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Fourth Amendment Seizure - Getting Cuffed and Stuffed for Not Wearing a Seat Belt - Atwater v. City of Lago Vista, 121 S. Ct. 1536

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CASE NOTES

FOURTH AMENDMENT SEIZURE—Getting "Cuffed and Stuffed" for Not Wearing a Seat Belt. *Atwater v. City of Lago Vista*, 121 S. Ct. 1536 (2001).

INTRODUCTION

On March 26, 1997, Gail Atwater was driving her two children, ages three and five, home from soccer practice when, along the way, the children realized that one of their favorite toys had fallen out of the truck window onto the street.[1] Atwater turned the truck around and retraced her route to the soccer field in search of the toy.[2] Though the children were previously wearing seat belts, Atwater let them remove their seat belts so they could look out the truck's windows for their lost toy.[3] In the course of the children's search, Ms. Atwater passed Officer Bart Turek, a city police officer, who observed that neither Ms. Atwater nor her children were wearing seat belts and stopped them for violating the Texas seat belt law.[4]

Following the stop, Turek approached Ms. Atwater's truck and

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1. Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1541 (2001); Brief for Petitioner at 2, Atwater v. City of Lago Vista, 121 S. Ct. 1536 (2001) (No. 99-1408) [hereinafter Petitioner's Brief]. These are the facts as alleged by Atwater. Because the case below was dismissed pursuant to a motion for summary judgment filed by respondent, the United States Supreme Court views the facts in the light most favorable to Atwater. *See* FED. R. CIV. P. 56(c).

2. Petitioner's Brief, *supra* note 1, at 2.

3. Petitioner's Brief, *supra* note 1, at 2.

4. *Atwater*, 121 S. Ct. at 1541; Petitioner's Brief, *supra* note 1, at 2-3. With respect to the seat belt law, the Court explains as follows:

> In Texas, if a car is equipped with safety belts, a front-seat passenger must wear one, Tex. Tran.Code Ann. [sic] § 545.413(a) (1999), and the driver must secure any small child riding in front, § 545.413(b). Violation of either provision is 'a misdemeanor punishable by a fine not less than $25 or more than $50.' § 545.413(d). Texas law expressly authorizes '[a]ny peace officer [to] arrest without warrant a person found committing a violation' of these seatbelt laws, § 543.001, although it permits police to issue citations in lieu of arrest, §§ 543.003-543.005.

Atwater, 121 S. Ct. at 1541 (alteration in original).

began yelling at her and jabbing his finger in her face.[5] Turek screamed either that they had met before or that they had had this conversation before.[6] Turek's conduct frightened the children; when they began to cry, Ms. Atwater calmly asked Turek to lower his voice.[7] He responded by informing her that she was "going to jail."[8] When Turek's continued verbal abuse caused the children to become increasingly frightened and distressed, Ms. Atwater asked to take them to a nearby friend's house before going to the police station.[9] Turek told her she was "not going anywhere,"[10] and said he would take the children into custody as well.[11] However, a friend arrived in time to prevent the children from being taken to jail with their mother.[12]

Once the children were gone, Turek "handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets."[13] After her "mug shot" was taken, officers placed Ms. Atwater in a jail cell for approximately one hour until she was taken before a magistrate.[14] She was released on $310 bond.[15] Ultimately, Ms. Atwater pled no contest to the seat belt violation and paid the maximum penalty—a fifty dollar fine.[16]

Following this incident, Ms. Atwater filed suit in a Texas state court against Turek, Police Chief Frank Miller, and the City of Lago

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5. *Atwater*, 121 S. Ct. at 1541; Petitioner's Brief, *supra* note 1, at 3.

6. Petitioner's Brief, *supra* note 1, at 3. Officer Turek had stopped Atwater several months prior to her arrest for failure to have her youngest son properly restrained in the vehicle. Atwater v. City of Lago Vista, 165 F.3d 380, 382 (5th Cir. 1999). *See* Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1541 n.1 (2001). However, the seat belt was properly fastened and Atwater received no citation. *Atwater*, 165 F.3d at 382.

7. Petitioner's Brief, *supra* note 1, at 3.

8. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting); Petitioner's Brief, *supra* note 1, at 3.

9. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting); Petitioner's Brief, *supra* note 1, at 4.

10. *Atwater*, 121 S. Ct. at 1542; Petitioner's Brief, *supra* note 1, at 4.

11. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting); Petitioner's Brief, *supra* note 1, at 4.

12. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting).

13. *Id.* at 1542; Petitioner's Brief, *supra* note 1, at 4. Interestingly, the dissent points out that Officer Turek failed to secure Atwater in her seat belt for the ride to the police station. *Atwater*, 121 S. Ct. at 1565 (O'Connor, J., dissenting). However, Texas law did not require such action. *See, e.g.*, TEX. TRANSP. CODE ANN. § 545.413(a) (1999).

14. *Atwater*, 121 S. Ct. at 1542; Petitioner's Brief, *supra* note 1, at 5.

15. *Atwater*, 121 S. Ct. at 1542; Petitioner's Brief, *supra* note 1, at 5.

16. *Atwater*, 121 S. Ct. at 1542; Petitioner's Brief, *supra* note 1, at 5. In addition to the fine, Atwater was required to pay more $110 to get her vehicle out of the police impound in another city after an inventory search had been conducted. *Id.* at 29.

Vista, alleging *inter alia* that the arrest violated her Fourth Amendment rights.[17] Ms. Atwater sought compensatory and punitive damages.[18] The city removed the suit to the United States District Court for the Western District of Texas and filed a motion for summary judgment.[19] Because Ms. Atwater admitted to violating the Texas seat belt law, and because the court did not find that she was harmed or detained in an unreasonable manner, the court granted the city's motion for summary judgment.[20] On appeal, a panel of the United States Court of Appeals for the Fifth Circuit reversed the district court's ruling.[21] The Fifth Circuit panel held that, although based upon probable cause, Turek's actions in this case were not constitutionally reasonable.[22] Subsequently, the Fifth Circuit, sitting *en banc*, vacated the panel's decision and reinstated the district court's ruling on the city's motion for summary judgment.[23] The Court of Appeals held, "[W]hen probable cause exists to believe that a suspect is committing an offense, the government's interests in enforcing its laws outweigh the suspect's privacy interests, and an arrest of the suspect is reasonable."[24] In addition, the court concluded that no evidence suggested that Turek "conducted the arrest in an 'extraordinary manner, unusually harmful' to Atwater's privacy interests."[25]

The United States Supreme Court granted certiorari "to consider 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."[26] In a five-to-four decision, the Court affirmed the Fifth Circuit's *en banc* judgment and applied the standard of probable cause to all arrests without a need to balance the interests and circumstances of the particular parties involved.[27] Accordingly, an officer having probable cause "to believe that an individual has committed even a very minor criminal offense in his presence . . . " may arrest without violating the Fourth Amendment.[28]

This case note will discuss why the bright-line rule issued by

17. *Atwater*, 121 S. Ct. at 1542. Atwater filed suit under 42 U.S.C. § 1983. *Id.*
18. *Atwater*, 121 S. Ct. at 1542.
19. *Id.*
20. *Id.*
21. Atwater v. City of Lago Vista, 165 F.3d 380, 388 (5th Cir. 1999).
22. *Id.* at 389.
23. Atwater v. City of Lago Vista, 195 F.3d 242, 246 (5th Cir. 1999) (en banc).
24. *Id.* at 244 (citation omitted).
25. *Id.* at 246 (citing Whren v. United States, 517 U.S. 806, 818 (1996)).
26. Atwater v. City of Lago Vista 121 S. Ct. 1536, 1542-43 (2001).
27. *Id.* at 1557.
28. *Id.*

the United States Supreme Court in *Atwater v. City of Lago Vista* was inappropriate. In discussing the inappropriateness of the *Atwater* rule, this case note will examine whether probable cause alone is sufficient to justify a warrantless arrest for a minor criminal offense, or whether, in addition to probable cause, the arrest must satisfy some standard of reasonableness. Finally, this case note will analyze how the *Atwater* rule may affect the future of Fourth Amendment law in areas such as roving-patrol stops, checkpoints, impermissible pretextual stops, and searches incident to citation.

BACKGROUND

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[29]

Probable Cause

The Supreme Court has frequently described the Fourth Amendment probable cause requirement as a flexible standard:

> It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[30]

"In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations

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29. U.S. CONST. amend. IV.

30. Texas v. Brown, 460 U.S. 730, 742 (1983) (internal quotations and citation omitted). *See* Brinegar v. United States, 338 U.S. 160, 175-76 (1949). The *Brinegar* court explained that "[p]robable cause exists where 'the facts and circumstances within . . . (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

of everyday life on which reasonable and prudent men, not legal technicians, act."[31] With respect to the sufficiency of information required to satisfy a probable cause standard, the Court has explained that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ."[32] Information sufficient to warrant probable cause can be acquired through a number of ways, including an informant's tip confirmed by independent police work,[33] collective knowledge of all law enforcement officers involved in an investigation,[34] and plain view.[35] Probable cause may also be acquired if the offense is committed in the officer's presence.[36]

The Reasonableness Requirement

Although the United States Supreme Court requires probable cause to make a warrantless arrest, the Court has traditionally required that in addition to probable cause, the arrest must also be reasonable. In *Welsh v. Wisconsin*, the Court explained that an important requirement in determining whether exigent circumstances justify a warrantless Fourth Amendment arrest is the severity of the underlying offense.[37] The *Welsh* court was called upon to decide whether the Fourth Amendment prohibits police from entering a person's home without a warrant to arrest him for a fine-only traffic offense.[38]

One night, an eyewitness observed Edward Welsh driving apparently under the influence of an intoxicant.[39] After Welsh ran his car off the road, he left the scene before officers could arrive.[40] When officers checked the vehicle's registration, they learned that Welsh lived nearby

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31. *Brinegar*, 338 U.S. at 175.

32. Hill v. California, 401 U.S. 797, 804 (1971).

33. *See, e.g.*, United States v. Dawkins, 17 F.3d 399 (D.C. Cir. 1994); United States v. Reyes, 792 F.2d 536 (5th Cir. 1986).

34. United States v. Morales, 238 F.3d 952 (8th Cir. 2001); United States v. Kirk, 781 F.2d 1498 (11th Cir. 1986); United States v. McCoy, 478 F.2d 176 (10th Cir. 1973).

35. Minnesota v. Dickerson, 508 U.S. 366 (1993).

36. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980); United States v. Watson, 423 U.S. 411 (1976); Johnson v. United States, 333 U.S. 10 (1948); Carroll v. United States, 267 U.S. 132 (1925); John Bad Elk v. United States, 177 U.S. 529 (1900).

