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Constitutional Law - Search and Seizure: The Authority of Peace Officers to Conduct Warrantless Custodial Arrests for Fine-Only Misdemeanor Offenses

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CONSTITUTIONAL LAW–SEARCH AND SEIZURE: THE AUTHORITY OF PEACE OFFICERS TO CONDUCT WARRANTLESS CUSTODIAL ARRESTS FOR FINE-ONLY MISDEMEANOR OFFENSES

Atwater v. City of Lago Vista, 532 U.S. 318 (2001)

I. FACTS

Gail Atwater and her family were long-time residents of Lago Vista, Texas, a suburb of Austin.[1] She was a full-time mother and her husband was an emergency room physician at a local hospital.[2] In March 1997, Atwater was driving her two young children home from soccer practice in Lago Vista.[3] She was travelling at a rate of fifteen miles per hour through a residential neighborhood.[4] All three were in the front seat and not wearing their seatbelts.[5] Officer Turek observed the seatbelt violation[6] and pulled Atwater over.[7] He approached the vehicle and yelled to Atwater, "'we've met before' and 'you're going to jail.'"[8] He then called for backup and requested to see Atwater's driver's license and proof of insurance.[9] When Atwater replied that she did not have the documents because her purse had been stolen the day before, Officer Turek stated that "he had heard that story two-hundred times."[10]

Because Officer Turek's conduct was frightening her children, Atwater asked his permission to take them to a friend's house located nearby.[11] Her request was denied.[12] Officer Turek stated that Atwater's children could

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1. Atwater v. City of Lago Vista, 165 F.3d 380, 382 (5th Cir. 1999).
2. *Id.*
3. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
4. *Atwater*, 165 F.3d at 382.
5. *Atwater*, 532 U.S. at 323-24. Atwater claimed that the children were not wearing seatbelts because they were looking out the window to find a toy that had been lost on the road. Brief for Petitioner at 2, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408).
6. *Atwater*, 532 U.S. at 324. Section 545.413(a) of the Texas Transportation Code requires drivers to secure small children riding in the front seat of a car with a seatbelt, if the car is equipped with a seatbelt. TEX. TRANSP. CODE ANN. § 545.413(a) (West 1999).
7. *Atwater*, 532 U.S. at 324.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

accompany her to the police station.[13] However, one of Atwater's friends learned of the situation and arrived on the scene to take the children.[14]

Atwater remained calm, did not act suspiciously, and did not pose a threat to Officer Turek.[15] Officer Turek was verbally abusive to Atwater.[16] He stated that he had recently stopped her for the same offense, although this previous stop did not result in a citation because the children were actually secured with seatbelts.[17] Officer Turek ridiculed Atwater and insinuated that she was a liar because she could not produce her license and proof of insurance.[18] However, if he had followed proper procedures during the previous stop, he would have known that Atwater was a licensed driver with insurance.[19]

Officer Turek handcuffed Atwater, placed her in the squad car, and drove her to the police station, where she had to empty her pockets and remove her shoes, jewelry, and eyeglasses.[20] Atwater's "mug shot" was taken, and she was placed in a jail cell alone for one hour until she was taken before a magistrate and released on $310 bond.[21] "Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance."[22] She pleaded no contest to the seatbelt offenses and paid a fifty-dollar fine; the other charges were dropped.[23]

As a result of the incident with Officer Turek, Atwater's youngest child required counseling, and Atwater was prescribed medication for nightmares, insomnia, and depression.[24] Atwater and her husband sued Officer Turek, the City of Lago Vista (City), and Police Chief Frank Miller for compensatory and punitive damages in Texas state court under 42 U.S.C. §1983.[25] The City removed the case to the United States District Court for

13. Atwater v. City of Lago Vista, 165 F.3d 380, 382 (5th Cir. 1999).

14. Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001). Atwater's friend found out about the incident from a neighborhood child who passed by while it was occurring. Brief for Petitioner at 4, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408).

15. *Atwater*, 165 F.3d at 382. According to the summary judgment record, there was no evidence that Atwater acted inappropriately. Petitioner's Brief at 3, *Atwater* (No. 99-1408).

