*, this worst case scenario appears to have come to pass.

136. See generally George L. Kelling & Catherine M. Coles, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the*

as John Adams put it, “that places the liberty of every man in the hands of every petty officer,”<sup>137</sup> a power directly at odds with the acute distrust of discretionary authority inherent in the Fourth Amendment itself.<sup>138</sup> Of equal if not greater concern, such unbounded discretion threatens that police will enforce the law discriminatorily, a concern expressly downplayed by the *Atwater* majority,<sup>139</sup> yet persistently evidenced on America’s streets with socially toxic effects.<sup>140</sup>

In this regard, the majority’s approval of Gail Atwater’s custodial arrest is in a sense refreshing: she was, after all, a white, well-off female with no drugs or other contraband in her possession,<sup>141</sup> not a Hispanic or African-American motorist or

*Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Phillip B. Heyman, *The New Policing*, 28 FORDHAM URB. L.J. 407 (2000); Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551 (1997). As Professors Kelling and Coles have noted, these new strategies are by their “*very nature* more aggressive and interventionist than traditional 911 policing.” Kelling & Coles, *supra*, at 164 (emphasis in original).

The popularity of the approach persists despite its questionable efficacy in reducing crime and disorder. See Harcourt, *supra*, at 312-39; Robert J. Sampson & Stephen J. Raudenbush, *Disorder in Urban Neighborhoods—Does it Lead to Crime?* 2001 NAT’L INST. OF JUST. RES. IN BRIEF 5 (Feb. 2001), available at <http://www.opj.usdoj.gov/nij/rsrdocs2001.htm>.

137. John Adams, *Petition of Lechmere*, in 2 LEGAL PAPERS OF JOHN ADAMS 106, 141-42 (L. Kinvin & Hiller B. Zobel eds., 1965).

138. See Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1729 (1996); see also Davies, *supra* note 8, at 591-600; Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?*, 3 U. PA. J. OF CONST. L. 398, 414-28 (2001).

To a significant degree, as Professor Davies has observed, this distrust was bred by “outright disdain for the character and judgment of ordinary officers,” who most often hailed from uneducated and lower socioeconomic segments of the early American population, and were poorly paid for their part-time work. Davies, *supra* note 8, at 577, 620-21. According to Davies, “[t]he common-law tradition viewed any form of discretionary authority with unease—but delegation of discretionary authority to ordinary, ‘petty,’ or ‘subordinate’ officers was anathema to framing era lawyers.” *Id.* at 578. In contrast to officers, “the justice of the peace was a man of wealth and high status in the local community.” *Id.* at 623. See also David F. Forte, *Marbury’s Travail: Federalist Politics and William Marbury’s Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 354 (1996) (noting that the office was populated by “men of means and standing” (quoting PETER C. HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 3 (1992))).

139. *Atwater*, 121 S. Ct. at 1557 n.25.

140. See, e.g., STEVEN K. SMITH ET AL., U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION AND PERCEPTIONS OF COMMUNITY SAFETY IN 12 CITIES, 1998, 25-26 (1999) (citing statistics underscoring continued negative perception of police in minority communities); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 119 tbl. 2.29 (Ann L. Pastore & Kathleen Maguire eds., 2001) (indicating that only 36% of African-Americans polled believe that police in their community “treat all races fairly”).

141. Turek’s decision to arrest Atwater, rather than being driven by racial animus, appeared to derive from emotional pique arising when she asked him to calm down and lower

pedestrian, the typical targets of racial profiling and aggressive policing more generally.<sup>142</sup> The conclusion, moreover, is notable for its jurisprudential symmetry with an outcome reached in another case litigated in the Fifth Circuit about the time of *Atwater*'s. In *United States v. Castro*,<sup>143</sup> the Fifth Circuit sitting en banc upheld not only the Texas arrest of two Hispanic males for failing to wear seat belts, but also the incidental search of their vehicle, which revealed a large amount of cocaine.<sup>144</sup> The officer elected to arrest, not ticket, the men for the seat belt violations because they gave "conflicting statements" and had a "nervous demeanor."<sup>145</sup>

However refreshing, this symmetry will likely afford little solace to Americans of all backgrounds who, in the years to come, will experience arrest merely because they are suspected of committing a minor offense. As a result of *Atwater*, we are all now vulnerable to suffering "pointless indignities" and "gratuitous humiliations" at the hands of vindictive officers like Turek. Even more ominous, *Atwater* frees up police, when motivated by a discriminatory purpose,<sup>146</sup> to arrest and search persons who do

his voice because he was scaring her young children. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting).

142. See generally ACLU, *DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS* (1999); CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GEN. OF THE STATE OF N.Y., *THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK* (1999) [hereinafter *STOP AND FRISK*]; R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David Rudovsky, *Law Enforcement By Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

143. *United States v. Castro*, 166 F.3d 728 (5th Cir. 1999) (en banc), cert. denied, 528 U.S. 827 (1999).

144. *Id.* at 731.

145. *Id.* The *Castro* defendants, in fact, had been the target of an elaborate hunt by a drug task force which trailed their vehicle for 115 miles through several counties. *Id.* at 730. A local sheriff agreed to assist, but was told that "he would have to 'develop his own probable cause' for stopping the vehicle." *Id.*

Dissenting, Judge Politz characterized the circumstances leading up to the seizure of the defendants as follows:

This case presents the unique situation of an admittedly pretextual stop and arrest, followed by a pretextual impoundment, to obtain a pretextual inventory search for drugs the agents suspected were in the vehicle .... There must be a point where the combination of pretext and continuing bad faith cannot be tolerated if the fourth amendment protections are to have any meaning whatsoever.

*Id.* at 734-35 (Politz, J., dissenting).

146. See *supra* note 120 and accompanying text; see also David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 376 (2001) (stating that after *Whren* "[w]hatever else the Fourth Amendment does or used to do, it will no longer serve as a tool to



not resemble Gail Atwater—a far more likely scenario, yet equally lacking in constitutional protection.<sup>147</sup>

Unfortunately, with all constitutional control removed, there is little reason to believe that officers themselves will exercise restraint, despite the *Atwater* majority's confident inference that it is in the "interest of the police to limit petty-offense arrests."<sup>148</sup> This is because, in reality, for police the benefits of arrest far outweigh the costs. To be sure, arrests entail significant burdens for police, in the form of time and effort expended in paperwork and transport. Nevertheless, arrests—much more than less intrusive seizures such as *Terry* stops, or consensual street encounters with citizens—have enormous instrumental benefits. Most important, arrests for even minor offenses facilitate police efforts to project an image of control and presence on the streets<sup>149</sup> and enable them to intervene in what they perceive to be incipient criminal situations.<sup>150</sup> Even the threat of custodial arrest, reified by *Atwater*, can reap benefits for police because citizens will be logically fearful of the associated negative consequences, making it more likely that they will submit to police intrusions (including "consent" searches) in the hope of avoiding full custodial arrest.<sup>151</sup>

prevent racially based policing").

147. See *supra* note 120 and accompanying text; see also Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L. J.* 457, 457, 462 (2000) (concluding on basis of New York data that "order-maintenance policing" "is not about disorderly places, nor about improving the quality of life, but about policing poor people in poor places"); James Walsh & Dan Browning, *Presumed Guilty Until Proved Innocent*, *STAR-TRIBUNE* (Minneapolis), July 23, 2000, at A1 (noting significantly higher warrantless arrest rates for African-Americans with regard to a broad array of minor offenses).

148. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1556 (2001) (stating same and asserting that such arrests "carry costs that are simply too great to incur without good reason").

149. See WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 146-49 (Frank J. Remington ed., 1965) (observing on basis of field studies that police resort to arrest to "maintain respect for the police"). This goal has motivated law enforcement since the emergence of professional police forces in the mid-nineteenth century. As noted by Professor Friedman, "the rise of the police was ... an event of huge significance. The police interposed a constant, serious, full-time presence into the social spaces of the cities." LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 70 (1983).

150. See LAFAVE, *supra* note 149, at 437-82 (surveying widespread use of arrest to control incipient social disorder). Reflecting on the landmark studies conducted by the American Bar Foundation in the 1950s and 1960s, of which Professor LaFave's work was a part, Professor Herman Goldstein recently observed: "The substantial police involvement in an activity like traffic control, through arrests made and searches conducted, was used in various ways to control serious crime." Herman Goldstein, *Confronting the Complexity of the Policing Function*, in *DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* (Lloyd E. Ohlin & Frank J. Remington eds., 1993).

151. See Amy Waldman, *When a Badge Is Seen, Views Vary: After Louima, New Yorkers Are Split on Police Progress*, *N.Y. TIMES*, July 24, 2001, at B1 (noting same). On consent searches more generally, see Jose Felipe Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 *NEB. L. REV.* 711 (2000).

Moreover, arrests, even for menial offenses, carry professional benefits for police who feel pressure from commanders to “show results” in the current era of decreasing crime rates.<sup>152</sup> Even more important, the per se authority to search upon any arrest<sup>153</sup> provides officers a compelling, volume-based incentive to execute custodial arrests for minor offenses so that they can uncover evidence for “good busts” (that is, those leading to more serious prosecutions).<sup>154</sup> And, if no evidence of more serious criminal behavior is discovered, government can truncate extended systemic costs by exercising its prerogative *not to prosecute*, a very common occurrence.<sup>155</sup>

In short, the *Atwater* majority badly misconceived the motivational dynamic at

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152. See Barry Loveday, *Managing Crime: Police Use of Crime Data as an Indicator of Effectiveness*, 28 INT'L J. SOC. L. 215, 216 (2000) (observing that “[p]olice forces . . . are now judged on performance criteria, which embraces their success in reducing crime”); see also Howie Carr, *Arresting Memo Puts State Cops in a Pinch*, BOSTON HERALD, Oct. 21, 1998, available at LEXIS, News Library, Bherld File (discussing state police internal memorandum demanding “corrective action . . . [to] increase the level of activity” because arrests are a “valid indicator” of police performance); Larry Celona & Linda Masarella, *“Collar” Shortage Puts Queens Cops in Doghouse*, N.Y. POST, June 11, 1998, at 12, available at LEXIS, News Library, Nypost File (addressing internal memorandum from police supervisor threatening officers with lost vacation days if they did not execute ample number of arrests); Thomas Ott, *Police Say Mentor Still Using Quotas*, PLAIN DEALER (Cleveland), Oct. 27, 1998, available at LEXIS, News Library, Clevpd File (discussing use of arrest quotas). This pressure, it seems, has been so substantial that it has encouraged fabrications of local crime data. See Fox Butterfield, *As Crime Falls, Pressure Rises to Alter Data*, N.Y. TIMES, Aug. 3, 1998, at A1 (reporting that “[s]enior police officials around the nation are concerned that the sharp drop in crime in recent years has produced new pressure on police departments to show ever-decreasing crime statistics and might be behind incidents in several cities in which [police] have manipulated crime data”).