37. 466 U.S. 740, 753 (1984). *See also* McDonald v. United States, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring) (requiring that the nature of a warrantless Fourth Amendment seizure be proportional to the severity of the offense, the presence of violence or the threat of violence, and danger to life or security).

38. *Welsh*, 466 U.S. at 742.

39. *Id.* Welsh was observed changing speeds, veering from side to side until he finally ran off the road and stopped in a field. *Id.* After conversing with Welsh following the accident, the eyewitness concluded that Welsh was either drunk or very sick. *Id.*

40. *Id.*

and presumed that he had walked home.[41] Without obtaining a warrant, officers then went to Welsh's home and, when his stepdaughter answered the door, gained entry into the home.[42] Officers then proceeded upstairs, found Welsh lying on his bed, and arrested him for driving while intoxicated.[43]

The *Welsh* court began its analysis by repeating a basic principle of Fourth Amendment law that warrantless seizures inside a home are presumptively unreasonable.[44] The Court reiterated that exigent circumstances must be present, in addition to probable cause, to justify a warrantless arrest in the home.[45] When the government seeks to conduct a warrantless Fourth Amendment seizure in the home, the Court explained, it bears a heavy burden:

> [T]o demonstrate exigent circumstances that overcome the presumption of unreasonableness . . . . When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.[46]

Thus, the Court drew the line for permissible warrantless arrests in the home at extremely minor offenses.[47] The Supreme Court found it difficult to imagine any reasonable warrantless arrest in the home when the underlying offense is very minor.[48]

The government attempted to justify Welsh's warrantless ar-

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41. *Id.*

42. *Id.* at 743.

43. *Id.*

44. *Id.* at 749. *See* Payton v. New York, 445 U.S. 573, 586 (1980).

45. *Welsh*, 466 U.S. at 749; *Payton*, 445 U.S. at 583-90. *See also* United States v. Santana, 427 U.S. 38, 42-43 (1976) (applying the hot-pursuit exception as the only recognized exigent circumstance for warrantless felony arrests in the home).

46. *Welsh*, 466 U.S. at 750.

47. *Id.* at 753. With respect to warrantless arrests in the home for misdemeanors, the Court stated:

> [A]lthough no exigency is created simply because there is probable cause to believe that a serious crime has been committed, . . . application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Id.

48. *Welsh*, 466 U.S. at 753.

rest, citing the hot-pursuit exception, threat to public safety, and the need to preserve evidence.[49] The Supreme Court dismissed the state's hot-pursuit and threat-to-public-safety justifications.[50] With respect to the need to preserve evidence, the Court explained that by itself such a need does not justify a warrantless arrest in the home.[51] According to the Court, the best indication of the government's interest in effecting a warrantless home arrest lies in the state's classification of the underlying offense for which an arrest is sought.[52] In other words, as the severity of the punishment decreases, so does the state's interest in effecting a warrantless arrest in the home. In this case, because Wisconsin classified a first drunk driving offense as a fine-only offense, the state's interest in conducting a warrantless home arrest to preserve evidence was very slight when compared with the protections afforded Welsh by the Fourth Amendment.[53] Thus, Welsh's arrest was the unconstitutional result of unreasonable police behavior.[54]

The principles of reasonableness were extended as the United States Supreme Court, in *Tennessee v. Garner*, considered the importance of how a seizure is made under the Fourth Amendment.[55] In *Garner*, police officers responded to a "prowler inside call" in the middle of the night.[56] Upon arriving at the house, one of the officers saw someone running across the backyard.[57] When the suspect stopped at a six-feet-high chain link fence, the officer, aided by a flashlight, saw that Garner was unarmed.[58] While Garner was still crouched at the base of the fence, the officer took a few steps toward him and commanded him to stop.[59] As Garner began to climb the fence, the officer, fearing that Garner would escape, pulled his gun and shot him in the back of the head.[60] From Garner's dead body, officers recovered ten dollars and a purse taken from the house.[61]

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49. *Id.*
50. *Id.*
51. *Id.* at 753-54.
52. *Id.* at 754.
53. *Id.*
54. *Id.*
55. 471 U.S. 1 (1985).
56. *Id.* at 3.
57. *Id.*
58. *Id.*
59. *Id.* at 4.
60. *Id.* Edward Garner was 15 years old, measured 5'4" tall, and weighed between 100 and 110 pounds. *Id.* at 4 n. 2. The officer who shot Garner acted under the authority of a Tennessee statute and pursuant to police department policy. *Id.* at 4. *See* TENN. CODE. ANN. § 40-7-108 (1982).
61. *Garner*, 471 U.S. at 4.

The *Garner* court acknowledged that "[a] police officer may arrest a person if he has probable cause to believe that person committed a crime."[62] However, the Court explained that the constitutionality of the arrest depends on the outcome of balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[63] For the *Garner* court, the balancing of these competing interests was the key principle of the Fourth Amendment.[64] The Supreme Court explained that extent of the "intrusion" is one of the necessary factors to determine the nature and quality of an intrusion.[65] Thus, the reasonableness of an arrest depends not only on when a seizure is made but also upon how the seizure is carried out.[66]

In essence, the reasonableness of a particular seizure depends on whether it was justified by the totality of the circumstances.[67] Following a balancing of competing interests, the *Garner* court concluded that the state's interest in "shooting nondangerous fleeing suspects [does not] outweigh the suspect's interest in his own life . . . . It is not better that all felony suspects die than that they escape."[68] In summary, the Court determined that where a fleeing suspect poses no immediate threat to the safety of the officer and no threat to others, the use of deadly force to apprehend the suspect is constitutionally unreasonable.[69]

Though the Supreme Court in *Garner* applied the reasonableness standard in the context of felony arrests, the Court expanded this standard's application in *Graham v. Connor*.[70] The *Graham* court likewise dealt with a claim that law enforcement officials used excessive force in the course of making a Fourth Amendment seizure.[71] When Dethorne Graham, a diabetic, felt the onset of an insulin reaction, he asked a friend to drive him to a nearby convenience store so he could purchase some orange juice to counteract the reaction.[72] When Graham ran into

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62. *Id.* at 7.
63. *Id.* at 7-8 (internal quotations and citations omitted).
64. *Id* at 8. *Accord* Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).
65. *Garner*, 471 U.S. at 8.
66. *Id. Accord* United States v. Ortiz, 422 U.S. 891, 895 (1975); Terry v. Ohio, 392 U.S. 1, 28-29 (1968).
67. *Garner*, 471 U.S. at 8-9.
68. *Id.* at 11.
69. *Id.*
70. 490 U.S. 386 (1989).
71. *Id.* at 388.
72. *Id.*

the store, he noticed a long line at the checkout counter.[73] Rather than wait, he ran out of the store and asked his friend to drive him to another friend's house nearby.[74] Officer Connor witnessed these events, became suspicious, and followed the car in which Graham was riding.[75]

Approximately one-half mile from the convenience store, Officer Connor made an investigative stop.[76] Graham's friend told Officer Connor that Graham was merely suffering from an insulin reaction and needed sugar.[77] Officer Connor, however, ordered Graham to wait at the car until he found out what had happened at the convenience store.[78] Graham got out of the car, ran around it twice, and passed out on the curb.[79] "In the ensuing confusion, a number of other . . . officers arrived on the scene in response to Officer Connor's request for backup."[80] After one of the officers handcuffed Graham's hands tightly behind his back, a number of officers carried Graham over to the car and placed him face down on its hood.[81] According to the Court:

> Regaining consciousness, Graham asked officers to check in his wallet for the diabetic decal that he carried. In response, one of the officers told him to 'shut up' and shoved his face down against the hood of the car. Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it. Finally, Officer Connor received a report that Graham had done nothing wrong at the convenience store, and the officers drove him home and released him.[82]

During the course of events, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and developed a loud ringing in his right ear.[83]

In addressing whether the officers' use of force to detain Graham was excessive, the Supreme Court applied the balancing test announced

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73. *Id.*
74. *Id.* at 389.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 390.

in *Garner*.[84] Citing *Terry v. Ohio*, the *Graham* court made clear that the use or threat of using some degree of physical force is necessary at times in order to make an arrest or investigatory stop.[85] Because the reasonableness test is incapable of precise definition, its proper application requires determining whether the totality of the circumstances warrants a particular seizure.[86] Such circumstances include the severity of the crime, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[87] In addition, the Court explained that some allowance must be made for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[88] Finally, the Court inquired as to whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them.[89] Following its promulgation of the reasonableness test, the Supreme Court vacated the Court of Appeals' decision, and remanded the case to it for consideration of the issues under that test.[90]

Warrantless Arrests

As a general rule, warrantless searches and seizures are per se unreasonable and officers are encouraged to obtain an arrest warrant prior to making an arrest.[91] Yet the law acknowledges specific instances when based on probable cause an officer may make a warrantless arrest of an individual suspected of committing a criminal offense. For instance, an officer may make a warrantless felony arrest, even absent exigent circumstances, if the officer has probable cause to believe that the arrestee committed the underlying offense.[92] Though the felony offense

84. *Id.* at 396.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 396-97.
89. *Id.* at 397.
90. *Id.* at 399.
91. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366, 372 (1993).
92. *See, e.g.*, United States v. Reid, 226 F.3d 1020, 1027-28 (9th Cir. 2000) (defining exigent circumstances as those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained). *Accord* United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996); United States v. Stewart, 867 F.2d 581, 584 (10th Cir. 1989). *But see* United States v. Santana, 427 U.S. 38, 42-43 (1976) (applying the hot pursuit exception as the only exigent circumstance recognized by the Court for warrantless arrests in the home).

need not occur in the officer's presence,[93] a warrantless felony arrest must occur in a public place where the suspect has a diminished expectation of privacy.[94]

Although a warrantless felony arrest may occur regardless of whether the officer witnessed the offense, the law differs with respect to misdemeanors. The Supreme Court has consistently described the common law rule regarding warrantless misdemeanor arrests as permissible if the offense is committed in the officer's presence.[95]

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93. *See, e.g.*, Florida v. White, 526 U.S. 559, 565-66 (1999) (requiring a warrantless felony arrest to occur in a public place); United States v. Watson, 423 U.S. 411, 424-25 (1976) (upholding Postal Service officers' warrantless arrest in a public place of an individual suspected of committing a felony where the arrest was based upon probable cause).