16. *Atwater*, 165 F.3d at 382. Specifically, Officer Turek stated that Atwater was not taking care of her children. Petitioner's Brief at 3, *Atwater* (No. 99-1408).

17. *Atwater*, 165 F.3d at 382.

18. *Id.*

19. *Id.*

20. Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001).

21. *Id.*

22. *Id.*

23. *Id.*

24. Atwater v. City of Lago Vista, 165 F.3d 380, 383 (5th Cir. 1999).

25. *Atwater*, 532 U.S. at 325; *see also* 42 U.S.C. § 1983 (Supp. V 1999).

the Western District of Texas.[26] Because Atwater admitted that she violated the law and because she did not allege that her detention was unlawful, the district court concluded that her claim was meritless and granted summary judgment for the City.[27] Atwater then appealed to the United States Court of Appeals for the Fifth Circuit.[28]

Although the district court dismissed Atwater's action for failure to state a claim, the Fifth Circuit decided the issue of whether Officer Turek was entitled to qualified immunity.[29] The court stated that determining whether an official is entitled to qualified immunity is a two-step process, which requires the court to determine first, whether a constitutional right was violated, and second, whether the official's conduct was objectively reasonable.[30] The Fifth Circuit determined that Officer Turek's actions were unreasonable and that he was not entitled to qualified immunity.[31] Therefore, the district court's dismissal of Atwater's Fourth Amendment claim against Officer Turek and the City was reversed and remanded.[32]

The Fifth Circuit granted a rehearing of the case *en banc*.[33] In its analysis, the court stated that the constitutionality of an arrest is determined by balancing the governmental interests in making the arrest against the intrusion on the individual's Fourth Amendment rights.[34] The court further reasoned that when probable cause exists, an arrest is reasonable unless it is abnormally harmful to an individual's interests.[35] The Fifth Circuit determined that Officer Turek had probable cause to arrest Atwater, and he did not conduct the arrest in a manner that was damaging to her privacy interests.[36] Therefore, the district court's decision to grant summary judgment for the defendants was affirmed.[37]

The Supreme Court of the United States granted certiorari to decide "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only

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26. *Atwater*, 532 U.S. at 325.
27. *Id.*
28. *Atwater*, 165 F.3d at 382.
29. *Id.* at 384.
30. *Id.*
31. *Id.* at 389.
32. *Id.*
33. Atwater v. City of Lago Vista, 195 F.3d 242, 244 (5th Cir. 1999). *En banc* means that all of the judges were present and participating in the decision. BLACK'S LAW DICTIONARY 546 (7th ed. 1999).
34. *Atwater*, 195 F.3d at 244.
35. *Id.* at 244-45.
36. *Id.* at 245-46.
37. *Id.* at 246.

by a fine."[38] The Court reasoned that the probable cause standard applies to all arrests, regardless of the circumstances involved.[39] The Court *held* that Atwater's arrest did not violate the Fourth Amendment.[40]

II. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution states that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated."[41] An arrest made without a warrant is a seizure, which the Fourth Amendment requires to be reasonable.[42] The Fourth Amendment applies to seizures of persons and property.[43]

In *Mayo v. Wilson*,[44] a 1799 New Hampshire statute allowed "selectmen" and "tithingmen" to stop and detain any person suspected of needlessly traveling on Sunday.[45] The plaintiff challenged the statute by arguing that it violated the state constitution, and therefore, an arrest could not be justified under it.[46] The plaintiff claimed that a warrant issued by a magistrate was the only way due process allowed for an arrest to be made.[47] In deciding that a warrantless arrest did not violate the state constitution, the court looked at the phrase "*[n]ullus liber homo capiatur vel imprisonetur nisi per legem terrae*," as stated in the Magna Carta.[48]

Specifically, it focused on the last portion of the phrase, *per legem terrae*, which literally means "by due process of law."[49] The court used a rule of construction, which said: if a word used in a statute has a common law meaning, then the statute should be interpreted using that meaning.[50] The court reasoned that a warrantless arrest authorized by statute or common law had always been allowed by due process of law in England under the

38. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
39. *Id.* at 354 (citing Dunaway v. New York, 442 U.S. 200, 208 (1979)).
40. *Id.*
41. U.S. CONST. amend. IV.
42. Payton v. New York, 445 U.S. 573, 585 (1980).
43. *Id.*
44. 1 N.H. 53 (N.H. 1817).
45. *Mayo*, 1 N.H. at 54. Selectmen were annually elected municipal officers. BLACK'S LAW DICTIONARY 1363 (7th ed. 1999). A tithingman was "[a]n elected local official having the function of a peace officer in various American colonies." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2400 (1993).
46. *Mayo*, 1 N.H. at 54.
47. *Id.* at 55.
48. *Id.* at 55-56.
49. *Id.* at 56-57.
50. *Id.* at 55.

Magna Carta.[51] Based on this historical approval of warrantless arrests, the court determined that the statute did not violate the New Hampshire Constitution.[52] The court further reasoned that the constitution adopted common law, which allowed warrantless arrests in cases where guilt was obvious or strongly suggested.[53]

In *White v. Kent*,[54] the Ohio Supreme Court answered the question of whether an 1857 ordinance, which allowed a warrantless arrest to be made when an offense was committed within view of the arresting officer, violated state policy.[55] The plaintiff claimed that state policy permitted warrantless arrests only for felonies or breaches of the peace.[56] Section 74 of the "act to provide for the organization of cities and incorporated villages" stated that watchmen could arrest any person who they saw commit an unlawful act.[57] The court determined that the statute clearly sanctioned warrantless arrests.[58] Despite counsel's argument, there was no indication that the statutes at issue sanctioned warrantless arrests only for felonies and breaches of the peace.[59] The court determined that many ordinances would be almost worthless if offenders could not be arrested without a warrant.[60]

In *Davis v. American Society for the Prevention of Cruelty to Animals*,[61] one of the defendants was appointed by the sheriff to enforce an act meant to prevent cruelty to animals.[62] This defendant went onto the plaintiffs' property and threatened them with arrest based on his belief that they had violated the law.[63] He also arrested a plaintiff and one of the plaintiffs' employees.[64] The plaintiffs, whose business was slaughtering hogs, requested an injunction from the court, whereby the defendant would be prevented from impeding their business.[65] The statute at issue made it a misdemeanor to abuse an animal and allowed the defendant to arrest

51. *Id.* at 57.
52. *Id.*
53. *Id.* at 59-60.
54. 11 Ohio St. 550 (Ohio 1860).
55. *White*, 11 Ohio St. at 551.
56. *Id.*
57. *Id.* at 552-53.
58. *Id.* at 554.
59. *Id.*
60. *Id.*
61. 75 N.Y. 362 (N.Y. 1878).
62. *Davis*, 75 N.Y. at 366.
63. *Id.* at 364-66. The defendants asserted that the plaintiffs slaughtered hogs in a way that caused unnecessary suffering to the animals. *Id.* at 365.
64. *Id.* at 364.
65. *Id.* at 365. The plaintiffs believed that the defendants would "continually interfere with and arrest plaintiffs and their employees" unless prevented by the court. *Id.*

violators.[66] It was not necessary for the defendant to obtain a warrant prior to making an arrest for a misdemeanor violation.[67] In fact, it was determined that the statute provided the warrant.[68] Therefore, the warrantless arrest made by the defendant was appropriate.[69]

Carroll v. United States[70] involved the search and seizure of liquor possessed in violation of the National Prohibition Act.[71] Throughout the opinion, the Court discussed a variety of search and seizure issues, including whether a search and seizure could be made without a warrant.[72] The Court stated the "true rule" of search and seizure as follows:

> [I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.[73]

The strong deference to history and common law reasoning can be seen in *Carroll*, in which the Court stated that the rule is sometimes expressed as follows:

> In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.[74]

This indicated that the *Carroll* Court found that a breach of the peace was a prerequisite for a warrantless misdemeanor arrest.[75]