153. See *United States v. Robinson*, 414 U.S. 218, 235 (1973). Even more problematic, as I have noted elsewhere, very often courts do not insist that a formal custodial arrest occur, to justify a search incident, concluding that it is sufficient if police “could have” arrested at the time of the search. See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 405-14 (2001). As a result, police can search and yet avoid the logistical and administrative hassles associated with the arrest, transport, and processing of suspects. *Id.* at 412-14. This power is extended further still by the ongoing confusion among courts, and indeed legislatures, over the definitional parameters of the legal concept “arrest.” See *id.* at 418-38 (discussing numerous examples of same). In Alabama, for instance, when police “arrest” a traffic offender, they “shall” issue a summons, unless extenuating circumstances are present. See ALA. CODE ANN. § 32-1-4(a) (1975). This of course poses a conflict in the wake of *Knowles*, which conditions search-incident authority solely upon the occurrence of a custodial arrest. See *Iowa v. Knowles*, 525 U.S. 113, 118-19 (1998).

154. See Wayne A. Logan, *Policing in an Intolerant Society*, 35 CRIM. L. BULL. 334, 345 (1999) (noting that police have an “institutional, volume-oriented incentive to make ‘bigger’ cases on the basis of custodial arrests and searches premised on petty crimes”).

155. See *supra* note 116.

work; instead of fretting about police “disincentives” to arrest for minor offenses,<sup>156</sup> the majority’s focus should have been on providing citizens a countervailing buffer against the potent incentives driving police resort to arrest. Such a buffer could assume various forms, including Atwater’s proposal that tied arrest authority to whether the suspected offense carries jail time and whether government has a compelling need for immediate detention,<sup>157</sup> Justice O’Connor’s *Terry*-based alternative,<sup>158</sup> or even an outright bar on warrantless arrests for nonfelony offenses not involving a breach of the peace (however defined).<sup>159</sup> However, the majority elected to afford police yet more discretionary authority to arrest, and search, notwithstanding the ambiguous historical lineage supporting warrantless arrests for minor offenses.<sup>160</sup>

156. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1556 (2001).

157. *See supra* note 35 and accompanying text.

158. *See supra* note 63 and accompanying text.

159. The *Atwater* majority studiously avoided any attempt to define this category, which has been the subject of disagreement for some time. *See Atwater*, 121 S. Ct. at 1543 n.2; *see also* CHARLES E. TORCIA, *WHARTON’S CRIMINAL PROCEDURE* § 61 (13th ed. 1989 & Supp. 2001) (citing and discussing cases reaching varied results).

160. Whatever else critical can be said of *Atwater*, the majority’s treatment of the historical record regarding warrantless misdemeanor arrests is troublesome. Even accepting that enumerated exceptions existed at common law, like those authorizing arrests of “night walkers,” the fact remains that they were “exceptions” to accepted common law limits barring officers from executing warrantless arrests for non-breach-of-the-peace misdemeanors. *See Davies, supra* note 8, at 622 n.196 (citation omitted) (noting that as of 1794 there had been only a “few instances” in Virginia in which officers had exercised warrantless arrest authority for petty statutory crimes); *see also Wilgus, supra* note 11, at 704-05 (noting “a few exceptional cases of misdemeanors” not involving breaches of the peace that justify warrantless arrest). *Cf. PERRY MILLER, THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 121 (1965) (referring to antebellum common law as “a haphazard accumulation of precedents, quirks, and obscurities ... fundamentally irrational by its inherent nature”). *Atwater*’s telescopic use of history, focusing on exceptions rather than rules, would appear a distortion of originalist understanding, leading to a situation in which modern-day Americans enjoy fewer protections than enjoyed by their forebears. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (expressing concern that Fourth Amendment protections “should not become less than that” enjoyed at common law); *see also Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (stating that the Fourth Amendment’s goal was “to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted”).

The majority’s emphasis on the judicial and legislative augmentation of police arrest authority over the course of many decades causes additional concern. *See generally* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1794-99 (2000) (discussing “indeterminacy” of analytic efforts to gauge common law, based on postframing developments). *Cf. Jerome Hall, Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 575-76, 590 (1936) (noting that “[o]ne does usually think of 1827,” the time when English courts first permitted warrantless arrests based on probable cause for felonies and misdemeanors alike, “as tantamount to ‘at common law’”). Rather than

*B. The Prospect of a Statutory "New Federalism"*

Beyond *Atwater's* day-to-day practical importance, the decision is significant because it underscores yet again the Court's determination to remove itself from its structural role as arbiter and guardian of the Fourth Amendment.<sup>161</sup> The mere fact that Texas saw fit to legislatively authorize *Atwater's* arrest for a fine-only offense should not have substituted for analysis of whether such an arrest was "reasonable." Echoing *Marbury*,<sup>162</sup> a majority of the Court noted over thirty years ago: "The question in this Court upon review of a state-approved search or seizure 'is not whether the search (or seizure) was authorized by state law. The question is rather whether the search [or seizure] was reasonable under the Fourth Amendment.'"<sup>163</sup>

While troublesome as a constitutional matter, this abdication might nonetheless contain a silver lining: it can be taken as an invitation for the advent of a salutary, statutory-based "new federalism."<sup>164</sup> Under this view, in the constitutional vacuum

warranting deference in constitutional analysis, the ongoing enlargement of police authority more aptly serves as testament to the unwillingness of courts over the years to exercise constitutional oversight, at last culminating in *Atwater*.

Finally, given that the framing-era record convincingly shows that the statutes constituted quite isolated exceptions to the common law rule limiting warrantless arrest authority, the majority's insistence that *Atwater* had a "heavy burden" to establish that officers' authority was limited seems misplaced. See *Atwater*, 121 S. Ct. at 1553 n.14. If anything, the record underscored the need of the majority to shoulder the burden of departing from mainstream historical understanding and practice. Cf. Sklansky, *supra*, at 1790 (noting that "the common law revered by the Framers—the common law they thought timeless and universal—resided in fundamental principles, not in judicial precedents and statutory prescriptions").

161. See, e.g., *Boyd v. United States*, 116 U.S. 616, 635 (1886) (stating that "[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and to guard against any stealthy encroachments thereon"). See generally Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 93-94 (1988) (asserting that judicial oversight is necessary "to assure that the tradeoff between privacy and law enforcement is [that which a hypothetical political system would strike if] everyone's interests [were] counted equally").

162. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is").

163. *Sibron v. New York*, 392 U.S. 40, 61 (1968) (citation omitted); see also *Duncan v. Louisiana*, 391 U.S. 145, 170 (1968) (Black, J., concurring) (asserting that "under the guise of federalism the States should [not] be able to experiment with the protections afforded our citizens through the Bill of Rights"). A similar sentiment was voiced more recently by Michigan's supreme court, which observed that "it is not the genius of our system that the constitutional rights of persons shall depend for their efficacy upon legislative benevolence. Rather, the courts are charged with the solemn obligation of erecting around those rights, in adjudicated cases, a barrier against legislative or executive invasion." *Sitz v. Michigan Dep't of State Police*, 506 N.W.2d 209, 224 (Mich. 1993).

164. The phrase, if not the concept, originated most famously in a 1977 article by Justice William Brennan, William J. Brennan, *State Constitutions and the Protection of Individual*

created by *Atwater*, “courageous” states can serve as “laboratories” of criminal justice experimentation,<sup>165</sup> imposing limits on police authority in accord with local needs and desires.<sup>166</sup> This experimentation was already in evidence at the time of *Atwater*, with several states imposing statutory limits on police authority to execute warrantless arrests for specified minor offenses;<sup>167</sup> in others, “cite and release” provisions permitted warrantless arrests for minor offenses but only under specific circumstances (for example, when the suspect lacks identification or it appears that the violation will continue).<sup>168</sup> After *Atwater*, in addition to state courts imposing

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*Rights*, 90 HARV. L. REV. 489 (1977), and a prior article by Professor Donald Wilkes, Donald Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975). Since its origin, new federalism has focused mainly on the rights-enhancing authority of state courts to expansively interpret their own constitutions, not the enactment of legislative protections, in the face of increasingly rights-restrictive decisions by the Supreme Court. See generally Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991) (discussing state courts’ protection of fundamental rights pursuant to their respective constitutions); Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065 (1997) (same).

165. The reference, of course, dates from Justice Brandeis who in 1932 urged that we “let our minds be bold” in contemplating local legal experimentation:

Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state, may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (discussing “social experiments . . . in the insulated chambers afforded by the several States”). For a discussion of this view with respect to criminal justice issues in particular, see Kevin R. Wright, *The Desirability of Goal Conflict Within the Criminal Justice System*, 9 CRIM. JUST. 209, 213-14 (1981) (endorsing diversity because it permits inevitable conflicts in community values to be fleshed out and resolved).

166. See *Ker v. California*, 374 U.S. 23, 34 (1963) (noting that under our federated system, states are not “precluded from developing workable rules governing arrests, searches and seizures to meet ‘the practical demands of effective criminal investigation and law enforcement’”); see also WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 1.2 (2000 ed.) (exploring the capacity of states to implement their own criminal justice rules and processes).

167. See ALA. CODE § 32-1-4(a) (2001) (barring warrantless arrests for traffic violations); KAN. STAT. ANN. § 22-2401(d) (2000) (barring warrantless arrests for traffic violations and “a cigarette or tobacco infraction”); OR. REV. STAT. § 810.410(3)(a) (2000) (barring arrests for traffic violations). Indeed, Texas statutory law provides for two exceptions from the otherwise broad authority to arrest: speeding offenses and open container violations. See TEX. TRANSP. CODE ANN. § 543.004(a)(1) (Vernon 2000) (stating that officers can only issue written notices to appear in such circumstances). In addition, numerous states expressly prohibit custodial arrests for seat belt violations. See, e.g., LA. REV. STAT. ANN. § 32:295.1(G) (West 2001).