94. In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the concept of diminished expectation of privacy was explained in terms of an automobile. The Court explains that "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not. . . . [b]ecause the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.* at 367. Unlike homes, the Court explains:

> Automobiles . . . are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

Id. at 368. *See also* Payton v. New York, 445 U.S. 573, 588-89 (1980) (holding that a warrantless entry into the suspect's home for a routine felony arrest violates the Fourth Amendment in the absence of valid or exigent circumstances because of the special protection individuals enjoy in their homes); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (holding that the expectation of privacy as to automobiles is further diminished by the public nature of automobile travel, whereby the automobile's occupants and contents are in plain view).

95. *See, e.g., Payton*, 445 U.S. at 590 n.30 (explaining that "cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence . . . ."); United States v. Watson, 423 U.S. 411, 418 (1976); Johnson v. United States, 333 U.S. 10, 15 (1948); Carroll v. United States, 267 U.S. 132, 156 (1925) ("The usual rule is that a police officer . . . may only arrest without a warrant one guilty of a misdemeanor if committed in his presence."); John Bad Elk v. United States, 177 U.S. 529, 534 (1900) ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."). *See* Brief for the United States as Amicus Curiae Supporting Respondents at 18-24, Atwater v. City of Lago Vista, 121 S. Ct. 1536 (2001) (No. 99-1408). *Accord* United States v. Reed, 220 F.3d 476, 478-79 (6th Cir. 2000); Hutton v. Strickland, 919 F.2d 1531, 1539 (11th Cir. 1990); Bodzin v. City of Dallas, 768 F.2d 722, 724 (5th Cir. 1985); United States v. Williams, 754 F.2d 1001, 1002 (D.C. Cir. 1985) (per curiam); Hart v. Walker, 720 F.2d 1436, 1439 (5th Cir. 1983). For an excellent discussion of the meaning of "in

Prior to its decision in *Atwater v. City of Lago Vista*, the Supreme Court had never addressed the constitutionality of a warrantless arrest for minor traffic offenses. In *Gustafson v. Florida*, a police officer arrested James Gustafson for failure to have his driver's license in his possession while driving.[96] Following the arrest, the officer conducted a full-scale body search and discovered marijuana cigarettes.[97] Rather than challenge the constitutionality of an arrest for a minor traffic violation, Gustafson contended that a search incident to such an arrest violated the Fourth Amendment.[98] Citing *United States v. Robinson,*[99] the Supreme Court rejected Gustafson's claim and held:

> [I]t is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a 'reasonable' search under that Amendment.[100]

However, in his concurring opinion, Justice Stewart stated that "a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments."[101]

Search Incident to a Lawful Custodial Arrest

Although prior to *Atwater v. City of Lago Vista* the Supreme Court had remained virtually silent with respect to the lawfulness of a custodial arrest for minor traffic offenses, its recent decisions have indicated strong approval of a warrantless search incident to a custodial ar-

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the officer's presence," *see* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 3.5(a), at 180 (3d. ed. 2000).

96. 414 U.S. 260, 262 (1973).

97. *Id.* at 262-63.

98. *Id.* at 263.

99. 414 U.S. 218 (1973). In *Robinson*, the Court held that a crumpled cigarette package located during a search incident to an arrest was admissible as evidence. *Id.* at 235. According to the Court, the authority to search incident to arrest does not hinge upon the probability that the search will produce weapons or evidence. *Id.* The fact that the search was conducted incident to a lawful arrest satisfies the Fourth Amendment's reasonable requirement. *Id.*

100. *Gustafson*, 414 U.S. at 263-64 (quoting *Robinson*, 414 U.S. at 235) (omission in original).

101. *Id.* at 266-67 (Stewart, J., concurring). *See* Brief Amicus Curiae of Americans for Effective Law Enforcement, Inc. at 10, Atwater v. City of Lago Vista, 121 S. Ct. 1536 (2001) (99-1408).

rest following a stop for traffic violations. In a situation similar to that in *Gustafson*, the Court in *Whren v. United States* addressed whether the Fourth Amendment permits a police officer to stop and temporarily detain a motorist who the officer has probable cause to believe has committed a traffic violation.[102] In *Whren*, police officers patrolling a high drug area of the District of Columbia stopped a vehicle they had been observing after the driver sped off at an unreasonable speed.[103] When officers approached the vehicle and looked in through the windows, they saw within plastic bags filled with what appeared to be drugs.[104] Officers then arrested the occupants of the vehicle, and, in the search that followed, found quantities of several types of drugs.[105]

Michael Whren challenged the constitutionality of the stop, acknowledging that although the officers had probable cause to stop the vehicle, probable cause is not enough to justify a search in the context of traffic violations.[106] Because traffic violations are so pervasive, he argued, police officers could use a traffic stop as a means of investigating other crimes for which officers have no reasonable suspicion, let alone probable cause.[107] Such stops, Whren argued, could be based on impermissible pretextual factors, such as race.[108] To remedy such concerns, Whren proposed a subjective reasonableness requirement: In addition to probable cause, an officer cannot justify a traffic stop unless, acting reasonably, he would have made the stop for the reason given.[109]

The Supreme Court, however, was unmoved by Whren's position. The Court stated that while automobile stops are subject to the reasonableness requirement of the Fourth Amendment, that requirement is met when police stop an automobile with probable cause to believe that a traffic violation has occurred.[110] Citing various prior decisions, the Court rejected Whren's subjective test and dismissed his contention that "the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."[111] The Court further refused Whren's invitation to establish a balancing test weighing the governmental and individual interests implicated in a traffic stop.[112] The Court ex-

102. 517 U.S. 806, 808 (1996).
103. *Id.* Of interest, the facts do not allege that Whren was speeding.
104. *Id.* at 808-09.
105. *Id.* at 809.
106. *Id.* at 810.
107. *Id.*
108. *Id.* Both petitioners in this case were black. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 813.
112. *Id.* at 816.

plained:

> It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the . . . seizure is based upon probable cause.[113]

The Court held that where probable cause exists to effect a Fourth Amendment seizure, no balancing test is needed unless the seizure was "conducted in an extraordinary manner, unusually harmful to the individual's privacy or . . . physical interests . . . ."[114] In summary, the *Whren* court concluded that "probable cause to believe that petitioners had violated the traffic code . . . rendered the stop reasonable under the Fourth Amendment . . . ."[115] The decision in *Whren* is important because it clarifies the constitutional authority of police officers with respect to traffic violations. However, it is significant to note that the *Whren* court dealt only with the constitutionality of a traffic stop and subsequent evidence obtained through the "plain view" exception and the search that followed.[116]

In *Arkansas v. Sullivan*, the Court compared the warrantless search following the traffic stop in *Whren v. United States* to the inven-

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113. *Id.* at 817.

114. *Id.* at 818.

115. *Id.* at 819.

116. In *Horton v. California*, 496 U.S. 128 (1990), the United States Supreme Court characterized the plain view exception as follows:

> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify [a] warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be immediately apparent. . . . Second, not only must the officer be lawfully located in the place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.

Id. at 136-37 (internal quotations and citation omitted). In essence, if the officer was behaving legally when he saw the evidence, and if he is legally in a place where he can gain physical control over the evidence, he can seize it if he has probable cause. *Id. But see* Arizona v. Hicks, 480 U.S. 321, 328 (1987) (holding that although search for weapons and shooter was a lawful objective for entry into apartment, lifting stereo equipment to record serial numbers based on suspicion, not probable cause, that the equipment was stolen constituted a separate, unlawful search).

tory search following an arrest for a traffic violation that was the subject of *Sullivan*.[117] In *Arkansas v. Sullivan*, Kenneth Sullivan was stopped for speeding and for having an improperly tinted windshield.[118] Following the stop, the officer requested Sullivan's license, registration, and proof of insurance.[119] When the officer saw Sullivan's license, he realized that Sullivan was suspected of narcotics activity.[120] As Sullivan opened his car door in an unsuccessful attempt to locate his registration and proof of insurance, the officer noticed a rusted roofing hatchet on the floor.[121] He then arrested Sullivan for speeding, driving without proof of registration and insurance, improper window tinting, and carrying a weapon.[122] Then, on the roadside, the officer conducted an inventory search which produced illegal drugs.[123]

The Arkansas Supreme Court held that, though supported by probable cause, Sullivan's arrest "nonetheless violated the Fourth Amendment because [the officer] had an improper subjective motivation for making the stop."[124] The United States Supreme Court rejected the Arkansas Supreme Court's holding as inconsistent with the holdings in *Whren* and *Atwater*.[125] The Supreme Court explained that in *Whren*, it was "'unwilling[] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,'" and that "'[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'"[126] The Supreme Court sustained Sullivan's arrest and subsequent search as consistent with precedent.[127] In commenting on the similarities between the facts in *Whren* and those in *Sullivan*, the *Sullivan* court stated, "That *Whren* involved a traffic stop, rather than a custodial arrest, is of no particular moment . . . ."[128] In *Whren*, the search took place following the traffic stop when, after approaching the vehicle, the officer saw drugs in the vehicle.[129] This observation gave the officer probable cause to search the rest of the vehicle for drugs. In *Sullivan*, the inventory search was conducted pursuant to a lawful custodial arrest.[130]

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117. 121 S. Ct. 1876 (2001) (per curiam).
118. *Id.* at 1877.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1878.
125. *Id.*
126. *Id.* (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).
127. *Sullivan*, 121 S. Ct. at 1878.
128. *Id.*
129. *Whren*, 517 U.S. at 808-09.
130. *Sullivan*, 121 S. Ct. at 1877.

Thus, regardless of the nature of the seizure, the warrantless search following the seizure was conducted in a manner consistent with Fourth Amendment requirements.

This principle is further fortified by the Court's holding in *New York v. Belton*.[131] Roger Belton was one of four occupants of a vehicle stopped for speeding.[132] Following the stop, the officer had probable cause to arrest the vehicle's occupants for possession of marijuana.[133] After arresting the four men, the officer searched the vehicle and discovered cocaine.[134] In *Belton*, the Court specifically addressed the "proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants."[135] In clarifying its holding in *Chimel v. California*,[136] the *Belton* court stated:

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile . . . . [T]he police may also examine the contents of any containers found within the passenger compartment . . . . Such a container may . . . be searched whether it is open or closed . . . .[137]

Furthermore, relying on *United States v. Robinson*, the Court held that a container could be searched even if it "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested."[138]

While a search is reasonable if made incident to a lawful arrest based on probable cause, the Court, in *Knowles v. Iowa*, distinguished the rule in *Belton* and concluded that a search incident to a citation violates the Fourth Amendment.[139] In that case, an officer stopped Patrick

131. 453 U.S. 454 (1981).
132. *Id.* at 455.
133. *Id.* at 455-56. Upon approaching the vehicle, the officer smelled burnt marijuana and saw an envelope on the floor which he suspected of containing marijuana. *Id.*
134. *Id.* at 456.
135. *Id.* at 459.
136. 395 U.S. 752 (1969). The *Chimel* court held that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee. *Id.* at 763. However, as this principle pertains to automobiles, courts had difficulty determining what exactly constituted the area within the arrestee's immediate control. *Belton*, 453 U.S. at 460. *Belton* modified the holding in *Chimel* only as it pertained to automobiles. *Id.* at n.3
137. *Belton*, 453 U.S. at 460-61.
138. *Id.* at 461. (citing United States v. Robinson, 414 U.S. 218 (1973)).
139. 525 U.S. 113, 118-19 (1998).