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66. *Id.* at 367.
67. *Id.*
68. *Id.*
69. *Id.* at 369.
70. 267 U.S. 132 (1925).
71. *Carroll*, 267 U.S. at 143. The National Prohibition Act was passed to enforce the Eighteenth Amendment, which made it unlawful to "manufacture, sell, or transport" liquor. *Id.*; *see also* National Prohibition Act, ch. 85, 41 Stat. 305, 315 (1919) (repealed 1933).
72. *Carroll*, 267 U.S. at 146.
73. *Id.* at 149.
74. *Id.* at 157 (quoting HALSBURY, LAWS OF ENGLAND 612 (1909)).
75. *Id.*

In *United States v. Watson*,[76] a statute allowed postal workers to make a warrantless arrest as long as there was probable cause to believe that a felony had been or was being committed, even if there was time to obtain a warrant.[77] Although *Watson* involved the alleged commission of a felony, the Court also discussed warrantless misdemeanor arrests.[78] The Court reasoned that common law allowed a peace officer to make a warrantless arrest when an unlawful act was committed in the officer's presence.[79] This common law rule continued to be dominant under state law.[80]

In *New York v. Belton*,[81] the Court reasoned that certain exigencies may allow police officers to take action without a warrant.[82] In *Belton*, the Court specifically stated that it was lawful to search the passenger compartment of a vehicle when the officer made a lawful arrest of its occupant.[83] The Court stated that the Fourth Amendment is meant to control the everyday activities of officers, and that Fourth Amendment rules should be easily administrable.[84] In order to be easily administrable, the rules should be simple.[85] The Court deemed it necessary to have recognized standards so that an officer knows the extent of his authority, and a citizen knows the extent of his constitutional protection.[86]

In *Higbee v. City of San Diego*,[87] the Ninth Circuit Court of Appeals decided that a warrantless arrest for a misdemeanor was constitutional.[88] In *Higbee*, the plaintiffs were sales clerks at peep show establishments.[89] The plaintiffs violated San Diego Municipal Code section 33.3317, which constituted a misdemeanor.[90] Police officers advised counsel for the proprietor

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76. 423 U.S. 411 (1976).

77. *Watson*, 423 U.S. at 415. Title 18 U.S.C. § 3061(a)(3) allows those who perform duties related to postal inspection to make warrantless arrests if there are "reasonable grounds" to believe that a felony has been or is being committed. 18 U.S.C. § 3061(a)(3) (2001).

78. *Watson*, 423 U.S. at 418.

79. *Id.*

80. *Id.* at 419.

81. 453 U.S. 454 (1981).

82. *Belton*, 453 U.S. at 457.

83. *Id.* at 460.

84. *Id.* at 458.

85. *Id.* Specifically, the Court stated that a "sophisticated set of rules" would likely be unworkable in the field. *Id.* (quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)).

86. *Id.* at 459-60.

87. 911 F.2d 377 (9th Cir. 1990).

88. *Higbee*, 911 F.2d at 379.

89. *Id.* The court described peep show establishments as "coin-operated movie arcades." *Id.* at 377-78.

90. *Id.* San Diego Municipal Code section 33.3317(a) stated:

> No peep show establishment shall be maintained or operated unless the complete interior of the arcade where the pictures are viewed is visible upon entrance to such pic-

of four stores covered under the section that they were going to inspect the stores and issue field release citations to clerks at stores found violating the code.[91] The police further explained that if subsequent violations of the municipal code occurred, the store clerks would be taken to jail instead of receiving a field release citation.[92] The authority to perform a full custodial arrest was provided by California Penal Code section 853.6(i)(7).[93]

When police officers performed their initial inspection, they found the stores were in violation of section 33.3317 and issued field release citations to the plaintiffs.[94] Upon a second inspection, the police once again found the stores were in violation of section 33.3317 and subsequently arrested the plaintiffs.[95] The Ninth Circuit determined that arresting and jailing the plaintiffs was sanctioned by California law and was consistent with the United States Constitution.[96] The *Higbee* court stated that the practice of allowing officers to conduct warrantless arrests for misdemeanors committed within their presence "has never been successfully challenged and stands as the law of the land."[97]

In *Whren v. United States*,[98] the Court reaffirmed that temporarily detaining an individual is a seizure within the meaning of the Fourth Amendment.[99] The appellant in *Whren* argued that the test for whether a police officer's conduct in making a traffic stop was reasonable under the Fourth Amendment should be whether a reasonable police officer would have made the stop for the rationale given.[100] The Court stated that previous cases have always allowed traffic stops to be made based on probable

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ture arcade. No partially or fully enclosed booths or partially or fully concealed booths shall be maintained. It shall be unlawful for any person to operate, manage or maintain a peep show in violation of this section.