168. See CAL. PENAL CODE § 853.6(i) (West 2000) (suspect has outstanding warrants,

reasonableness limits in accord with their own constitutions,<sup>169</sup> state legislatures can seize the initiative to regulate police behaviors, creating, in the words of the Ohio Supreme Court, “a substantive right of freedom from arrest for one accused of . . . a minor misdemeanor.”<sup>170</sup> In short, *Atwater*’s redeeming value, for civil libertarians at least, is that legislatures now have a major opportunity to impose much-needed limits on the discretionary authority of police in search and seizure decisions.<sup>171</sup>

Any optimism for progressive change in this arena, however, must be tempered by

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lacks satisfactory identification, will likely continue unlawful act, refuses to sign citation, or is not likely to appear); KAN. STAT. ANN. § 22-2401(c)(2) (2000) (suspect otherwise will not be apprehended, evidence will be irretrievably lost, suspect will harm self, others, or property, or has intentionally inflicted harm on another); MINN. R. CRIM. PROC. 6.01, subd. 1(1)(a) (West 2001) (suspect will likely harm self or others, commit further criminal conduct, or not likely appear); NEB. REV. STAT. ANN. § 29-404.02 (Michie 2000) (suspect otherwise will not be apprehended, might cause injury to persons or property, or destroy evidence); OHIO REV. CODE ANN. § 2935.36(A) (West 2001) (suspect requires medical care, fails to provide satisfactory identification, refuses to sign citation, or has previously failed to appear); TENN. CODE ANN. § 40-7-118(b), (c) (2000) (suspect likely to resume or continue offense, endanger himself or others, or cannot produce satisfactory identification); VA. CODE ANN. § 19.2-74(A)(1)(2) (Michie 2001) (suspect will likely cause harm to self or others, will not likely appear, or fails or refuses to discontinue the unlawful act); VT. R. CRIM. P. 3(c) (2000) (suspect fails to provide satisfactory identification, will likely harm self or others, or is not likely to appear); WYO. STAT. ANN. § 7-2-102(b)(iii) (Michie 2001) (suspect may cause injury to self, others, or property; will not otherwise be apprehended; or evidence will be destroyed or concealed).

The District of Columbia has adopted a hybrid approach, designating certain offenses for warrantless arrest, but only if the suspect will evade ultimate apprehension, might harm himself, others, or property, or might tamper with or destroy evidence. *See* D.C. CODE ANN. § 23-581(2001).

169. *See, e.g., State v. Bauer*, 36 P.3d 892, 897 (Mont. 2001) (deeming it unreasonable under Montana Constitution for police to arrest for non-jailable offense absent “special circumstances”).

170. *State v. Slatter*, 423 N.E.2d 100, 104 (Ohio 1981). To add greater force to such provisions, and to avoid uncertainty over their practical importance, states would be well advised to codify provisions expressly requiring exclusion of evidence seized when such laws are violated. *See* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 66-74 (1989) (discussing legislative authority in this vein).

171. This recognized deficit dates back at least to *United States v. Robinson* and its companion case *Gustafson v. Florida*. In *Robinson*, the defendant was arrested for operating a vehicle without a license, and the officer was required to execute a custodial arrest, not merely issue a ticket. *See* *United States v. Robinson*, 414 U.S. 218, 221 n.2 (1973). In *Gustafson*, on the other hand, state law afforded police discretion to either arrest or ticket violators for driving without a license. *See* *Gustafson v. Florida*, 414 U.S. 260, 265 (1973). The *Gustafson* Court, however, did “not find these differences determinative of the constitutional issue,” *id.*, prompting Professor Anthony Amsterdam to remark that the Court passed up an opportunity to make “the greatest contribution to the jurisprudence of the fourth amendment since James Otis against the writs of assistance in 1791.” Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974).

the sober realities of the political process. In words eerily reminiscent of a time before *Mapp v. Ohio*<sup>172</sup> when the Court adhered to the view that states can be relied upon to protect the civil liberties of citizens,<sup>173</sup> the *Atwater* majority expressed faith that, in the absence of a constitutional limit imposed by the Court, abuses of unregulated misdemeanor arrest authority would be limited by “the good sense” of police and, “failing that, the political accountability of most local lawmakers.”<sup>174</sup> As discussed earlier, there is reason to be skeptical of the “good sense” of officers, given the strong institutional incentives for arrest,<sup>175</sup> incentives now no longer diluted by any residual doubt over the constitutionality of warrantless minor offense arrests.<sup>176</sup>

The Court’s faith in “political accountability,” however, is equally suspect, given the acknowledged strong desire of politicians to be perceived as “tough on crime.”<sup>177</sup> For examples one need only consider the proliferation of “three strikes” sentencing provisions across the land,<sup>178</sup> and the “exorbitant codes” of substantive criminal law

172. 367 U.S. 643 (1961).

173. See *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (expressing faith that, in lieu of extending the exclusionary rule to the states, “the internal discipline of the police, under the eyes of an alert public opinion” sufficed to deter illegal searches). In *Mapp v. Ohio*, the Court overruled *Wolf* and imposed the exclusionary rule upon the states, notwithstanding their nonuniform fealty to the rule. See *Mapp*, 367 U.S. at 651, 659-60.

174. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1557 (2001). Cf. *Manson v. Braithwaite*, 432 U.S. 98, 118 (1977) (Stevens, J., concurring) (citation omitted) (expressing confidence that the “rulemaking function” regarding police eyewitness identification practices “can be performed ‘more effectively by the legislative process than by a somewhat clumsy judicial fiat’” and that “the Federal Constitution does not foreclose experimentation by the States in the development of such rules”). But cf. *Rodriguez v. Young*, 906 F.2d 1153, 1162 (7th Cir. 1990) (noting continued failure of state and local authorities to regulate police eyewitness identification procedures).

175. See *supra* notes 149-50 and accompanying text.

176. See *supra* notes 3-4 and accompanying text (noting that prior to *Atwater* police authority to execute warrantless arrests for minor offenses was unclear).

177. As noted by Justice O’Connor, herself a vigorous advocate of federalism and a former Arizona state legislator, “[t]he legislature’s objective in passing a law authorizing unreasonable searches . . . is explicitly to facilitate law enforcement . . . . Legislators by virtue of their political role are more often subjected to political pressures that may threaten Fourth Amendment values than are judicial officers.” *Illinois v. Krull*, 480 U.S. 340, 365-66 (1987) (O’Connor, J., dissenting). Nor is the political influence of crime control advocacy limited to state legislators; local politicians, too, are mindful of the political pull. See Herbert Jacob & Robert L. Lineberry, *Crime, Politics and the Cities*, in *CRIME IN CITY POLITICS 1* (Anne Heinz et al. eds., 1983) (recognizing that “[c]rime fighting is critical to the electoral fortunes of local politicians”). For commentary on the political influence of crime control more generally, see KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY POLITICS* (1997); Henry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527 (1996).

178. See generally PUNISHMENT & DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (Franklin E. Zimring et al. eds. 2001); THREE STRIKES AND YOU’RE OUT: VENGEANCE AS PUBLIC POLICY (David Shichor & Dale K. Sechrest eds., 1996) (discussing the three strikes rule and the sources that influence its inception).

that the Court has refused to regulate.<sup>179</sup> Texas itself provides a stellar example of this political predisposition. After the Court rendered its decision in *Atwater*, Texas Governor Rick Perry vetoed a bill that prohibited warrantless arrests for minor traffic offenses, except under specified circumstances.<sup>180</sup> In announcing his decision regarding the legislation, which was vigorously opposed by law enforcement groups, the governor insisted that “[p]eace officers should retain their existing authority to use their discretion to arrest for a traffic violation.”<sup>181</sup> In the wake of the terrorist acts of September 11, 2001, we can expect that the appeal of appearing tough on crime, and granting deference to police authority, will be even more compelling to elected officials.<sup>182</sup>

Nor is there reason to think that leaders will be held politically accountable if it becomes evident that police are abusing their warrantless arrest authority. The *Atwater* majority presumed that constituents will complain to their representatives if police abuse their authority, and that any excesses would in turn be curtailed by legislative refinements.<sup>183</sup> In reality, however, if past experience is any guide, such arrests will fall disproportionately on the politically disempowered, individuals whose voices are either muted or not heeded by elected officials.<sup>184</sup> Indeed, other than

179. See *Whren v. United States*, 517 U.S. 806, 818-19 (1996):

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, what particular provisions are sufficiently important to merit enforcement.

*Id.* See generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1421-38 (2001) (surveying proliferation of such laws at the state and local levels).

180. See Michele Deitch, *Veto Risks Texans' Civil Rights*, DALLAS MORNING NEWS, July 1, 2001, at 5J, available at 2001 WL 24406662.

181. Tex. Mun. League, *Governor's Vetoes Include Five City-Related Bills* (July 9, 2001), available at [http://www.tml.org/legis\\_update070901a\\_vetoes.htm](http://www.tml.org/legis_update070901a_vetoes.htm).

182. The rapid enactment of the Patriot Act, with the overwhelming support of both houses of Congress, is testament to this. See Robert E. Pierre, *Wisconsin Senator Emerges as a Maverick*, WASH. POST, Oct. 27, 2001, at A8 (noting that there was only one dissenting vote in the Senate and sixty-six in the House in the votes to enact the legislation).

183. For other expressions of this faith, see, for example, *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.16 (2000), avowing that “structural democratic constraints” will impede excessive sentencing provisions. See also *Patterson v. New York*, 432 U.S. 197, 228 (1977) (expressing faith in the “political check on potentially harsh legislative action”).

184. See generally Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (stating that groups with little political clout are the ones that suffer as a result of unrestricted law enforcement); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 488-89 (noting that the politically powerless may in reality be the ones bearing



aberrations such as the arrest of Gail Atwater,<sup>185</sup> police are most likely *not to arrest* those with political visibility; their focus, rather, will be on those of lesser standing, such as the Hispanic defendants arrested and searched in *Castro*.<sup>186</sup>

In short, it remains to be seen whether *Atwater* will provide the impetus for more engaged legislative involvement in this critically important civil liberties area, or will instead endure merely as an unfulfilled opportunity.

### C. Whither "Fourth Amendment Federalism"?

Even presuming that states seize the initiative, a basic question still looms: what influence would state laws, designed to constrain the warrantless misdemeanor arrest authority of police, have on Fourth Amendment analysis? Suppose, for example, police in a "cite and release" jurisdiction execute a custodial arrest in a given situation, instead of merely issuing a citation as required by state law; or that they execute a custodial arrest for a particular offense expressly made ineligible by statutory limit; or indeed that they execute a warrantless arrest for a minor offense committed outside their "presence," in violation of the common law rule codified in numerous misdemeanor arrest statutes. Under state law, the arrests are demonstrably illegal. But are they "unreasonable," and hence unconstitutional, for Fourth Amendment purposes? And, if so, does this require that a reviewing court—a federal one, in particular—suppress any contraband found by police in a search incident to the arrest?