Knowles and issued him a citation for speeding.[140] Following the citation, the officer conducted a full search of the car, which produced marijuana.[141] In expressing its disapproval of the search, the Court relied on *Robinson* in setting forth the two historical rationales for a search incident to arrest: (1) The need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.[142] The *Knowles* court determined that neither of these rationales is sufficient to justify a search incident to a citation.[143]

The first historical rationale for a search incident to arrest takes into account the need for officer safety.[144] Although this rationale is "both legitimate and weighty,"[145] the *Knowles* court felt that "[t]he threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest."[146] To a large extent, the concern for officer safety during an arrest stems from the officer's extended exposure to the suspect.[147] In addition, the stress and uncertainty involved in making an arrest result in a heightened danger to the arresting officer.[148] A traffic stop wherein a citation is issued, however, usually results in a briefer encounter than a custodial arrest.[149] Thus, while a traffic stop may justify a minimal intrusion, it does not justify "the often considerably greater intrusion attending a full field-type search."[150]

The second historical rationale for conducting a search incident to arrest reflects the need to discover and preserve evidence.[151] However, the Court held that with respect to a traffic stop for speeding, once the

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140. *Id.* at 114. Knowles was clocked driving 43 miles per hour in a 25 mile per hour zone. *Id.*

141. *Id.* Under IOWA CODE ANN. § 321.485(1)(a) (West 1997), the officer could have arrested Knowles for speeding. *Id.* at 115. Nevertheless, under IOWA CODE ANN. § 805.1(1) (West Supp. 1997), the officer issued a citation. *Id.* However, IOWA CODE ANN. § 805.1(4) (West Supp. 1997) explains that just because the officer issues a citation does not preclude him from conducting an otherwise lawful search. *Id.* The Iowa Supreme Court had interpreted this provision as permitting officers to conduct a search incident to a citation in any situation where the officer could have arrested the individual. *Id.* The officer in this case acted according to this interpretation and conducted a search incident to a citation. *Id.*

142. *Id.* at 116; *Robinson*, 414 U.S. at 234.

143. *Knowles*, 525 U.S. at 117.

144. *Id.* at 116.

145. Pennsylvania v. Mimms, 434 U.S. 106, 110 (1997) (per curiam).

146. *Knowles*, 525 U.S. at 117.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 116.

driver is issued a citation, "all the evidence necessary to prosecute that offense ha[s] been obtained."[152] According to the Court, "[n]o further evidence of excessive speed [is] going to be found either on the person of the offender or in the passenger compartment of the car."[153] As to the concern that the subject of a routine traffic stop may destroy evidence of another, as yet undetected crime, the Court felt the likelihood that an officer would stumble onto evidence unrelated to the traffic offense was remote.[154]

In addition to the principle permitting police officers to conduct a full search both of the vehicle and of the person, police may also access the contents of a vehicle in the process of conducting an inventory search incident to a lawful custodial arrest. In *South Dakota v. Opperman*, the Supreme Court found inventory searches of automobiles to be consistent with the Fourth Amendment.[155] The Court explained that neither the policies behind the warrant requirement nor the related concept of probable cause are implicated in an inventory search.[156] The Court noted:

> The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures . . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.[157]

Thus, "an inventory search may be 'reasonable' under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause."[158]

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152. *Id.* at 118.

153. *Id.*

154. *Id.*

155. 428 U.S. 364, 376 (1976). For more recent cases endorsing the holding in *Opperman*, *see, e.g.*, Colorado v. Bertine, 479 U.S. 367, 372-73 (1987) (acknowledging the constitutionality of an inventory search and permitting evidence of criminal activity discovered in the course of the search to be used in proving criminal charges); Florida v. Wells, 495 U.S. 1, 4 (1990) (requiring inventory search to be conducted in a manner consistent with police protocol, while allowing police sufficient latitude to determine whether a container should be opened to verify its contents). *See also* Arkansas v. Sullivan, 121 S. Ct. 1876, 1878 (2001) (per curiam) (sustaining the lawfulness of an inventory search conducted by officers on the roadside following a lawful arrest).

156. *Opperman*, 428 U.S. at 370 n.5.

157. *Id.*

158. *Bertine*, 479 U.S. at 371.

The governmental interests advanced by an inventory search are to protect the property of an arrestee while the property is in police custody, to insure the police against claims for lost, stolen, or destroyed property, and to guard the police from danger.[159] In light of these strong governmental interests, coupled with the diminished expectation of privacy in an automobile, the Court in *Opperman* upheld the constitutionality of the inventory search.[160] Though an inventory search is constitutional, this type of search "must not be a ruse for a general rummaging in order to discover incriminating evidence."[161] Neither should an inventory search become "a purposeful and general means of discovering evidence of crime."[162] Nevertheless, contraband or evidence discovered during the course of an inventory search conducted according to established police protocol may be properly submitted to prove criminal charges.[163]

Judicial Treatment of Misdemeanor Arrests Prior to Atwater v. City of Lago Vista

Prior to the Supreme Court's decision in *Atwater*, various lower courts struggled with whether an arrest based upon probable cause for a fine-only misdemeanor violated the Fourth Amendment. In *Diaz v. City of Fitchburg*, the United States Court of Appeals for the First Circuit, applying the *Garner* test, found that while an arrest for a fine-only misdemeanor is not a per se Fourth Amendment violation, there may be circumstances under which a custodial arrest for such an offense could violate the reasonableness requirement pertaining to seizures.[164] In *Goff v. Bise*, the United States Court of Appeals for the Eighth Circuit applied the *Graham* test to determine that arresting officers used excessive force in violation of the Fourth Amendment.[165] Adding to the three elements of

159. *Opperman*, 428 U.S. at 369.

160. *Id.* at 376.

161. Florida v. Wells, 495 U.S. 1, 4 (1990).

162. *Bertine*, 479 U.S. at 376.

163. *Id.* at 375-76. *See also* Arkansas v. Sullivan, 121 S. Ct. 1876 (2001) (per curiam) (sustaining a roadside inventory search of an automobile following an arrest for traffic offenses).

164. 176 F.3d 560, 563-64 (1st Cir. 1999). The City of Fitchburg had in effect an ordinance that prohibits obstruction of public passages within the city. *Id.* at 561. A maximum penalty for a violation of this ordinance is $300. *Id.* Officers stopped and ordered a group congregated outside a residence to move. *Id.* Minutes after the group refused to move, and without a warrant, "approximately ten members of the [Special Response Team] arrived in an unmarked van and exited with guns drawn." *Id.* The plaintiffs alleged that "they . . . were forced to the ground, frisked, handcuffed, and thrown face down in the van on top of one another. Plaintiffs further allege that, en route to the police station, they were threatened, punched, stepped and spit on, and subjected to racial insults." *Id.*

165. 173 F.3d 1068, 1073 (8th Cir. 1999). The Eighth Circuit determined that a rea-

the *Graham* test, the United States Court of Appeals for the Ninth Circuit, in determining whether excessive force was used in the course of an arrest for a fine-only ordinance, also considers whether any other exigent circumstances existed at the time of the arrest.[166]

PRINCIPAL CASE

The Fifth Circuit Panel Decision

Initially, a unanimous Fifth Circuit panel decided *Atwater v. City of Lago Vista* in favor of Atwater.[167] The three-judge panel undertook its analysis of Atwater's claim that her arrest for failure to wear a seat belt violated her Fourth Amendment rights by examining the reasonableness standard.[168] Although the panel found no case where a court considered a situation like Atwater's, the panel nonetheless proceeded based on the principle that "there is a constitutional right to be free from unreasonable seizures."[169] The panel further determined that, in addition to probable cause, "any seizure which is conducted in an extraordinary manner or which constitutes an extreme practice must meet the reasonableness requirement of the Fourth Amendment."[170]

The Fifth Circuit panel next analyzed the objective reasonableness of Atwater's arrest. In doing so, the panel described the Texas seat belt law as paternalistic—a law that is "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large."[171] The panel explained that laws of this nature differ from most traffic laws, the violation of which can have an immediate impact on the public.[172] Though the panel acknowledged that under Texas law an officer could make a warrantless arrest of a person found committing a violation of the traffic code, the decision to arrest and the

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sonable juror could have found that the subject of the arrest: (1) Was not suspected of any crime when he was arrested, (2) did not resist efforts to arrest him, and (3) posed a threat to no one. *Id.* at 1073-74.

166. Headwaters Forest Defense v. County of Humboldt, 240 F.3d 1185 (9th Cir. 2000). The Court found that the use of pepper spray to remove environmental protestors engaged in acts of civil disobedience was not "reasonably necessary as a matter of law in the totality of the circumstances." *Id.* at 1201.

167. 165 F.3d 380 (5th Cir. 1999).

168. *Id.* at 384.

169. *Id.*

170. *Id.*

171. *Id.* at 385. Atwater was arrested for violating TEX. TRANSP. CODE ANN. § 545.413, requiring the driver, front-seat passenger, and children from ages four to fifteen to wear a seat belt. *Id.*

172. *Atwater*, 165 F.3d at 385.

circumstances surrounding that arrest must be considered in light of the Fourth Amendment.[173]

Respondents argued that Turek's actions were immune from civil suit because he had probable cause to believe that Atwater had violated the seat belt law.[174] Thus, according to the traffic code, nothing further was required to arrest Atwater.[175] In characterizing this argument as an attempt to hide behind the law, the panel cited *Knowles v. Iowa* for the proposition that simply because a statute permitting an arrest exists does not "obviate the need for an independent Fourth Amendment analysis."[176] The panel stated that a reading of the seat belt statute that does not factor in the reasonableness requirement is "patently violative of the Fourth Amendment . . . ."[177] The panel determined that the Texas traffic code did not authorize an arrest for every violation.[178] Reasonableness, in the panel's view, was the key in determining whether to arrest.[179]

The Fifth Circuit panel further attempted to clarify its evaluation of the reasonableness of a seizure by distinguishing between major and minor offenses. With a brief nod to history, the panel relied on the Supreme Court's ruling in *Carroll v. United States* in determining that "[e]arly common law prohibited arrest for very minor offenses."[180]

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173. *Id.*

174. *Id.* at 386.