SAN DIEGO, CAL., CODE § 33.3317(a) (1984).

91. *Higbee*, 911 F.2d at 378. A field release citation allowed arrestees to avoid custodial arrest as long as they agreed to appear in court at a given time. *Id.*

92. *Id.*

93. *Id.* "California Penal Code section 853.6(i)(7) provides that a police officer making a misdemeanor arrest may forego field release procedures if the police officer has a reasonable belief that the offense will 'continue or resume.'" *Id.; see also* CAL. PENAL CODE § 853.6(i)(7) (West Supp. 2002).

94. *Higbee*, 911 F.2d at 377.

95. *Id.*

96. *Id.*

97. *Id.* at 379.

98. 517 U.S. 806 (1996).

99. *Whren*, 517 U.S. at 809-10. Thus, the Court determined that an automobile stop must be reasonable to satisfy the Fourth Amendment. *Id.* An automobile stop is generally deemed reasonable when an officer had probable cause to believe that the driver committed a traffic violation. *Id.*

100. *Id.* at 810.

cause, without considering what the officer's subjective intent may have been.[101]

The Court further stated that every Fourth Amendment case involves a balancing of factors in order to determine reasonableness.[102] The Court inferred that when an officer has probable cause, his actions are almost always deemed reasonable.[103] When making a traffic stop, the fact that an officer observed the traffic violation is enough to ensure that he was acting with probable cause.[104] The Court stated that as long as there is probable cause, a balancing test is only required when the search or seizure was in some way extraordinary.[105] The Court determined that a traffic stop is reasonable when an officer has probable cause to believe that a driver violated a traffic law.[106]

In *Wyoming v. Houghton*,[107] the issue was whether police could search a passenger's personal belongings after making a valid traffic stop when there was probable cause to believe that the vehicle contained contraband.[108] The Court reasoned that when deciding whether an officer violated the Fourth Amendment, it first must determine whether the action would have been unlawful under the common law.[109] If it cannot be determined whether the action would have been a violation of common law, then traditional standards of reasonableness should be considered.[110] The Court stated that reasonableness can be determined by weighing the individual's privacy interests against the interests of the government in making the arrest.[111]

When an officer has deprived an individual of his or her rights, the officer can be subject to liability.[112] This liability, known as 42 U.S.C. § 1983 liability, can occur if an officer acted under color of law while de-

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101. *Id.* at 812.
102. *Id.* at 817.
103. *Id.*
104. *Id.* at 817-18 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).
105. *Id.* at 818. The Court described extraordinary searches and seizures as those where the conduct is "unusually harmful to an individual's privacy or even physical interests." *Id.* The Court stated that deadly force, entry into a home that was not announced or without a warrant, and physical intrusion into the body had been considered extraordinary searches. *Id.* (citing Tennessee v. Garner, 471 U.S. 1 (1985); Welsh v. Wisconsin, 466 U.S. 740 (1984); Wilson v. Arkansas, 514 U.S. 927 (1995); and Winston v. Lee, 470 U.S. 753 (1985) as examples of extraordinary searches).
106. *Id.* at 818-19.
107. 526 U.S. 295 (1999).
108. *Houghton*, 526 U.S. at 297.
109. *Id.* at 299.
110. *Id.* at 299-300.
111. *Id.* at 300.
112. 42 U.S.C. § 1983 (Supp. V 1999).

priving an individual of his or her rights.[113] Thus, if an officer acted in a manner that resulted in the deprivation of a constitutional right to a citizen, that officer can be liable to the injured party.[114]

III. ANALYSIS

Atwater was a five-to-four decision by the Supreme Court.[115] Justice Souter wrote the opinion, which Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas joined.[116] The majority held that the Fourth Amendment does not prohibit warrantless arrests for misdemeanors punishable only by fines.[117] Justice O'Connor wrote the dissenting opinion, and was joined by Justices Stevens, Ginsburg, and Breyer.[118] Justice O'Connor found Atwater's arrest unconstitutional because it was inconsistent with the Fourth Amendment.[119]