The Fourth Amendment significance of state arrest laws has been an abiding source of confusion, dating back over fifty years to *United States v. Di Re*.<sup>187</sup> In *Di*

the burden of unjust laws); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 18 (1996) (asserting that individuals likely to be subject to unfair criminal prosecution have little political power and are unable to influence the legislature to change the laws).

A variation on this point surfaced in the oral arguments in *Knowles v. Iowa*, 525 U.S. 113 (1998). There, in response to counsel's assertion at oral argument that undue or excessive police searches of motorists who were merely issued tickets, but not arrested, would trigger a legislative response, Justice Stevens retorted that Iowa police "might save [the strategy] for out-of-state motorists." Oral Argument of Bridget A. Chambers on Behalf of the Respondent at 49, *Knowles*, 525 U.S. 113 (No. 97-7597). See Linda Greenhouse, *Justices Question Iowa Law Allowing the Police to Search Cars in Traffic Violations*, N.Y. TIMES, Nov. 4, 1998, at A18.

185. Indeed, Atwater's determination, financial wherewithal, and initiative to retain a lawyer and sue distinguish her from the unknowable multitude of persons who suffer what they believe to be constitutional violations but do not seek redress. For Atwater, the ultimate outcome was profound disillusionment with the system and substantial financial hardship. See *supra* note 77.

186. See *supra* notes 143-45 and accompanying text. See also David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1083 (1999) ("The problem with discretionary authority—and the need for judicial control is that discretion permits law enforcement to target those whose complaints are least likely to be heard by the rest of the community.").

187. 332 U.S. 581 (1948).

*Re*, New York police violated state law in arresting the defendant without a warrant, because they lacked requisite suspicion that he had committed a misdemeanor in their presence, yet they obtained incriminating evidence in a search incident to arrest that was later used in a federal misdemeanor prosecution.<sup>188</sup> A seven-member majority of the Court looked to the law of New York to determine the validity of the arrest—and search—stating “that in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity.”<sup>189</sup> Noting that no federal law applied, the *Di Re* majority invalidated both the arrest and search and reversed the federal misdemeanor conviction for want of admissible evidence.<sup>190</sup>

A similar deference to state law was evidenced in other decisions by the Court down the years, including *Johnson v. United States*,<sup>191</sup> *Miller v. United States*,<sup>192</sup> *Ker v. California*,<sup>193</sup> *United States v. Watson*,<sup>194</sup> and *Michigan v. DeFillippo*.<sup>195</sup> Perhaps most notably, in *Welsh v. Wisconsin*<sup>196</sup> the Court held that courts assessing the reasonableness of warrantless in-home arrests based on exigency must take into account the relative gravity of the offense involved, with such seriousness being assessed in terms of how the offense is classified under state law (for example, felony, misdemeanor, or some lesser violation).<sup>197</sup>

Other decisions by the Court, however, have suggested that state law is constitutionally irrelevant. In *Elkins v. United States*,<sup>198</sup> for instance, the Court concluded that for Fourth Amendment purposes “[t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.”<sup>199</sup> Even more recently, in *California*

188. *Id.* at 591, 593.

189. *Id.* at 589; *see also id.* at 591 (stating that “the New York statute provides the standard by which this arrest must stand or fall”).

190. *Id.* at 594.

191. 333 U.S. 10, 15 n.5 (1948) (observing that “state law determines the validity of arrests without warrant”).

192. 357 U.S. 301, 305-06 (1958) (stating that “the lawfulness of the arrest without warrant is to be determined by reference to state law”).

193. 374 U.S. 23, 37 (1963) (citations omitted) (stating “the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. A fortiori, the lawfulness of . . . arrests by state officers for state offenses is to be determined by [state] law.”); *see also id.* at 31 (stating that the imposition of the federal exclusionary rule “implied no total obliteration of state laws relating to arrests and searches in favor of federal law” and did not sound a “death knell for our federalism”).

194. 423 U.S. 411, 420-21 n.8 (1976) (citation omitted) (noting “the rule recognized by this Court that even in the absence of a federal statute granting or restricting the authority of federal law enforcement officers, ‘the law of the state where the arrest without warrant takes place determines its validity’”).

195. 443 U.S. 31, 36 (1979) (stating that “[w]hether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law”).

196. 466 U.S. 740 (1984).

197. *Id.* at 753-54.

198. 364 U.S. 206, 224 (1960).

199. *Id.* at 206, 224.

*v. Greenwood*,<sup>200</sup> in determining whether the search of an individual's garbage can be reasonable, the Court stated that "[w]e have never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular state in which [it] occurs."<sup>201</sup>

As the Court itself has not spoken with one voice on this important question, so too have the lower federal courts differed. The most pronounced conflict exists between the Eighth and Ninth Circuits. The chief Ninth Circuit precedent on the question is *United States v. Mota*,<sup>202</sup> which involved the warrantless arrests by local police of two street vendors for violating a city ordinance requiring that they have business licenses, and their eventual federal prosecution based on counterfeit money uncovered as a result of searches conducted incident to arrest.<sup>203</sup> The defendants moved to suppress the evidence, arguing that California's "cite and release" law required that they be issued citations, not arrested.<sup>204</sup>

Emphasizing that the Court's decision in *United States v. Robinson* required a "lawful custodial arrest" to authorize a warrantless search incident, the *Mota* court deemed the arrests and searches unreasonable for Fourth Amendment purposes.<sup>205</sup> Because California had "abjured the authority to execute custodial arrests" as to such offenses, the prerequisite lawful authority for the arrests, and hence searches, was absent.<sup>206</sup> The *Mota* court concluded:

Given the state's expression of disinterest in allowing warrantless arrests for mere infractions, we conclude that a custodial arrest for such an infraction is unreasonable, and thus unlawful, under the Fourth Amendment. Since the custodial arrest of appellants was invalid, the search should not have been exempted from the warrant requirement of the Fourth Amendment as a search incident to a lawful arrest.<sup>207</sup>

The *Mota* court, however, was at pains to emphasize that state law is only constitutionally significant in two particular contexts: searches incident to arrest and inventory searches of vehicles.<sup>208</sup> Standing alone, reasonableness evaluations of

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200. 486 U.S. 35, 43 (1988).

201. *Id.* at 35, 43.

202. 982 F.2d 1384 (9th Cir. 1993).

203. *Id.* at 1385.

204. *Id.* at 1388-89.

205. *Id.* at 1389.

206. *Id.* at 1388.

207. *Id.* at 1389.

208. *Id.* at 1387. The court's inventory-based exception arose in *United States v. Wanless* in which the court stated that "federal law on inventory searches by state or local police officers [requires] that they must be conducted in accordance with the official procedures of the relevant state or local police department." 882 F.2d 1459, 1464 (9th Cir. 1989) (emphasis in original). Recently, the Ninth Circuit summarized the rationale requiring judicial resort to state law in addressing searches incident and inventories:

The common ground shared by these two exceptions is that the federal test for the legality of an inventory search and a search incident to arrest

wrongful police arrests challenged under 42 U.S.C. § 1983, do not require consideration of state law.<sup>209</sup> Because the *Mota* defendants were arrested and searched incident to arrest, however, and because the arrests themselves were illegal under California law, *Di Re* required that the evidence obtained without warrants incident thereto be suppressed.<sup>210</sup>

In *United States v. Bell*,<sup>211</sup> the Eighth Circuit embraced a different view of the role of state law. In *Bell*, two Des Moines, Iowa police officers arrested the defendant, a known gang member with a history of drug offenses, for operating a bicycle without a headlight in violation of state law.<sup>212</sup> In a search incident to arrest police found

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requires the incorporation of state law. For instance, an inventory search is only lawful under federal law if it also conforms to state law. Therefore, state law necessarily influences admissibility determinations, even in federal court. By the same token, the legality of a search incident to arrest by its very nature depends on the underlying legality of the arrest, a consideration governed by state law.

*United States v. Cormier*, 220 F.3d 1103, 1111 (9th Cir. 2000) (citation omitted); *see also* LAFAVE, *supra* note 125, § 1.5(b), at 140 (noting that state law governs under such circumstances “because it has, in effect, been ‘incorporated’ into the applicable Fourth Amendment doctrine”).

209. *Mota*, 982 F.2d at 1387 (citing *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990)). Concurring in the result, Judge Fernandez noted the asymmetry created: the government cannot be sued under the civil rights laws for an arrest that is illegal under state law, yet if evidence is secured pursuant to the arrest the officer can be sued and the evidence suppressed. *Id.* at 1389 (Fernandez, J., concurring). Judge Fernandez added that notwithstanding the possible conflict, the majority’s decision to bar the evidence seized incident to an illegal arrest was “a shaft of cleansing light.” *Id.*

In his treatise, Professor LaFave offers a game attempt to reconcile the apparent incongruity. According to LaFave, the “Supreme Court has *never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because the taking of custody was deemed unnecessary (as a matter of state law or otherwise).” LAFAVE, *supra* note 125, § 1.5(b), at 140. He suggests that the evidence in *Mota* was properly suppressed because it derived not from an unconstitutional arrest, but rather from a search rendered unconstitutional because of an illegal arrest. This is “because *Robinson* imposes a prerequisite of not just a constitutional arrest but, more demandingly, a ‘lawful custodial arrest.’” *Id.* Accordingly, the *constitutionality* of an arrest, which is illegal under state law, is of no moment relative to any challenge under § 1983 claims against such an arrest. However, if the search is at issue, constitutional analysis is at play because such a search is reasonable for Fourth Amendment purposes only if the *Robinson* prerequisite of a “lawful” arrest is satisfied. *Id.* & n.74. However, as discussed below, Professor LaFave remains unsure whether the *Robinson* requirement of a lawful arrest depends on the mere necessity of probable cause or also upon whether state law strictures on arrest are satisfied. *See infra* notes 216-217 and accompanying text.

210. *Mota*, 982 F.2d at 1387, 1389; *see also* *United States v. Velarde*, 823 F. Supp. 792, 795 (D. Haw. 1993) (stating that for a search incident to be valid the “officer must have authority to make the arrest. Authority to make the arrest is, in turn, a matter of state law.”).