175. *Id.*

176. *Id. See also* Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994) ("Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity.").

177. *Atwater*, 165 F.3d at 386.

178. *Id.*

179. *Id.*

180. *Id.* Carroll v. United States, 267 U.S. 132, 157 (1925). The Supreme Court in *Carroll* addressed whether the warrantless search of an automobile and the subsequent seizure of liquor found in the automobile violated the Fourth Amendment. *Id.* at 153-57. The Court held that when a seizure is made without a warrant, the officer acts unlawfully unless he can demonstrate probable cause to justify the warrantless seizure. *Id.* at 156. In expressing this principle, the *Carroll* court rejected the argument that when an officer makes a warrantless search leading to an arrest, "the right of seizure should be limited by the common-law rule as to the circumstances justifying an arrest without a warrant for a misdemeanor." *Id.* According to the Court, the reason for common-law warrantless misdemeanor arrests "was promptly to suppress breaches of the peace." *Id.* at 157. Even then, the Court explains, the arrest could not take place unless the breach of the peace was committed in the officer's presence, or the officer reasonably believed that a breach of the peace was about to be committed in his presence. *Id.* Due to the mobile nature of an automobile, the *Carroll* court determined a better rule to be that "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the

Moreover, the panel relied on more recent Supreme Court decisions distinguishing minor and serious criminal offenses.[181] In particular, the panel cited *Welsh v. Wisconsin* for the Supreme Court's holding that the warrantless arrest for the traffic offense committed in that case was unconstitutional.[182]

In response to the respondent's argument that all seizures are reasonable under the Fourth Amendment if based upon probable cause, the panel explained that because Atwater's seizure was conducted in an "extraordinary manner," the seizure must be analyzed in light of *Whren v. United States*.[183] In light of the Supreme Court's holding in *Whren*, the panel "easily conclude[d] that an arrest for a first-time seat belt offense is indeed an extreme practice and a seizure conducted in an extraordinary manner which requires a balancing analysis to determine the reasonableness of the police activity."[184] In the balancing analysis that followed, the panel applied the *Graham* test and concluded that Atwater's seizure was objectively unreasonable.[185] According to the panel, the only possible interest the government had in arresting Atwater was the enforcement of its seat belt law.[186] When weighed against the intrusion on Atwater's privacy, the panel found "no factors existing in this case that are appropriate for placement on the side of the scales that would tilt them in favor of seizure."[187]

The panel also analyzed Atwater's seizure based on Texas state court decisions in situations involving traffic stops resulting in arrest.[188] In all cases, "the arrest ensued only after some additional conduct occurred or some additional factor justifying arrest was revealed."[189] The panel found that when compared with the facts and circumstances in this case, Texas state court precedent indicated that Turek's actions were unreasonable.[190] In limiting its decision to the facts of the case, the panel

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offense may be seized and held as evidence . . . ." *Id.* at 158.

181. *Atwater*, 165 F.3d at 386-87. *See* Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring); Welsh v. Wisconsin, 466 U.S. 740, 753 (1984); Payton v. New York, 445 U.S. 573, 587-90 (1980).

182. For a discussion of *Welsh v. Wisconsin*, *see supra* notes 37-54 and accompanying text.

183. *Atwater*, 165 F.3d at 387.

184. *Id.* at 387.

185. *Id.*

186. *Id.*

187. *Id.* at 388.

188. *See, e.g.*, Madison v. State, 922 S.W.2d 610 (Tex. Ct. App. 1996); Valencia v. State, 820 S.W.2d 397 (Tex. Ct. App. 1991).

189. *Atwater*, 165 F.3d at 388.

190. *Id.*

explained that *Atwater* in no way affected the body of law encompassed in *Whren* that justified brief traffic stops for minor traffic violations.[191] Though traffic violations can become a serious matter affecting public safety, the panel concluded that Atwater's seat belt violation was neither so dangerous nor so serious as to justify her arrest.[192]

The Fifth Circuit En Banc Decision

Roughly eleven months following the Fifth Circuit panel's unanimous decision in *Atwater,* the Fifth Circuit sitting *en banc* reversed the panel's decision and held that when probable cause exists to believe that an individual is committing an offense, the government's interests in enforcing its laws outweigh the individual's privacy interests, and an arrest of the individual is reasonable.[193] Citing *Tennessee v. Garner*, the court explained that the constitutionality of an arrest is determined by balancing the nature and quality of the arrest against the importance of any governmental interests alleged to justify the arrest.[194] Then, the court laid the foundation for its decision by citing *Whren* for the proposition that "[i]f an arrest is based on probable cause then 'with rare exceptions . . . the result of that balancing is not in doubt.'"[195]

Relying on *Whren v. United States*, the Fifth Circuit stated that an arrest based on probable cause is reasonable under the Fourth Amendment unless the arrest is carried out in an extraordinary manner, unusually harmful to the individual's privacy or physical interests.[196] Following its legal foundation, the court turned to the case's facts. Because neither party disputed the fact that Turek had probable cause to arrest Atwater, and because the court determined that Atwater's arrest was not conducted in an extraordinary manner, unusually harmful to her interests, the court concluded that Atwater's arrest was reasonable under the Fourth Amendment.[197]

Though Atwater presented a common-law argument, the Fifth Circuit refused to consider it, noting that Atwater had not previously presented this alternative argument.[198] The Fifth Circuit explained that

191. *Id.* at 389.

192. *Id.*

193. Atwater v. City of Lago Vista, 195 F.3d 242, 245-46 (5th Cir. 1999) (en banc).

194. *Id.* at 244 (citing Tennessee v. Garner, 471 U.S. 1, 8 (1985)).

195. *Id.* at 244 (quoting Whren v. United States, 517 U.S. 806, 817 (1996)) (omission in original).

196. *Atwater*, 195 F.3d at 244-45 (citing *Whren*, 517 U.S. at 818).

197. *Id.* at 245-46.

198. *Id.* at 245 n.3. Atwater argued "that in determining whether her arrest violated the Fourth Amendment, [the court] should follow the common law rule that existed

the panel's treatment of the common law was done at the panel's election, as Atwater had not urged the panel to consider the common-law argument.[199] Thus, because it was not properly raised previously, Atwater waived her rights to advance that argument in that stage of the proceedings.[200]

Though the majority based its opinion solely upon the probable cause requirement coupled with an absence of extraordinary conduct in the course of making an arrest, the dissenting opinions focused on the need for a balancing analysis, in addition to probable cause, to determine whether Atwater's arrest violated the Fourth Amendment. Judge Garza's dissent acknowledged that while there are times when during a traffic stop an officer discovers a situation or observes activity justifying an arrest, such was not the case with Atwater.[201] Judge Garza focused on an affidavit exposing Officer Turek's lack of maturity and failure of two out of three psychological tests as insight into why Atwater's arrest occurred in the first place.[202] Judge Garza concluded his dissent by stating that in his opinion, Atwater's arrest "was unreasonable and therefore a violation of the Constitution of the United States."[203]

Judge Wiener's dissenting opinion likewise disagreed with the majority's analysis. For him, the majority's holding offended the Supreme Court's "longstanding pronouncements that every Fourth Amendment analysis must turn upon a tripartite balancing of individual interests, government interests, and the degree of certainty that the government interest will be furthered by the search or seizure at issue . . . ."[204] In addition, Judge Wiener stated that the majority decision completely ignored the extreme facts of the case.[205] Relying on *Terry v. Ohio*,[206] Judge Wiener explained that when analyzing a Fourth Amendment seizure, a court must balance: "(1) [T]he government's purported interest in effecting the . . . seizure, (2) discounted by the degree of certainty that the . . . seizure will in fact further the government's interest, against (3) the extent of any infringement on the targeted individual's constitutionally protected privacy and liberty interests."[207] In Judge Wie-

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when the Fourth Amendment was promulgated, which she claim[ed] limited the circumstances under which a midemeanant could be arrested without a warrant." *Id.*

199. *Atwater*, 195 F.3d at 245 n.3.
200. *Id.*
201. *Id.* at 246-47 (Garza, J., dissenting).
202. *Id.* at 247 (Garza, J., dissenting).
203. *Id.* (Garza, J., dissenting).
204. *Atwater*, 195 F.3d at 247 (Wiener, J., dissenting).
205. *Id.* (Wiener, J., dissenting).
206. 392 U.S. 1 (1968).
207. *Atwater*, 195 F.3d at 248-49 (Wiener, J., dissenting).

ner's opinion, the majority mistakenly focused on the second factor.[208]

To counter the majority's rigid, yet easily administrable rule that an arrest based on probable cause is sufficient to satisfy the Fourth Amendment, Judge Wiener, relying on the Supreme Court's holding in *Terry*, proposed:

> Before a police officer can constitutionally place an individual under full custodial arrest, even with probable cause, the officer must have a plausible, articulable reason for effecting such an intrusion—a reason other than a desire on the part of the officer to punish the individual for his or her conduct.[209]

Judge Wiener believed this proposed rule to be just as easy to apply and more respectful of the Fourth Amendment's guarantees than the majority's "rigid all-or-nothing" bright-line rule.[210]

Judge Dennis's dissent pointed out the majority's failure to incorporate into its analysis the common law regarding warrantless custodial arrests.[211] Citing *Wyoming v. Houghton*,[212] Judge Dennis explained, "When determining whether a particular governmental action violates the Fourth Amendment, the Supreme Court has said that the first inquiry is whether the action was regarded as an unlawful . . . seizure under the common law when the amendment was framed."[213] Having been convinced by petitioner's briefs, and with reliance upon *Carroll v. United States* and various historical commentaries, Judge Dennis concluded that at common law, Atwater's actions would not have justified a full custodial arrest.[214] Furthermore, even if the common law were found to be inconclusive, Judge Dennis stated that the balancing test required by the Supreme Court and as conducted by the Fifth Circuit panel, clearly indicated that the promotion of legitimate governmental interests did not

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208. *Id.* at 249 (Wiener, J., dissenting).

209. *Id.* at 251 (Wiener, J., dissenting). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that to justify a particular intrusion upon an individual, the "police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.

210. *Atwater*, 195 F.3d at 250-51 (Wiener, J., dissenting).