A. THE MAJORITY OPINION

The Court began its analysis by stating that the determination of whether a search and seizure was reasonable should be made by analyzing what would have been protected at the time the Constitution was framed.[120] According to the Court, the Framers' notion of what was constitutionally reasonable should be a relevant factor, and perhaps even dispositive.[121]

The Court stated that the first phase in determining the legitimacy of Atwater's claim was deciding whether common law limited the authority of peace officers to conduct warrantless misdemeanor arrests to situations that involved a "breach of the peace."[122] Although the Court agreed that the "breach of the peace" argument had some historical foundation, it was not concrete enough to withstand judicial examination.[123] The Court stated that Atwater's historical argument was based on the inaccurate notion that the common law rules regarding warrantless arrests for misdemeanors clearly indicated that such an arrest could only occur for a breach of the peace.[124]

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113. *Id.*
114. *Id.*
115. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
116. *Id.*
117. *Id.*
118. *Id.* at 360. (O'Connor, J., dissenting).
119. *Id.*
120. *Id.* at 326.
121. *Id.* (citing Payton v. New York, 445 U.S. 573, 591 (1980)).
122. *Id.* at 327. Atwater defined "breach of the peace" as "involving or tending toward violence." *Id.* (citing to Petitioner's Brief at 13, *Atwater* (No. 99-1408)).
123. *Id.* at 327-28.
124. *Id.*

However, the Court noted that common law principles regarding warrantless misdemeanor arrests were conflicting at best.[125] In fact, prior to American independence, Parliament consistently granted warrantless arrest authority to cover misdemeanor offenses without requiring that there be a breach of the peace.[126]

Next, the Court addressed Atwater's reliance on the quotation from Lord Halsbury that was cited in *Carroll*.[127] Atwater saw this statement as conclusively ratifying her position that a breach of the peace was a necessary prerequisite to justify a warrantless misdemeanor arrest.[128] However, the Court noted that the quote from *Carroll* was misleading because the *Carroll* Court actually dropped the breach of the peace reference when it stated the "usual rule" as allowing an officer to conduct a warrantless arrest for a misdemeanor committed in the officer's presence.[129] By dropping the breach of the peace reference, the *Carroll* Court implicitly stated that a breach of the peace was not required to make a warrantless misdemeanor arrest.[130]

The Court noted that there was not uniformity among authorities as to whether the right to conduct warrantless arrests extends to misdemeanors.[131] It acknowledged that Atwater's contention, that a breach of the peace was required, was supported by a number of distinguished authorities.[132] However, the Court stated that there was also a significant number of authorities who contended that the right to conduct warrantless misdemeanor arrests was not at all constrained by a breach of the peace prerequisite.[133] In fact, the Court reasoned that, as far back as 1631, there was a decision that stated "a private person (and thus *a fortiori* a peace officer)" did not need a warrant to make an arrest.[134] The Court determined that, con-

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125. *Id.* at 328.

126. *Id.*

127. *Id.*; *see supra* text accompanying note 74.

128. Atwater v. City of Lago Vista, 532 U.S. 318, 328 (2001).

129. *Id.* at 329; *see also* Carroll v. United States, 267 U.S. 132, 156-57 (1925) (clarifying that the common law rule was only sometimes expressed as requiring a breach of the peace).

130. *Atwater*, 532 U.S. at 329.

131. *Id.*

132. *Id.* Some of the authorities mentioned by the Court were Lord Halsbury, who was quoted in *Carroll*; James Fitzjames Stephen, author of *A History of the Criminal Law of England*; and Glanville Williams, *Arrest for Breach of the Peace*, 1954 CRIM. L. REV. 578, 578 (1954). *Id.* Sir Edward East, in *Pleas of the Crown*, also discussed breach of the peace, however, he referred only to its "sufficiency," and "not to its necessity." *Id.* at 329-30 (citing 1 EDWARD EAST, PLEAS OF THE CROWN § 71, 303 (1803)).