211. 54 F.3d 502 (8th Cir. 1995).

212. *Id.* at 503.

cocaine, resulting in defendant's prosecution under federal law.<sup>213</sup> Although the trial court suppressed the evidence, reasoning that Iowa law authorized only a citation, not an arrest for the bicycle violation, the Eighth Circuit deemed state law irrelevant because "[a]n arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause."<sup>214</sup>

More recently, the Eighth Circuit, applying *Bell* in *United States v. Lewis*,<sup>215</sup> upheld a search incident to arrest based on the violation of a municipal open container law that produced evidence for a federal drug prosecution, notwithstanding that the arrest contravened Minnesota's "cite and release" law.<sup>216</sup> Judges Heaney and Goldberg concurred in the result on *stare decisis* grounds, but urged en banc reevaluation of *Bell*, observing that the violation of state law undercut *Robinson's* prerequisite of a "lawful" arrest.<sup>217</sup> For his part, Judge Heaney emphasized that he thought it "incongruous to rely on common law as authority for an arrest based on a statutory offense, particularly when the same statutory authority has already constrained the power to arrest for that offense."<sup>218</sup>

*Atwater*, unfortunately, failed to clarify what role, if any, state arrest law should play in reasonableness evaluations. Turek's decision to arrest *Atwater* in fact did not violate Texas's broad arrest authority statute. Moreover, *Atwater* merely challenged her *arrest* for the seatbelt violation under 42 U.S.C. § 1983, rather than seeking to suppress evidence seized in a *search incident to arrest*, a species of claim in which even *Mota* eschews consideration of state law.<sup>219</sup>

*Atwater*, however, strongly suggests endorsement of what Professor George Dix has called "Fourth Amendment federalism,"<sup>220</sup> which regards state law as a benchmark for evaluating the reasonableness of police behavior. In *Atwater*, Turek's authority to arrest, not merely cite, *Atwater* derived from express statutory entitlement;<sup>221</sup> furthermore, the Court explicitly invited states to craft statutory limits

213. *Id.*

214. *Id.* at 504.

215. 183 F.3d 791 (8th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000).

216. *Id.* at 794.

217. *Id.* at 794-95 (Heaney, J., concurring); *see also id.* at 795 (Goldberg, J., concurring).

218. *Id.* at 795 (Heaney, J., concurring).

219. *See supra* notes 205-10 and accompanying text; *see also* *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974) (stating in a § 1983 case that "[t]he states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right").

220. George E. Dix, *Fourth Amendment Federalism: The Potential Requirement of State Authorization for Law Enforcement Activity*, 14 AM. J. CRIM. L. 1 (1986/1987).

221. *See* *United States v. Sealed Juvenile 1*, 255 F.3d 213, 216 (5th Cir. 2001) (citing *Atwater* and stating that "[a] law enforcement officer can make a warrantless arrest only if a federal or state law imbues him with that authority"); *see also* *Garrett v. City of Bossier City*, 792 So. 2d 24, 26 (La. Ct. App. 2001) (distinguishing *Atwater* because arrest in that case was "statutorily authorized," unlike the case at bar); *West v. Commonwealth*, 549 S.E.2d 605, 607 n.2 (Va. Ct. App. 2001) (distinguishing *Atwater* because "relevant Texas law expressly allowed for the custodial arrest"); EDWARD C. FISHER, *LAW OF ARREST* § 58, at 127 (1967) (observing that "[m]odern authority of peace officers to arrest without a warrant is now governed by statute in most of the states, and in these states such an arrest, except as thereby expressly

on police authority, should they see fit, in lieu of the imposition of a broad constitutional ban.<sup>222</sup> Viewed in this way, although troublesome in constitutional terms for reasons already discussed, *Atwater* would be consistent with federalism goals,<sup>223</sup> and would avoid the unseemly nullification of state laws designed to limit police arrest authority.<sup>224</sup> Deference to state legislative limits would also be in keeping with *Di Re*, which despite being criticized down the years,<sup>225</sup> has never been renounced by the Court<sup>226</sup> and comports with precedent that ties reasonableness to the existence of both probable cause and governmental authority to arrest.<sup>227</sup>

However, like *Bell*, *Atwater* can be read to have made state law moot because the constitutionality of the arrest arguably turned only on whether probable cause existed that a law was violated, regardless of whether the arrest was explicitly authorized by state law. Indeed, it remains unclear what the *Robinson* Court meant when it

authorized, is illegal"); Wilgus, *supra* note 11, at 703 (stating that "unless there is statutory authority neither an officer nor a citizen may arrest for a misdemeanor which does not amount to a breach of the peace even though it occurs in his presence").

222. See *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1556 (2001) (stating that "it is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution").

223. See *Patterson v. New York*, 432 U.S. 197, 201 (1977) (observing that "preventing and dealing with crime is much more the business of the States than it is of the Federal Government"). As Professor Dix has written, "[i]t cannot be reasonably disputed that as a matter of general criminal justice system policy it is desirable to have state policymakers address the extent to which various law enforcement techniques should be made available to state law enforcement officers." Dix, *supra* note 220, at 45.

224. See *Townsend v. Yeomans*, 301 U.S. 441, 451 (1937) (stating that "[t]here is no principle of constitutional law which nullifies action taken by a legislature" and that "the legislature . . . is presumed to know the needs of the people of the State").

225. See, e.g., Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667, 723 (1988) (calling *Di Re* "an ill-conceived decision" that has "produced both confusion among the federal courts and illogical fragmentation in the law governing searches and seizures").

226. But see *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (concluding that *Di Re* was "rejected, by implication" in *Elkins*). The view has also been expressed that, rather than amounting to a constitutional rule, *Di Re* instead was an outgrowth of the Court "utilizing its supervisory power to exclude from a federal prosecution evidence obtained pursuant to an illegal but constitutional . . . arrest." LAFAVE, *supra* note 125, § 1.5(b) at 138.

227. According to the Seventh Circuit:

[T]he reasonableness of an arrest depends on the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. *Second, was the arresting officer authorized by state or municipal law to effect a custodial arrest for the particular offense.*

*Ricci v. Arlington Heights*, 116 F.3d 288, 290 (7th Cir. 1997) (emphasis added), *cert. granted*, 522 U.S. 1038, and *cert. dismissed as impro. granted*, 523 U.S. 613 (1998); see also *Cupp v. Murphy*, 412 U.S. 291, 294 (1973) (looking to Oregon law for understanding of the term "arrest").

enunciated the requirement of a “lawful custodial arrest.” According to the Court, “[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”<sup>228</sup> As Professor LaFave has noted, the Court’s language “seems to say that ‘lawful’ refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it is based on probable cause.”<sup>229</sup>

The ambiguous role of state law in Fourth Amendment analysis thus remains, as before *Atwater*, in the words of Professor LaFave, a “particularly difficult problem.”<sup>230</sup> In the wake of *Atwater*, state courts have reached mixed results on the Fourth Amendment significance of their indigenous statutory limits on police warrantless arrest authority.<sup>231</sup> It remains to be seen how the federal courts will resolve the issue, which given the burgeoning tendency of the federal government to piggyback on the work of state law enforcement efforts,<sup>232</sup> represents a crucial question that the Court itself doubtless will be forced to address in the years to come.

#### *D. The Untoward Consequences and Ambiguity of Atwater’s Bright-Line Rule*

Another cause for concern derives from *Atwater*’s bright-line rule: that police can arrest for any and all violations of law, so long as probable cause exists that the violation occurred.<sup>233</sup> With its rule, the *Atwater* Court avoided imposing on police “sensitive, case-by-case determinations,”<sup>234</sup> and seemingly advanced the cause of greater consistency in search and seizure jurisprudence, long a concern of

228. *United States v. Robinson*, 414 U.S. 218, 235 (1973).

229. LAFAVE, *supra* note 125, § 1.5(b), at 141-42.

230. *Id.* at 137.

231. *Compare West v. Commonwealth*, 549 S.E.2d 605, 607 (Va. Ct. App. 2001) (granting motion to suppress cocaine based on officer’s decision to arrest, not cite, because cite-and-release requirements not satisfied), *with People v. Patterson*, 111 Cal. Rptr. 2d 896, 899 (Ct. App. 2001) (“assuming” that California cite-and-release law was violated when police arrested misdemeanant but affirming trial court rejection of motion to suppress, noting that *Atwater* “profoundly limited Fourth Amendment restrictions”).

For examples of pre-*Atwater* decisions suppressing evidence seized incident to arrests for petty offenses because local law expressly prohibited such arrests, see, for example, *Barnett v. United States*, 525 A.2d 197, 199 (D.C. 1987) (invalidating arrest for jaywalking and barring evidence) and *State v. Jones*, 727 N.E.2d 886, 895 (Ohio 2000) (same).

232. See, e.g., *United States v. Jones*, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999) (discussing “Project Exile,” in which local police review each firearm-related offense to determine whether the conduct alleged constitutes a federal crime and, if so, refer the defendant to federal authorities). See generally Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369 (2001) (discussing “Project Exile,” the policy implications of making it a nationwide program, and the consequences of such federal intervention).

233. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1557 (2001).

234. *Id.* at 1540.

commentators<sup>235</sup> and the Justices themselves.<sup>236</sup> But consistency, as discussed next, can come at a cost.<sup>237</sup>

Perhaps most notably, the Court's blunderbuss bright-line rule risks overinclusiveness. There is no disputing that there are instances in the daily work of police in which factual determinations are quite difficult—for instance, as noted by the *Atwater* majority, when the weight of drugs seized suffices to warrant jail time, the suspect is a repeat offender, or the violation is likely to continue unless an arrest is made.<sup>238</sup> However, the Court's scenarios, while perhaps useful in a hypothetical sense, are of little practical significance because such precise line-drawing is relatively rare in the course of police work. Far more common are situations such as the one presented in *Atwater* itself, in which an officer uncovers what appears to be a minor violation of law, and is faced with a clear-cut decision of whether to execute a custodial arrest. *Atwater*'s arrest itself starkly illustrates the excessiveness of the Court's rule: she was a longtime resident of Lago Vista and had no criminal record (indeed, the seat belt law embodied no aggravating provision for recidivists, as hypothesized by the Court), she admitted her misbehavior, and she apologized once Turek informed her of her violation.<sup>239</sup> In short, rather than erring in favor of allowing police to be "jerks,"<sup>240</sup> the Court should have deferred to reasonableness considerations militating in favor of protecting the physical and privacy interests of citizens.<sup>241</sup>

235. See, e.g., AKHIL R. AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1 (1997) (referring to Fourth Amendment case law as "complex and contradictory," a "vast jumble"); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (describing law as "a mass of contradictions and obscurities that has ensnared the 'Brethren'"); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 603 (1982) (stating that "it is difficult to avoid the impression that the Court is no longer attempting to achieve doctrinal coherency in search and seizure cases").