211. *Atwater*, 195 F.3d at 251 (Dennis, J., dissenting).

212. 526 U.S. 295 (1999).

213. *Atwater*, 195 F.3d at 253 (Dennis, J., dissenting).

214. *Id.* (Dennis, J., dissenting). Carroll v. United States, 267 U.S. 132 (1925). For historical commentaries, see 2 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 436-37 (E.A. Jelf ed., 3d. ed. 1938); SIR WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAW 811-16 (Bernard C. Gavit ed. 1892).

justify the intrusion upon Atwater's privacy and dignity.[215]

The United States Supreme Court Decision

Following the Fifth Circuit's *en banc* decision in *Atwater v. City of Lago Vista*, the United States Supreme Court granted Gail Atwater's petition for *certiorari* to consider "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine."[216]

Justice Souter, author of the majority opinion, began the Court's analysis by examining founding-era common law to determine what traditional protections, if any, were afforded against unreasonable seizures.[217] The Court first determined whether a seizure such as Atwater experienced was unlawful under the common law at the time the Fourth Amendment was drafted.[218] The Court's extensive review of pre-founding English common law and founding-era common law led the Court to conclude, "[t]his, therefore, 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.'"[219] The Supreme Court found "disagreement, not unanimity, among both the common-law jurists and the text-writers . . . ."[220]

In addition to its review of founding-era common law, the Court conducted a complete review of statutory law from the founding era to the present and concluded that "history, if not unequivocal, has expressed a decided, majority view . . . " that warrantless misdemeanor arrests were appropriate regardless of whether the misdemeanant was violent or posed the threat of violence.[221] Though Atwater presented a very strong argument that common law forbade a warrantless misdemeanor arrest not involving breach of the peace, the Court's research, which produced evidence in favor of, and in opposition to, Atwater's argument, caused it to be unable to reach the conclusion Atwater sought.[222] Yet, rather than considering the common law to be dispositive

215. *Atwater*, 195 F.3d at 254 (Dennis, J., dissenting).
216. Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1541 (2001).
217. *Id.* at 1543.
218. *Id.*
219. *Id.* at 1552-53 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (alterations in original).
220. *Id.* at 1546.
221. *Id.* at 1553. *But see id.* at 1561 (O'Connor, J., dissenting) (stating that the majority amply demonstrates in this case that history is inconclusive).
222. *Id.* at 1543 ("Although [Atwater's] historical argument is by no means insubstantial, it ultimately fails.").

of the issue in *Atwater*, the Court proceeded to address the feasibility of a bright-line rule.

After concluding that history was not dispositive of the issue, the Court addressed Atwater's invitation to develop a new rule reflecting the "current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness."[223] Atwater proposed a rule prohibiting custodial arrest, even if probable cause is present, when conviction for the offense could not carry any jail time and when there is no compelling governmental interest for immediate detention.[224] The Court declined Atwater's invitation, explaining that such a rule would result in the kind of case-by-case analysis that its Fourth Amendment decisions have consistently rejected.[225] Instead, the Court explained that it favors rules that are sufficiently clear and easily administered—rules that would survive judicial second-guessing.[226] Though a bright-line rule permitting arrests based on probable cause for misdemeanors and other minor criminal offenses might result in a few needless and pointless arrests, "[m]ultiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked . . . ."[227] In addition, the Court explained, one who is arrested can have his case reviewed if he can make a colorable argument that the warrantless arrest was conducted in an extraordinary or unusually harmful manner.[228]

Thus, the Court established a bright-line rule: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[229] Furthermore, although Atwater's arrest was surely humiliating, it was not extraordinary, as understood in the context of the Fourth Amendment.[230]

According to Justice O'Connor, who authored the four-person dissent, a full custodial arrest is "the quintessential seizure."[231] Thus, an arrest made without a warrant must be reasonable under the Fourth

223. *Id.* at 1553.
224. *Id.*
225. *Id.*
226. *Id.* at 1553-54.
227. *Id.* at 1556.
228. *Id.* at 1556-57.
229. *Id.* at 1557.
230. *Id.* at 1558.
231. *Id.* at 1560-61 (O'Connor, J., dissenting) (citing Payton v. New York, 445 U.S. 573, 585 (1980)).

Amendment.[232] Citing *Pennsylvania v. Mimms*, the dissenters stated that the touchstone of the Court's Fourth Amendment analysis is always reasonableness in all the circumstances of the particular governmental invasion of an individual's personal security.[233] The reasonableness of the governmental activity is analyzed first by resorting to the founding-era common law.[234] Yet, when history is inconclusive, the dissent explains, precedent requires the Court to evaluate the seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which the seizure intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.[235]

Based on this framework, the dissent characterized the majority holding as contrary to the principles that lie at the core of the Fourth Amendment.[236] First, the dissent pointed out that although the Supreme Court had never considered the issue before it in *Atwater*, what it had said about similar issues indicated disapproval.[237] Second, the dissent stated, since the common law as outlined in the majority opinion is unclear with respect to warrantless misdemeanor arrests, the Court must engage in balancing the interests of the parties involved.[238] While the dissent acknowledged that probable cause is necessary to arrest for fine-only offenses, a realistic assessment of the interests implied by such an arrest demonstrates that probable cause alone is not enough.[239]

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232. *Id.* at 1561 (O'Connor, J., dissenting).

233. *Id.* (O'Connor, J., dissenting). Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam). In *Mimms*, the Supreme Court addressed whether an order to step out of a car, issued after the driver had been lawfully detained, was reasonable under the Fourth Amendment. *Id.* at 106-07. Prior to its analysis of the issue, the Court explained:

> The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.

Id. at 108-09 (internal quotations and citations omitted).

234. *Atwater*, 121 S. Ct. at 1561 (O'Connor, J., dissenting) (citing Tennessee v. Garner, 471 U.S. 1, 13 (1985)).

235. *Id.* (O'Connor, J., dissenting) (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

236. *Id.* (O'Connor, J., dissenting).

237. *Id.* (O'Connor, J., dissenting) (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)).

238. *Atwater*, 121 S. Ct. at 1562 (O'Connor, J., dissenting).

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

Though the majority relied on *Whren*, the dissent stated that *Whren* is not at odds with the dissenting Justices' proposition. While *Whren* dealt with traffic stops, a full custodial arrest is a much more severe intrusion on individual liberty and privacy than a traffic stop, and therefore warrants consideration beyond probable cause.[240] Thus, the dissent advanced Judge Wiener's proposed rule: An officer may arrest for a fine-only misdemeanor only when probable cause exists and the officer can articulate specific facts which, taken together, justify the arrest.[241] Absent these articulable reasons, the officer may only issue a citation.[242]

The dissent next challenged the majority's expressed need for a bright-line rule centered on probable cause. Probable cause is itself unclear and is based on a case-by-case situation.[243] Moreover, the dissent contended, Judge Wiener's proposed rule did not undermine the clear and simple rule the majority desired.[244] In acknowledging that Judge Wiener's rule is based on the sometimes-imprecise *Terry* rule, the dissent justified the *Terry* rule's faults in terms of its adherence and sensitivity to Fourth Amendment reasonableness requirements.[245]

Following its proposal of Judge Wiener's rule, the dissent shifted its focus to the majority's concerns that the bright-line rule eliminated section 1983 liability for the misapplication of a constitutional standard.[246] The dissent explained that the doctrine of qualified immunity overcomes these fears by shielding government officials from civil liability for performing discretionary functions so long as their conduct does not clearly violate statutory or constitutional guidelines of which a reasonable person should be aware.[247] According to the dissent, Supreme Court precedent was very clear in refusing to hold an officer personally liable for the mistaken application of the probable cause requirement.[248] Though the appearance of potential liability may have substantial social costs, the dissent contended that the Fourth Amendment should not be

240. *Id.* at 1562-63 (O'Connor, J., dissenting).
241. *Id.* at 1563-64 (O'Connor, J., dissenting).
242. *Id.* (O'Connor, J., dissenting).
243. *Id.* at 1564 (O'Connor, J., dissenting) (citing Wong Sun v. United States, 371 U.S. 471, 479 (1963)).
244. *Id.* (O'Connor, J., dissenting).
245. *Id.* (O'Connor, J., dissenting).
246. *Id.* (O'Connor, J., dissenting).
247. *Id.* (O'Connor, J., dissenting) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
248. *Id.* (O'Connor, J., dissenting) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987)). *See also* Butz v. Economou, 438 U.S. 478, 507 (1978) (holding police not responsible for mere mistakes in judgment).

set aside in attempts to avoid these costs.[249] Constitutional requirements should never be ignored merely to avoid the costs of their just administration.[250]

Finally, the dissent addressed the city's justifications for Atwater's arrest: (1) Enforcement of child safety laws and (2) encouraging Atwater to appear for trial.[251] According to the dissent, the record was clear that Atwater posed no threat to the community, was not a repeat offender, accepted responsibility for her actions, and apologized.[252] Furthermore, with respect to the goal of child welfare, Atwater's arrest was counterproductive.[253] According to the record, the dissent stated, the arrest so severely frightened Atwater's two small children that they require counseling, as they are terrified of the police.[254] With respect to the city's second justification for the arrest—encouraging Atwater to appear for trial—the dissent pointed out that Atwater was a 16-year resident of Lago Vista.[255] Citing the Court's holding in *Wyoming v. Houghton*, the dissent concluded that the city's interests in arresting Atwater did not outweigh the invasion of her privacy and liberty.[256] The dissent admitted that while an officer's subjective motivations for making a traffic stop are not relevant considerations, the fact that such subjective motivations are beyond the reach of the Court requires the Court to vigilantly ensure that an officer's post-stop actions, which are within the Court's control, comport with the requirements of the Fourth Amendment.[257]

ANALYSIS

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249. *Atwater*, 121 S. Ct. at 1564-65 (O'Connor, J., dissenting).

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

251. *Id.* (O'Connor, J., dissenting).

252. *Id.* at 1565-66 (O'Connor, J., dissenting).

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

254. *Id.* (O'Connor, J., dissenting).

255. *Id.* (O'Connor, J., dissenting).

256. *Id.* (O'Connor, J., dissenting). In *Wyoming v. Houghton*, 526 U.S. 295 (1999), the Supreme Court was presented the question of whether "police officers violate the Fourth Amendment when they search a passenger's personal belongings inside an automobile that they have probable cause to believe contains contraband." *Id.* at 297. In balancing the government's interest in the search against the degree of intrusiveness upon personal privacy, the *Houghton* court conducted an historical analysis enabling it to conclude that where probable cause exists "to search for contraband in a car, it is reasonable for . . . officers . . . to examine packages and containers without a showing of individualized probable cause for each one." *Id.* at 302. Thus, a passenger's personal belongings that are in the car are properly within the scope of a search. *Id.* Furthermore, like drivers, passengers of automobiles enjoy considerably diminished expectations of privacy. *Id.* at 304-05.

257. *Atwater*, 121 S. Ct. at 1567 (O'Connor, J., dissenting) (citing Whren v. United States, 517 U.S. 806, 813 (1996)).

Atwater v. City of Lago Vista is a difficult case. And, as is often true, difficult cases make bad law. *Atwater* raises two difficult issues. The first is the bright-line rule. The second is the decision's effect on the future of Fourth Amendment law.

The Bright-line Rule

Though the Court was faced with an arrest for a fine-only traffic violation, the Court decided to expand its focus to include all misdemeanors and other minor traffic violations. The Court's decision to create a new rule encompassing a broad spectrum of minor criminal offenses was appropriate. However, the rule upon which the majority settled is inappropriate because it inaccurately reflects the Supreme Court's Fourth Amendment precedent and denied Ms. Atwater the justice she sought before the Court.[258]

1. The Need for a Bright-line Rule

With respect to establishing a bright-line rule, the majority explained that the Supreme Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."[259] Because officers are often required to apply the Fourth Amendment on the spur of the moment, the Court concluded that any attempt to strike a reasonable balance between government and private interests must "credit the government's side with an essential interest in readily administrable rules."[260] This position appears to be consistent with an abundance of Supreme Court precedent explaining the need to fashion bright-line rules in its Fourth Amendment jurisprudence. For instance, in *United States v. Robinson*, the Court stated that a case-by-case analysis rule for determining the authority of an officer to search incident to a lawful arrest is not in keeping with Fourth

258. The majority acknowledged, "If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail . . . . Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case." *Atwater*, 121 S. Ct. at 1553. However, the majority's desire to establish a bright-line rule governing arrests for all minor criminal offenses effectively "cloak[ed] the pointless indignity that Gail Atwater suffered with the mantle of reasonableness." *Id.* at 1567 (O'Connor, J., dissenting). For the dissenters, because Atwater's humiliation outweighed any governmental interest in effecting the arrest, "the Fourth Amendment inquiry ends there." *Id.* at 1566 (O'Connor, J., dissenting).

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

260. *Id.* at 1553-54.

Amendment precedent.[261] The Court held that the Fourth Amendment does not require quick ad hoc judgments made by officers to be "broken down in each instance into an analysis of each step in the search."[262] Again in *New York v. Belton*, the Court held that the absence of a straightforward rule poses difficulties for courts seeking to apply Fourth Amendment law.[263] Finally, in *Dunaway v. New York*, the Court posited, "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[264]

2. *Probable Cause v. Reasonableness*

The great debate in *Atwater* revolves around whether probable cause should be the controlling standard to justify an arrest for a minor criminal offense, or whether, in addition to probable cause, some form of reasonableness must also be present for an arrest to pass constitutional muster. This debate is not unique to the Supreme Court. The very structure of the Fourth Amendment has led to great scholarly debate over whether the Reasonableness Clause retains independent vitality or whether it is inextricably tied to the Warrant Clause.[265] A basic principle of Fourth Amendment law requires an officer effecting a warrantless arrest for a fine-only offense to act based upon probable cause. For years, the Supreme Court has held that warrantless arrests may be justified upon a showing of probable cause.[266] On the other hand, the Supreme Court has required that such arrests must also be reasonable.[267] For instance, in *Pennsylvania v. Mimms*, the Court clearly stated, "The

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261. 414 U.S. 218, 235 (1973).

262. *Id.*

263. 453 U.S. 454, 458 (1981).

264. 442 U.S. 200, 213-214 (1979).

265. Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 706-13 (1998) (discussing various views with respect to whether the Reasonableness Clause and the Warrant Clause are independent or interrelated).

266. *See, e.g.*, United States v. Watson, 423 U.S. 411, 431-32 (1976) (upholding warrantless felony arrest based upon probable cause and in a public place); Florida v. White, 526 U.S. 559 (1999) (same); Payton v. New York, 445 U.S. 573, 590 n.30 (1980) (holding that an officer may arrest without a warrant for a misdemeanor or felony committed in his presence); Johnson v. United States, 333 U.S. 10, 15 (1948) (same); Carroll v. United States, 267 U.S. 132, 156 (1925) (holding that a police officer may make a misdemeanor arrest without a warrant if the offense was committed in his presence).

267. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 7-8 (1985) (holding that the reasonableness of an intrusion depends not only on when a seizure is made, but also upon how it is carried out); United States v. Ortiz, 422 U.S. 891, 895 (1975) (same). *Accord* Terry v. Ohio, 392 U.S. 1, 28-29 (1968).

touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."[268] Furthermore, the Court recently announced in *Wyoming v. Houghton* that when a historical analysis of Fourth Amendment law proves inconclusive, the Court must "evaluate the . . . seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[269]

The majority in *Atwater* held 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."[270] The majority justified its bright-line rule for two reasons. First, the requirement that warrantless arrests be based upon probable cause is generally considered to be beyond dispute.[271] Furthermore, the oft-cited common law rule that a warrantless misdemeanor arrest is justifiable under the Fourth Amendment if based upon probable cause and if committed in the officer's presence lends support to the majority position.[272] Second, the Court expressed the need for an easily administrable rule.[273] Because the Fourth Amendment is often applied in an instant, both police officers and citizens alike would greatly benefit from a clear-cut rule describing exactly the offenses for which an officer may arrest without a warrant if committed in the officer's presence.[274] Based on these reasons, the Court dismissed Atwater's proposed bright-line rules.[275]

In contrast, the dissent contended that the rule announced by the majority "is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment."[276] For the dissent, "[w]hen a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable."[277] Though the dissent recognized the value of clarity in Fourth Amendment jurisprudence, the dissenting Justices contended that clarity

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268. 434 U.S. 106, 108-09 (1977) (per curiam) (internal quotations and citation omitted).
269. 526 U.S. 295, 300 (1999).
270. Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1557 (2001).
271. *Id.*
272. *Id.* at 1553-54.
273. *Id.* at 1554.
274. *Id.*
275. *Id.* at 1555.
276. *Id.* at 1561 (O'Connor, J., dissenting).
277. *Id.* (O'Connor, J., dissenting).

"by no means trumps the values of liberty and privacy at the heart of the Amendment's protections."[278]

Though readily administrable rules are important, the Court has not always placed the concern for administrative ease above individual protections. For instance, in *Tennessee v. Garner*, the Court required police officers to take into account the totality of the circumstances before making a particular sort of search or seizure.[279] Thus, the Court concluded, the use of deadly force is not justified "where the suspect poses no immediate threat to the officer and no threat to others . . . ."[280] However, the Court refused to believe that this rule would require police to make impossible, split second evaluations of unknowable facts.[281] Relying upon *Terry v. Ohio*, the *Garner* court admitted that while there are practical difficulties associated with attempting to assess the suspect's dangerousness, "similarly difficult judgments must be made by the police in equally uncertain circumstances."[282] One such judgment to which the Supreme Court refers is "the highly technical felony/misdemeanor distinction . . . ."[283] Such a distinction, the Court held, is "equally, if not more, difficult to apply in the field."[284] Nevertheless, the Court determined that from time to time difficult judgments must be made. Yet, the majority in *Atwater* was unwilling to require officers to make these types of distinctions any longer. Instead, the majority felt it necessary to fashion a bright-line rule eliminating the judgment calls that police had been making for years.

The judgment-based rule upon which the *Garner* court relied is found in *Terry v. Ohio*.[285] The familiar *Terry* Doctrine states:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable

278. *Id.* at 1564 (O'Connor, J., dissenting).
279. 471 U.S. 1, 8-9 (1985).
280. *Id.* at 11.
281. *Id.* at 20.
282. *Id.*
283. *Id.*
284. *Id.*
285. 392 U.S. 1 (1968).

> fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[286]

In other words, the officer must act on articulable inferences, not a mere hunch, to justify a search of the suspect's outer clothing.

Over the years since *Terry* was decided, the rule has been administered with varying success. Yet, as the dissent pointed out, "What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment."[287] While not all-inclusive, these two rules are examples of how the Supreme Court has construed the Fourth Amendment balancing of interests to burden the government with reasonableness requirements and judgment calls. Other than the fact, as the majority correctly concludes, that *Terry* also favors a "more finely tuned approach to the Fourth Amendment . . . " than a case-by-case determination, *Terry* lends no further support to the majority position.[288] Unlike the rule announced in *Atwater*, the *Terry* rule requires officers in Fourth Amendment situations to reasonably articulate the need for a search. The *Atwater* rule, on the other hand, contemplates no such requirement.

With the requirements of the *Terry* rule in mind, and knowing of the Supreme Court's apparent satisfaction with the rule's ease of administrability, it is difficult to understand the majority's neglect of the rule proposed by Judge Wiener in the Fifth Circuit dissent. Judge Wiener's rule "require[s] that when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is 'able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."[289] While the majority addressed a number of Atwater's proposed bright-line rules, which are admittedly flawed, the majority completely failed to address the relative ease with which a modified *Terry* rule, such as the dissent proposed, could be administered. Instead, the majority established probable cause as the sole requirement to justify a warrantless arrest for a

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286. *Id.* at 30.

287. *Atwater*, 121 S. Ct. at 1564 (O'Connor, J., dissenting).

288. *Atwater*, 121 S. Ct. at 1554 n.16.