236. See, e.g., *New York v. Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring) (criticizing the "hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence"); *Chapman v. United States*, 365 U.S. 610, 622 (1961) (Clark, J., dissenting) (noting that "[f]or some years now, the [Fourth Amendment] field has been muddy, but today the Court makes it a quagmire").

237. As Professor Maclin recently noted, while bright-line rules have become a "staple of the Court's Fourth Amendment doctrine," they very often appear the product of result-driven analysis in favor of expanded police authority, rather than any "neutral principle for determining when a bright-line rule should control a particular Fourth Amendment context." Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 156-57 (2001). For classic commentary on the role of bright-line rules in search and seizure jurisprudence, see, for example, Albert W. Alschuler, *Bright-line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) and LaFave, *supra* note 4.

238. See *Atwater*, 121 S. Ct. at 1554-55.

239. *Id.* at 1565 (O'Connor, J., dissenting).

240. Oral Argument, *Atwater v. City of Lago Vista*, 121 S. Ct. 1536 (2001), available at 2000 WL 1801617 \*21 (comment of Kennedy, J.).

241. The *Atwater* majority, however, erred in favor of police authority in such "tie



Moreover, in embracing its “readily administrable” rule,<sup>242</sup> the Court did something more than disserve citizens’ liberty and privacy concerns.<sup>243</sup> The Court also disserved police and the high standard of police work rightfully expected in a democratic society. *Atwater* suggests that police cannot, and should not be expected to, know the law, a tenet contrary to both decisional law and common sense.<sup>244</sup> Nor does *Atwater*

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breaker” situations, reasoning that a liberty-deferential position would amount to an untenable “least-restrictive-alternative limitation,” and otherwise serve as a “systematic disincentive to arrest” when arrest might best serve society’s interests. *Atwater*, 121 S.Ct. at 1555-56. Such an orientation, of course, is antithetical to the very animating purpose of the Fourth Amendment, as expressed in numerous opinions. See *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (stating that “the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials”); see also *Gouled v. United States*, 255 U.S. 298, 304 (1921) (urging that the Fourth Amendment “should receive a liberal construction” so that personal liberties will be preserved).

242. *Atwater*, 121 S. Ct. at 1554.

243. See *id.* at 1564 (O’Connor, J., dissenting) (urging that the desire for clarity in rules governing police conduct should not “trump[] the values of liberty and privacy”).

244. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (noting that penalties associated with a criminal act “can be easily identified both by the courts, and by officers faced with a decision to arrest”); *Doctor v. State*, 596 So. 2d 442, 447 (Fla. 1992) (stating that “[l]aw enforcement officers are charged with knowledge of the law”). In keeping with this expectation, courts have invalidated arrests and stops, and granted motions to suppress evidence seized as a result, based on faulty police understandings of applicable law. See, e.g., *United States v. Sigmond-Ballesteros*, 247 F.3d 943 (9th Cir. 2001) (suppressing evidence seized based on motorist’s quick lane change because behavior not illegal); *United States v. Freeman*, 209 F.3d 464 (6th Cir. 2000) (suppressing evidence seized as a result of a traffic stop based on a motorist’s brief deviation into a traffic emergency lane because behavior not illegal); *United States v. Miller*, 146 F.3d 274 (5th Cir. 1998) (suppressing evidence obtained as result of traffic stop for failure to signal turn while driving because stop lacked “objectively grounded” legal basis); *Hilgeman v. State*, 790 So. 2d 485, 487 (Fla. Dist. Ct. App. 2001) (suppressing evidence based on arrest stemming from “officers’ misapprehension of the law” pertaining to violation of open container ordinance).

Nor does the “good-faith” exception to the exclusionary rule redeem searches based on arrests without basis in the law. See *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (noting that “there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law”). According to the *Lopez-Soto* court, to provide an exception “would remove the incentive for police to make certain they properly understand the law that they are entrusted to enforce and obey.” *Id.*; see also *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001) (citation omitted) (stating that “[e]ven a good faith mistake of law by an officer cannot form the basis for reasonable suspicion, because ‘there is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law’”).

On the other hand, police are afforded latitude in the event they misapprehend facts related to stops and arrests. See *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (stating that “what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable”);

suggest that police should be expected to make reliable factual inferences, with their corollary serious legal implications. This pronouncement is odd given that such judgments permeate everyday police work, for example, in assessing probable cause<sup>245</sup> and reasonable suspicion,<sup>246</sup> and even in the high-stakes decision of whether deadly force is permissible.<sup>247</sup> Indeed, state limits imposed on warrantless misdemeanor arrest authority, discussed above, are premised on the faith that police can (and should) make such factual determinations,<sup>248</sup> a capacity, it bears mention, increasingly enhanced by advances in technology that permit officers to more readily assess the personal backgrounds of suspects.<sup>249</sup> Accordingly, if anything, *Atwater* will facilitate the “dumbing down” of police, as they will have no incentive to know the statutory seriousness of an offense, and, in instances when they have unsubstantiated hunches that a given suspect is perhaps more culpable in the eyes of the law (for example, a recidivist), to be overinclusive and indulge such hunches at the expense of citizens’ civil liberties.

Ultimately, *Atwater*’s rule might also militate against legislative initiative and competence. As discussed, legislatures can now fill the vacuum created by *Atwater* and impose limits on warrantless arrest authority, per offense type or category, or the factual circumstances in which arrests can occur, as some states have already done.<sup>250</sup> However, by disavowing any need to correlate reasonableness with offense gravity, the *Atwater* majority missed an opportunity to provide legislatures with an incentive to undertake critical reexaminations of their criminal codes, a task that is long overdue.<sup>251</sup> With *Atwater*’s one-size-fits-all approach, legislatures across the land will continue to have no constitutional compulsion to reexamine the types of offenses that should warrant criminal intervention;<sup>252</sup> any and all offenses, “even very minor” ones,

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*see also*, United States v. Hatley, 15 F.3d 856, 859 (9th Cir. 1994) (upholding warrantless search of vehicle that police reasonably but mistakenly believed was mobile).

245. *See, e.g.*, Ornelas v. United States, 517 U.S. 690 (1996); United States v. Watson, 423 U.S. 411 (1976).

246. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119 (2000); United States v. Hensley, 469 U.S. 221 (1985).

247. *See* Tennessee v. Garner, 471 U.S. 1 (1985).

248. *See supra* notes 167-68 and accompanying text.

249. *See, e.g.*, Thomas J. Lueck, *Patrol Officers Soon to Carry Minicomputers on Gun Belts*, N.Y. TIMES, May 24, 2001, at B6 (discussing recent purchase by New York City Police Department of minicomputers that provide foot patrol officers immediate access to information on offense history and outstanding warrants).

250. *See supra* note 167-68 and accompanying text.

251. For an astute discussion of this need, see generally Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000). Legislators, it bears mention, are not alone in their failure to scrutinize and rethink the coverage of criminal laws and their associated sanctions; scholars too have traditionally ignored the substantive criminal law. *See* Markus D. Dubber, *The Historical Analysis of Criminal Codes*, 18 LAW & HIST. REV. 433, 433 (2000) (noting that “[s]tudents of Anglo-American criminal law, historians included, have traditionally had very little to say about criminal codes”).

252. *See* Markus D. Dubber, *Penal Panopticon: The Idea of a Modern Model Penal Code*, 4 BUFF. CRIM. L. REV. 53, 93 (2000) (asserting that “[i]n a modern democratic state, any law,

now justify arrest for constitutional purposes.<sup>253</sup>

In the wake of *Atwater*, jurisdictions can continue to indulge their tendency to proliferate criminal laws without need for reflection.<sup>254</sup> Such laws, and their enforcement, have manifold negative consequences for individuals, communities, and society as a whole.<sup>255</sup> They also risk breeding disrespect for the law, with corollary destabilizing effects.<sup>256</sup> As Professor Tom Tyler has written, “[i]f people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives.”<sup>257</sup>

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and particularly penal law, the most coercive mode of law, can only be legitimated through its continuous scrutiny by its subject-objects, the constituents of the state”).

253. Needless to say, police authority to arrest is intimately related to, and facilitated by, the modern proclivity to overcriminalize. See GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 203 (1998) (noting that “[t]he tendency at the close of the twentieth century is to focus not on the necessity that the guilty atone but on the pragmatic utility of using criminal sanctions to influence social behavior”). This tendency poses legitimacy problems, for as Professor Paul Robinson recently observed, “[a] central task of a criminal code is to impose punishment on those who deserve the condemnation of criminal liability and to protect from punishment and condemnation those who do not deserve it.” Robinson et al., *supra* note 250, at 14. Under this view, the criminalization of trivial offenses is “undesirable not only because those activities themselves are minor or morally insignificant, but because their existence subverts the moral and social power of the criminal code as a whole. However slight its effect on the public, to criminalize the trivial is to trivialize the criminal.” *Id.* at 15 n.28. For a classic discussion of the deleterious effects of overcriminalization, see generally Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 *AM. CRIM. L.Q.* 17 (1968).

254. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 *HARV. L. REV.* 842, 854 (2001) (emphasis in original) (noting that the “[c]riminal law is not static; like other areas of law, it is constantly changing. Unlike other areas of the law, it tends to change in one direction only: legislatures regularly add new crimes but rarely repeal old ones”).

255. See generally Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, 65 *FED. PROBATION* 3 (June 2001); Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441 (1998). For a discussion of the adverse impact of “over-enforcement” on the African-American community in particular, see Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 *U.C. DAVIS L. REV.* 1005 (2001).

256. See Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 *LAW & SOC. INQUIRY* 983, 989 (2000) (noting that “the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly”).

257. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 108 (1990); see also TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 176 (1997) (asserting that “people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules”); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 *B.U. L. REV.* 361, 363 (2001)

Beyond these practical concerns, *Atwater's* bright-line rule casts doubt on a realm of Fourth Amendment jurisprudence that contains a proportionality requirement, which correlates the reasonableness of police searches and seizures to offense seriousness.<sup>258</sup> Perhaps most notable among these decisions is *Welsh v. Wisconsin*,<sup>259</sup> in which the Court addressed the permissibility of a warrantless in-home arrest by police of an individual suspected of committing a minor offense.