289. *Id.* at 1563-64 (O'Connor, J., dissenting) (quoting *Terry*, 392 U.S. at 21) (alterations in original).

fine-only misdemeanor. Perhaps the reason for the majority's willingness to forgo any sort of reasonableness requirement lies in the holding of *Whren v. United States.*

3. The Problem with Whren v. United States

One of the problems in *Atwater* is the Supreme Court's decision in *Whren v. United States.* Though the majority never expressly relied on the holding in *Whren*, that holding nonetheless enabled the majority to reach its decision in *Atwater.* In *Whren*, the Supreme Court inappropriately equated probable cause with reasonableness. The *Whren* court acknowledged that "*in principle* every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors."[290] However, the Court seemed to say that *in practice* "the result of that balancing is not in doubt where the search or seizure is based upon probable cause."[291]

The decision in *Whren* does not square well with either the traditional definition of probable cause or the Court's reasonableness requirements. Probable cause is traditionally defined as encompassing practical and factual considerations of everyday life on which reasonable and prudent men act.[292] Reasonableness, on the other hand, as established in *Welsh v. Wisconsin*, *Tennessee v. Garner*, and *Graham v. Connor* has very specific requirements that are not found in a probable cause determination, but have been created in addition to it.[293] One such reasonableness requirement is the severity of the offense.[294] Another is whether the offender has threatened or poses an immediate threat to the safety of officers or others.[295] A third requirement is whether the offender poses a flight risk.[296] Finally, even if these three elements are satisfied, the Supreme Court has indicated that the reasonableness of a Fourth Amendment seizure depends upon whether the totality of the circumstances justifies the seizure.[297]

Clearly, the Supreme Court has intended that these considerations be made in addition to the probable cause requirement when determining whether an arrest is reasonable. For instance, in *Graham*,

290. Whren v. United States, 517 U.S. 806, 817 (1996) (emphasis added).
291. *Id.*
292. Brinegar v. United States, 338 U.S. 160, 175 (1949).
293. Welsh v. Wisconsin, 466 U.S. 740 (1984); Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989).
294. *Welsh*, 466 U.S. at 753; *Graham*, 490 U.S. at 396.
295. *Garner*, 471 U.S. at 11; *Graham*, 490 U.S. at 396.
296. *Graham*, 490 U.S. at 396.
297. *Garner*, 471 U.S. at 8-9; *Graham*, 490 U.S. at 396-97.

Garner, and *Welsh*, the officers had probable cause to make a Fourth Amendment seizure. Nevertheless, the Court held in each case that the methods used to conduct the seizure were unreasonable. Thus, the Court's statement in *Whren* that probable cause takes reasonableness into account appears to be at odds with significant precedent.

The Future of Fourth Amendment Law

One of the great concerns following the pronouncement of the *Atwater* rule is its potential effect on the body of Fourth Amendment law pertaining to roving-patrol stops. In *Delaware v. Prouse*, the Supreme Court concluded:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[298]

The purpose of a rule prohibiting indiscriminate roving-patrol stops is to limit "the unbridled discretion of police officers."[299]

Following the announcement of the *Atwater* rule, the prohibition against indiscriminate roving-patrol stops has virtually disappeared for two reasons. First, the pervasiveness with which society in general violates traffic laws will likely provide police with any number of legitimate reasons for stopping a motorist, ranging from exceeding the speed limit by one mile per hour to failing to signal a lane change or failing to perform a proper left turn.[300] Second, the Supreme Court's consistent refusal to inquire into the detaining officer's mind allows the officer to use an insignificant, yet legitimate reason as a pretext to properly stop the driver and, in the course of such detention, request the information the officer suspects the driver is lacking.

Closely aligned with the roving-patrol stop is the roadblock or checkpoint. In fact, the *Prouse* court suggested that a roadblock involving the "[q]uestioning of all oncoming traffic . . ." is a possible solution

298. 440 U.S. 648, 663 (1979).

299. *Id.*

300. This passage should not be read to condone violations of the law. Such is not the case.

to the roving-patrol stop.[301] Although a checkpoint may be an effective means of eliminating dangerous circumstances from a state's highways, and though it may require less effort in its application than indiscriminate roving-patrol stops, for the reasons mentioned above, police may now avoid the checkpoint alternative altogether.

Concerns similar to those expressed in prohibiting roving-patrol stops arise when officers conduct pretextual stops based on racial profiling and similar practices. "Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual."[302] The Court has clearly said that it does not sanction pretextual stops based on racial profiling.[303] However, the Supreme Court's holding in *Whren*, followed by its decision in *Atwater*, calls into question the Court's commitment to police these pretextual stops. From the facts in *Whren*, it is certainly possible that the traffic stop at issue in that case was based upon subjective motivations.[304] However, the *Whren* court dismissed petitioner's allegations regarding the pretextual stop as not having been brought under the proper Amendment to the Constitution.[305] The Court noted that pretextual stop claims implicate officers' subjective intentions in the discriminatory application of the law.[306] Thus, the *Whren* court held, such claims must be brought under the Equal Protection Clause of the Fourteenth Amendment, and not the Fourth Amendment, because inquiring into subjective intentions plays no role in ordinary, probable-cause analysis.[307] Now, combining the rule in *Atwater* with the Supreme Court's refusal to inquire into an officer's subjective

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301. *Prouse*, 440 U.S. at 663. *See also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990) (ruling that sobriety checkpoints are reasonable and serve a legitimate public interest); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (holding that "stops for brief questioning routinely conducted at permanent checkpoints" are appropriate under the Fourth Amendment). *But cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (holding that a checkpoint designed to interdict unlawful drugs violates the Fourth Amendment).

302. Atwater v. City of Lago Vista, 121 S. Ct. 1536, 1567 (2001) (O'Connor, J., dissenting).

303. Whren v. United States, 517 U.S. 806, 813 (1996). The *Whren* Court "agree[d] with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race." *Id.* However, the Court stated that claims alleging pretextual stops based on racial profiling should be brought under the Equal Protection Clause of the Fourteenth Amendment, as such claims have no place in "ordinary, probable-cause Fourth Amendment analysis." *Id.*

304. For a discussion of *Whren v. United States*, see *supra* notes 102-116 and accompanying text.

305. *Whren*, 517 U.S. at 813.

306. *Id.*

307. *Id.*

motivations for making a traffic stop, "the arsenal available to any officer" desiring to harass an individual because of his race, sex, or other genetic qualities, "extends to a full arrest and the searches permissible concomitant to that arrest."[308]

Though it may raise concern that *Atwater* seemingly grants police an ability to evade longstanding Fourth Amendment principles pertaining to roadblocks and pretextual stops, these acts pale in comparison to police officers' new unfettered ability to stop virtually every motorist on the road. Under the *Atwater* rule, when a police officer has probable cause to suspect that a traffic violation has occurred, "the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, and impound the car and inventory all of its contents."[309] In fact, the Supreme Court's recent decision in *Arkansas v. Sullivan* extended police authority in an *Atwater* situation to permit officers to conduct an inventory search along the roadside.[310]

Consistent with the *Atwater* rule's broadening of police powers, the rule all but nullifies the holding in *Knowles v. Iowa*. In *Knowles,* the Supreme Court held as unconstitutional an Iowa statute permitting officers to conduct a full-scale search incident to issuing a citation.[311] Under *Atwater*, however, an officer witnessing a violation of a traffic ordinance may, in lieu of issuing a citation, arrest the offending driver and lawfully conduct a full-scale search of the driver and the vehicle's passenger compartment, including containers and personal belongings.[312] If the search incident to arrest proves fruitless, the arresting officer may simply change his mind and send the motorist on his way with a citation.

Though much of this case note is focused on Fourth Amendment searches and seizures for violations of traffic laws, the majority's decision in *Atwater* clearly indicates that the scope of such a rule is not limited to minor traffic offenses, but includes all misdemeanors.[313] Thus, a person caught littering or jaywalking may, under *Atwater*, properly be arrested, searched, forced to submit to the booking process, and placed

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308. *Atwater*, 121 S. Ct. 1567 (O'Connor, J., dissenting). *See also Whren*, 517 U.S. at 813 (holding that an officer's subjective motivations for making a traffic stop are not relevant).

309. *Atwater*, 121 S. Ct. at 1567 (O'Connor, J., dissenting) (internal citations omitted).

310. Arkansas v. Sullivan, 121 S. Ct. 1876, 1878 (2001).

311. 525 U.S. 113, 117 (1998).

312. Such a search incident to a lawful arrest is condoned by *New York v. Belton*, 453 U.S. 454 (1981), and by *Wyoming v. Houghton*, 526 U.S. 295 (1999).

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

in a holding cell for up to forty-eight hours before being taken before a magistrate for arraignment. When seen in this context, the majority's refusal to consider the need for a reasonableness requirement is all the more bewildering.

Although *Atwater* is the law, it nevertheless remains difficult to comprehend how any governmental interest served by laws against jaywalking and littering justifies such an extensive intrusion into personal privacy. Admittedly, *Atwater v. City of Lago Vista* poses difficult questions requiring well-reasoned answers. However, hiding behind the established principle of probable cause will accomplish nothing but create more problems. For instance, the majority seems to draw support for its decision based on the fact that "there is simply no evidence of widespread abuse of minor-offense arrest authority."[314] Yet, shortly after announcing its decision in *Atwater*, the Supreme Court was unmoved by the Arkansas Supreme Court's unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search for the vehicle with impunity."[315]

Although the United States Supreme Court in a *per curiam* opinion reversed the Arkansas Supreme Court decision, the reversal did not come without reflection upon the majority's statements in *Atwater* pertaining to a "dearth of horribles demanding redress."[316] In a four-person concurring opinion in *Arkansas v. Sullivan*, the dissenting Justices in *Atwater* expressed their support for the majority decision as reflecting the Supreme Court's current case law.[317] However, the four Justices opined that should the *Atwater* decision result in "anything like an epidemic of unnecessary minor-offense arrests," their hope was that the Supreme Court "will consider its recent precedent."[318]

CONCLUSION

Although the Supreme Court in *Atwater v. City of Lago Vista*

314. *Id.* at 1557 n.25. The majority also said that while there may be a few cases of "comparably foolish arrests," it was sure that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Id.* at 1557. The lack of such an epidemic capped the majority's reasoning for rejecting any proposal to modify the probable cause requirement. *Id.*

315. Arkansas v. Sullivan, 16 S.W.3d 551, 552 (2000).

316. *Atwater*, 121 S. Ct. at 1557 (quoted text).

317. Arkansas v. Sullivan, 121 S. Ct. 1876, 1879 (2001).

318. *Id.*

faced a daunting task of determining where to draw the line with respect to warrantless arrests, the difficulty of the task should not excuse the majority's refusal to require that, in addition to probable cause, the arrest comport with standards of reasonableness. As has been shown, Supreme Court precedent is replete with examples of the Court requiring an arrest based upon probable cause to also fall within the confines of the Fourth Amendment's reasonableness requirement. Nevertheless, in favor of an easily administrable bright-line rule, the Court turned its back on the individual protections guaranteed by the Fourth Amendment. Though a "dearth of horribles" has not been reported since the *Atwater* decision came down on April 24, 2001, the concurring opinion in *Arkansas v. Sullivan* indicates that perhaps such fears should not yet be laid to rest. Moreover, the *Atwater* decision may become a cankerous rust that slowly erodes the solid framework of years of Fourth Amendment jurisprudence. *Atwater* now places the stamp of constitutional approval upon the actions of the Officer Tureks of the world who, to harass and embarrass unsuspecting motorists, delight in "cuffing and stuffing" them for even the most minor of offenses.

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