In *Welsh*, police received information from witnesses who reported that the defendant had driven his car in an erratic manner, perhaps due to intoxication, had run his car off the road, and had walked away from the accident scene.<sup>260</sup> Shortly thereafter, police arrived at the defendant's home, having learned his identity and address from the car registration; once inside, despite the lack of a warrant, they arrested him for driving while intoxicated.<sup>261</sup> The defendant, who refused a Breathalyzer test and had his license revoked as a result, challenged the constitutionality of the warrantless, in-home arrest.<sup>262</sup> The *Welsh* Court agreed:

Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate *when the underlying offense for which there is probable cause to arrest is relatively minor . . .* When the government's interest is only to arrest for a minor offense, [the presumption that warrantless in-home arrests are unreasonable] is difficult to rebut, and the government usually should be allowed to make such arrests only

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(concluding on the basis of survey data that the effectiveness of legal authorities such as police "lies in their ability to gain acceptance for their decisions among members of the public"); Tyler, *supra* note 255, at 1001 (concluding that individuals "use their treatment by authorities as information about their status in society . . . Fair and respectful treatment acknowledges people's importance and status, while unfair and disrespectful treatment communicates marginality.").

258. As Justice Jackson noted over fifty years ago, "if we are to make a judicial exception to the Fourth Amendment . . . it seems to me that should depend somewhat upon the gravity of the offense." *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting); *see also Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1567 (O'Connor, J., dissenting) (urging that the Fourth Amendment requires "a reasonable and proportional response to the circumstances of the offense"); *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (citation omitted) (stating that "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails'"); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1645 (1998) (asserting that "an 'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated"); Wayne R. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39, 57 (1968-69) (arguing that in criminal matters "there is one case-by-case variable—the seriousness of the offense—which cannot be ignored by police and courts").

259. 466 U.S. 740 (1984).

260. *Id.* at 740.

261. *Id.* at 742-43.

262. *Id.* at 740.

with a warrant issued upon probable cause by a neutral and detached magistrate.<sup>263</sup>

Writing for the six-member majority, Justice Brennan emphasized that “the gravity of the underlying offense” is an important factor in gauging the reasonableness of police action; when “only a minor offense” has been committed, a warrantless arrest premised on exigency should rarely be sanctioned.<sup>264</sup> “Gravity,” in turn, is to be gauged by how the offense is treated by the legislature: “[T]he best indication of the State’s interest in precipitating an arrest, and . . . one that can be easily identified both by the courts and by officers faced with a decision to arrest” is the penalty prescribed.<sup>265</sup> Because drunk driving under Wisconsin law at the time was a nonjailable civil offense involving a maximum \$200 fine for first-time offenders,<sup>266</sup> the Court proclaimed the arrest constitutionally unreasonable, deeming insufficient the state’s interest in foregoing a warrant for the “minor offense” arrest merely because it feared that defendant’s blood-alcohol level would dissipate.<sup>267</sup> The Court added that because classification of particular offenses can differ among states, “the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State’s interest in arresting individuals suspected of committing that offense.”<sup>268</sup> Consistent with this analytic tactic, numerous courts have attached importance to the “relatively minor” nature of the offense, invalidating warrantless entries by police even when the suspected offense threatens actual jail time.<sup>269</sup> Others have expressly factored offense seriousness into their reasonableness evaluations of police conduct beyond the context of exigent entries.<sup>270</sup>

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263. *Id.* at 750 (emphasis added).

264. *Id.*

265. *Id.* at 754 (emphasis added).

266. *Id.* at 746 (citing WIS. STAT. § 346.65(1) (1977)).

267. *Id.* at 753-54. Because the Court deemed the exigency-based need to arrest insufficient under the facts, it stopped short of altogether banning warrantless, in-home arrests for minor offenses. *Id.* at 749 n.11 (stating that “[b]ecause we conclude that, in the circumstances presented by this case, there were no exigent circumstances . . . we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses”).

268. *Id.* at 754 n.14.

269. *See, e.g.,* Howard v. Dickerson, 34 F.3d 978 (10th Cir. 1994) (invalidating arrest for careless driving and leaving accident scene); Butler v. State, 829 S.W.2d 412 (Ark. 1992) (invalidating arrest for disorderly conduct); State v. Curl, 869 P.2d 224 (Idaho 1993) (invalidating arrest for marijuana possession); Edwards v. State, 808 P.2d 528 (Nev. 1991) (invalidating arrest for indecent exposure); Fargo v. Lee, 580 N.W.2d 580 (N.D. 1998) (invalidating arrest for underage drinking); State v. Kiper, 532 N.W.2d 698 (Wis. 1995) (invalidating arrest for failure to pay fine for violating a municipal ordinance).

270. *See, e.g.,* Graham v. Connor, 490 U.S. 386, 396 (1989) (stating that allegations of police excessive force should be analyzed in terms of reasonableness, which turns in part on “the severity of the crime at issue”); Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (stating that “the fact that a multiple murderer is on the loose . . . may affect the judgment of what is reasonable . . . Probable cause . . . describes not a point but a zone, within which the

Writing for himself and Justice Rehnquist in dissent,<sup>271</sup> Justice White criticized the majority for linking reasonableness analysis to offense gravity.<sup>272</sup> To Justice White, the “social, cultural, and political reasons” that drive legislative decisions to classify an offense in a particular way should not be determinative of the constitutional reasonableness of police behaviors, for two practical reasons.<sup>273</sup> First, “[a] warrantless home entry to arrest is no more intrusive when the crime is ‘minor’ than when the suspect is sought in connection with a serious felony.”<sup>274</sup> Second, the coupling of reasonableness with offense gravity threatened to “hamper law enforcement and burden courts with pointless litigation concerning the nature and gradation of various crimes.”<sup>275</sup> This was because the Court’s approach would “necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped.”<sup>276</sup>

If the *Welsh* dissent’s bright-line approach sounds familiar, it should, because it tracks the approach enunciated by the five-member majority in *Atwater*. The question therefore arises: What remains of proportionality concerns in Fourth Amendment analysis? In *Illinois v. McArthur*,<sup>277</sup> decided the same term as *Atwater*, eight members of the Court agreed that offense seriousness should be considered when assessing the reasonableness of a police decision to prohibit a suspect from entering his home while a search warrant was secured.<sup>278</sup> The *McArthur* Court upheld the seizure by distinguishing *Welsh*—police had probable cause to believe that McArthur committed two *jailable* (yet minor) drug offenses, in contrast to the *nonjailable* offense in

graver the crime the more latitude the police must be allowed.”); *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975) (quoting *Arnold v. United States*, 382 F.2d 4, 7 (9th Cir. 1967) (stating that the reasonableness of [an] on-the-scene detention is determined by all the circumstances [including] [t]he seriousness of the offense”); *People v. Scott*, 578 P.2d 123, 127 (Cal. 1978) (attaching importance to the “seriousness of the underlying criminal offense” in evaluating reasonableness of bodily intrusion to obtain evidence); *State v. Niblock*, 631 P.2d 661, 666 (Kan. 1981) (stating that the “seriousness of the alleged offense” is a relevant factor “in evaluating police conduct in making a warrantless arrest”). As Professor Silas Wasserstrom has argued, once offense gravity is “introduced as an important factor in determining exigency, it is hard to argue that it should not be relevant to other fourth amendment issues as well.” Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 139-40 (1989).

271. Chief Justice Burger wrote separately, stating that he “would dismiss the writ as having been improvidently granted and defer resolution of the question presented to a more appropriate case.” *Welsh*, 466 U.S. at 755 (Burger, C.J., concurring). Justice Blackmun wrote a brief concurring opinion, adding a “personal observation” that Wisconsin’s decision to impose a relatively modest sanction on first-time drunk drivers must be considered in the analysis, but chastised the state’s decision as “indulgent.” *Id.* (Blackmun, J., concurring).

272. *Id.* at 756-64 (White, J., dissenting).

273. *Id.* at 760.

274. *Id.*

275. *Id.*

276. *Id.* at 761.

277. 121 S. Ct. 946 (2001).

278. *See id.* at 952.

*Welsh*.<sup>279</sup> This resulted despite the Court's almost contemporaneous refusal in *Atwater* to factor into its reasonableness analysis the menial nature of the legal violation triggering *Atwater*'s arrest.<sup>280</sup>

If faced with the need, the Court might reconcile *Atwater* with *McArthur* and *Welsh* insofar as the latter decisions concerned warrantless police activities regarding

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279. *Id.* at 952. As in *Welsh*, the Court was loath to impose a blanket, classification-based rule, electing instead to focus solely on the quantum of punishment imposed by the legislature. *See id.* (noting that “[t]he same reasoning applies here, where class C misdemeanors include such widely diverse offenses as drag racing, drinking alcohol in a railroad car or on a railroad platform, bribery by a candidate for public office, and assault”).

It bears mention that this aversion to use of offense classification is also evidenced in more liberal results of the Court, such as *Berkemer v. McCarty*, 468 U.S. 420 (1984), decided the same term as *Welsh*. In *Berkemer*, Justice Marshall rejected use of a felony-misdemeanor distinction for purposes of requiring police to Mirandize suspects, because police are “often unaware when they arrest a person whether he may have committed a misdemeanor or a felony.” *Id.* at 430. Such ambiguity, Justice Marshall reasoned, would undercut the beneficial bright-line clarity of *Miranda*:

Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind . . . . It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate a suspect.

Equally important, the doctrinal complexities that would confront the courts if we accepted [the classification distinction] would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters; at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? . . . The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development.

*Id.* at 430-32.

While Marshall's reasoning appears to be at odds with his normal pro-civil liberties orientation, it can be reconciled, and indeed gains more analytic force, when one reflects upon the question before the Court: Should the judiciary err on the side of overinclusion when requiring police to provide *Miranda* warnings, designed to serve a “prophylactic” constitutional purpose? The *Berkemer* Court responded unanimously in the affirmative. In *Atwater*, on the other hand, the question was whether overinclusiveness should be risked with respect to arrests, which infringe liberties, and thus should logically warrant a different emphasis.

280. *See supra* notes 36-52 and accompanying text.

the home, a place typically<sup>281</sup> (but not always)<sup>282</sup> accorded paramount Fourth Amendment protection. However, the parallels between *Atwater* and *Welsh* in particular are striking: both involved warrantless arrests for fine-only offenses. Indeed, the arrest condemned in *Welsh* involved a more serious offense than *Atwater*, yet the arrest in *Welsh* alone was deemed unreasonable. How the Court will resolve this conflict bears not just on Fourth Amendment jurisprudence but also possibly on other constitutional realms in which proportionality analysis currently applies, like the Sixth Amendment rights to jury trial,<sup>283</sup> counsel,<sup>284</sup> and speedy trial,<sup>285</sup> and may even raise due process concerns.<sup>286</sup>

#### IV. CONCLUSION

In the final analysis, the Court's decision in *Atwater* to permit warrantless arrests

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281. See *Welsh*, 466 U.S. at 754 (stating “[t]he Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner’s home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special protection afforded the individual in his home by the Fourth Amendment.”). As the Court noted at the outset of its opinion, “[i]t is axiomatic that the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’” *Id.* at 748 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); see also *Kyllo v. United States*, 121 S. Ct. 2038, 2041 (2001) (citation omitted) (stating “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and be free from unreasonable governmental intrusion’”); *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971) (stating it is a “basic principle of Fourth Amendment law that searches . . . inside a man’s house without warrant are *per se* unreasonable”).

282. See *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting) (noting that “the 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”); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (stating that “[t]his inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner”).

283. See *Baldwin v. New York*, 399 U.S. 66 (1970) (holding that persons accused of “petty offenses” are not entitled to jury trials, and defining “petty” as offenses involving six or less months of incarceration). Almost twenty years after *Baldwin*, the Court elaborated that, in assessing whether an offense is “petty,” it has looked to “‘objective indications of the seriousness with which society regards the offense.’” *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989) (citations omitted).

284. See *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that indigent suspects are not entitled to appointed counsel unless the conviction results in “actual imprisonment”).

285. See *United States v. Loud Hawk*, 474 U.S. 302 (1986) (adopting a four-part test, including offense seriousness, in analyzing speedy trial claims regarding delays stemming from interlocutory appellate review).

286. See, e.g., *United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001) (weighing gravity of the offense charged in assessing the due process rights of a criminal suspect to avoid being involuntarily subjected to psychotropic medication for purposes of being rendered competent to stand trial).



for “even very minor criminal offenses” will likely number among its most important Fourth Amendment decisions since *Terry v. Ohio*.<sup>287</sup> This significance stems both from the sheer practical consequences associated with formally granting police unlimited authority to arrest for the myriad minor offenses now punishable by law, and from what the decision potentially signals in other areas of search and seizure law.

As for the former, there can be no understating the practical effect of *Atwater*: For the first time in its over two-hundred-year history, the Court has made clear that it is constitutionally reasonable for police, without warrants, to arrest citizens for minor violations of the law (even those that do not threaten jail time). That the Court was not sensitive to the personal consequences of “being needlessly arrested and booked,” and subjected to “pointless indignity” and “gratuitous humiliations,”<sup>288</sup> should give pause to all Americans, who, in contrast to members of the *Atwater* majority, themselves unlikely targets of aggressive policing, will suffer the brunt of the Court’s cavalier sentiment. But the consequences do not stop with the immediate personal consequences of arrest—with arrest comes the power to search, ratchetting up considerably the intrusiveness of police-citizen encounters.<sup>289</sup>

In announcing its bright-line rule—that any and all legal violations can justify warrantless custodial arrest—the Court underscored its determination to withdraw from its oversight of the daily work of police. This abdication is troubling enough as a matter of constitutional principle. Conceived in the broader context of street patrol, however, the abdication is downright ominous, because *Whren v. United States* deemed officers’ motivations constitutionally irrelevant in search and seizure decisions.<sup>290</sup>

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287. 392 U.S. 1 (1968). In *Terry*, the Court for the first time condoned “investigatory stops” of persons, based on “reasonable suspicion,” and authorized “frisks” to uncover any weapons. *Id.* at 20-27. In so doing, the Court afforded police a powerful investigative tool, operating outside the requirements of probable cause and warrants. See *Dunaway v. New York*, 442 U.S. 200, 207-09 (1979) (noting same). As Professor Debra Livingston recently recognized, *Terry* “may be the Court’s single most important Fourth Amendment case in terms of its role in constituting a legal environment broadly supportive of the street-level discretion of officers on patrol.” Debra Livingston, *Gang Loitering, The Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 177-78. For commentary on *Terry* and its continued controversy, see Symposium, *Terry v. Ohio 30 Years Later: A Symposium on the Fourth Amendment, Law Enforcement and Police-Citizen Encounters*, 72 ST. JOHN’S L. REV. 721 (1998).

288. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1553, 1556 (2001).

289. See *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (acknowledging that “even a limited search of the person is a substantial invasion of privacy”); see also *Terry*, 392 U.S. at 24-25 (observing that “[e]ven a limited search of the outer clothing . . . constitutes a severe . . . intrusion upon cherished personal security”).

290. 517 U.S. 806, 809-10 (1996). In *Arkansas v. Sullivan*, 121 S. Ct. 1876 (2001), the Court reaffirmed *Whren*, emphasizing that subjective motivations are irrelevant both with regard to traffic stops and full custodial arrests. On this basis, the same five Justices comprising the majority in *Atwater* upheld the right of the Arkansas police to arrest Sullivan for speeding and having an unlawfully tinted windshield, and to inventory his car. *Id.* at 1878.

In tandem, *Atwater* and *Whren* allow police to act on the basis of pretext and discriminatory motive, a daunting prospect given the multitude of now arrestable low-level offenses contained in federal, state, and local laws, and the acknowledged willingness of government actors to utilize minor legal offenses to serve broader law enforcement ends.<sup>291</sup> Rather than shying away from this reality, it is, as Justice O'Connor noted in dissent, "precisely because [police] motivations are beyond" the Court's purview that the Court should have been on guard to "vigilantly ensure that officers' poststop actions . . . comport with the Fourth Amendment's guarantee of reasonableness."<sup>292</sup>

Indeed, *Atwater* begs the question of whether reasonableness has been written out of the Fourth Amendment altogether. This itself is an enormously significant development in light of the reality that over the course of many decisions the Rehnquist Court has staked near all on reasonableness, at the expense of the warrant clauses of the Fourth Amendment,<sup>293</sup> an evolution resulting in a marked diminution of constitutional protections.<sup>294</sup> If a seat belt violation reasonably justifies a full custodial arrest, regardless of whether a warrant has been secured, it is hard to imagine what would not satisfy the standard. After *Atwater*, one is constrained to ask whether there is, in fact, a "war between the Constitution and common sense."<sup>295</sup>

Beyond these practical realities, *Atwater* prompts but leaves unanswered several major jurisprudential issues. For one, the majority's opinion begs the question of what role state arrest laws should, and will, play in future Fourth Amendment analysis. Texas statutory law expressly authorized Gail Atwater's arrest; other jurisdictions have afforded police similarly broad authority to arrest without warrants persons suspected of committing non-breach-of-the-peace offenses.<sup>296</sup> Several of these same jurisdictions, however, have imposed statutory limits on warrantless arrest authority.<sup>297</sup> Whether such limits will become more common as a result of the constitutional vacuum created by *Atwater*, and whether they will influence Fourth Amendment jurisprudence, remain open but critically important questions.

Another area of uncertainty, ironically, stems from *Atwater*'s bright-line rule that

291. Attorney General John Ashcroft, for instance, recently extolled the federal government's "spit on the sidewalk" policy, under which "immigrants suspected of terrorist ties are apprehended for even minor, unrelated charges, just so long as they are taken off the street[s]." Philip Shenon and Don Van Natta, Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. TIMES, Nov. 1, 2001, at A1; see also *supra* note 136 and accompanying text (discussing popularity of aggressive "broken windows" and "zero tolerance" policing strategies).

292. *Atwater*, 121 S. Ct. at 1567 (O'Connor, J., dissenting).

293. See, e.g., *T.L.O.*, 469 U.S. at 340 (stating that the "fundamental command of the Fourth Amendment is that searches and seizures be reasonable").

294. See Scott E. Sundby, "Everyman's" Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1765-71 (1994) (surveying the evolution toward the "quagmire of reasonableness" and attendant lessening of Fourth Amendment protections).

295. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

296. See *supra* note 30.

297. See *supra* note 167 and accompanying text.

police can arrest for “even very minor offenses,” so long as probable cause exists and the arrest is not carried out in an “extraordinary manner.”<sup>298</sup> By eschewing any concern for offense seriousness in evaluating police decisions to arrest, the Court seemingly eased the daily decisionmaking demands of police work.<sup>299</sup> But in so doing it also cast doubt upon its Fourth Amendment jurisprudence that considers proportionality in gauging the reasonableness of police behaviors. In such circumstances, probable cause has not been deemed the *sine qua non* of reasonableness, in contrast to the Court’s analysis in *Atwater*. Furthermore, the Court’s bright-line rule, based on the idea that police should not be required to draw factual and legal distinctions in their daily work (even regarding arrests, with their major consequences), while on its face helpful to police, will likely only hinder their professional development. Finally, for reasons discussed, the bright-line rule also disserves legislatures and their constituencies, as there is now less incentive to scrutinize criminal codes to ensure that the gravity of offenses warrants the intrusive consequences of arrest.

In the end, however, whatever the broader and long-term consequences of *Atwater*, one thing is certain in the immediate: citizens will be well advised to buckle up, not just for safety, but also to avoid being arrested, searched, and hauled off to jail.

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298. Whether this standard will provide any appreciable protection remains to be seen. For instance, in Texas, a federal court recently upheld the seizure of a motorist who was stopped by police for driving 72 MPH in a 55 MPH zone. *See Fritz v. City of Corrigan*, 2001 WL 1078236, at \*1 (E.D. Tex. 2001). The motorist signed the ticket, as requested by the officer, and added the inscription “was not speeding” above his signature. *Id.* The officer then became enraged, tore up the ticket, and told the motorist that he was to sign only his name on the new ticket and that if he did more the officer would “take care of him.” *Id.* Meanwhile, during the confrontation, a private citizen who was “riding along” with the officer on patrol, pointed a pistol at the motorist. *Id.* Citing *Atwater* in support, the court rejected the motorist’s civil rights claim because the seizure was not “extraordinary.” *Id.* at \*5.

299. *See Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001) (expressing desire to avoid the situation whereby “every discretionary judgment in the field [will] be converted into an occasion for constitutional review”).