133. *Id.* at 330. One of the authorities that contradicted Atwater's position was Sir Matthew Hale, the Chief Justice of the King's Bench from 1671 to 1676. *Id.*

134. *Id.* at 331. This reference was made to *Holyday v. Oxenbridge*, 79 Eng. Rep. 805 (K.B. 1631), a case decided by the Court of King's Bench in 'England, which reasoned that whenever a

trary to Atwater's assertion, there was no consensus among scholars as to what constitutes settled practice in this area of law.[135]

The Court also determined that Parliament's establishment of "divers Statutes" exposed another problem with Atwater's historical argument.[136] These statutes authorized warrantless arrests without a breach of the peace prerequisite.[137] The Court reasoned that there was no doubt that any determination of what was reasonable under the Fourth Amendment would have to be made using the Framers' interpretation of reasonableness, which would no doubt include English statutes.[138] The Court acknowledged that there were English statutes authorizing peace officers and private citizens to make warrantless arrests for nonviolent, minor offenses.[139] In fact, the Court stated that Parliament continually granted the power to make warrantless arrests for misdemeanors with no breach of the peace requirement.[140] This warrantless arrest power was noted in the sixteenth century,[141] the seventeenth century,[142] and the eighteenth century.[143] The Court determined that the numerous exceptions to Atwater's contended "common-law rule" illustrated that there was no clear indication that the Framers of the Fourth Amendment would have found it unconstitutional to conduct a warrantless misdemeanor arrest for an offense not involving a breach of the peace.[144]

The Court further reasoned that American legal history also led to the conclusion that a breach of the peace was not required to justify a warrantless misdemeanor arrest.[145] It determined that a reexamination of American jurisprudence led to a conclusion that was contrary to Atwater's histori-

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private person was justified in making a warrantless arrest, such an arrest would also be justified by a police officer. *Id.* at 331, 332 n.5 (citing 2 WILLIAM HAWKINS, PLEAS OF THE CROWN § 1, 129 (6th ed. 1787)).

135. *Id.* at 332.

136. *Id.* at 333.

137. *Id.*

138. *Id.*

139. *Id.* One example provided was the "nightwalker" statutes, which allowed night watchmen to arrest any stranger walking outside between sunset and sunrise. *Id.*

140. *Id.* at 334.

141. *Id.* In the sixteenth century, a statute allowed peace officers to arrest individuals for playing illegal games, such as "bowling, tennis, dice, and cards," and also allowed officers to arrest individuals that frequented places where such games were played. *Id.* at 334-35.

142. *Id.* at 335. In the seventeenth century, any person could "'seize and detain any . . . hawker, pedlar, petty chapman, or other trading person' found selling without a license." *Id.*

143. *Id.* In the eighteenth century, there was statutory authorization for "the warrantless arrest of 'rogues, vagabonds, beggars, and other idle and disorderly persons' (defined broadly to include jugglers, palm-readers, and unlicensed play-actors), 'horrid' persons who 'profanely swear or curse,'" individuals who blocked the public streets, and "negligent carriage drivers." *Id.*

144. *Id.*

145. *Id.* at 336.

cal assertion.[146] Expanding on this historical background, the Court recognized that prior to and during the framing of the Bill of Rights, both the colonies and the states sanctioned warrantless misdemeanor arrests.[147] In fact, many of the original states allowed peace officers to conduct warrantless misdemeanor arrests.[148] The Court determined that because the Fourth Amendment was based on many states' search and seizure provisions, there was strong evidence that indicated the Framers' intent was to grant equivalent arrest authority to federal law enforcement officers.[149]

The Court stated that it was also detrimental to Atwater's argument that just one year after ratifying the Fourth Amendment, Congress vested federal marshals with power to enforce federal laws.[150] This power was equivalent to the power that sheriffs and deputies had to enforce the laws of their respective states.[151] Further, the Court determined that historical evidence did not demonstrate that the Framers of the Fourth Amendment were troubled by law enforcement officers' ability to conduct warrantless arrests.[152] The Court stated that the Fourth Amendment could not be interpreted as requiring a breach of the peace in order for a peace officer to conduct a warrantless arrest for a misdemeanor violation.[153]

The Court also found that there was no indication that a breach of the peace requirement was instituted after the Constitution was created.[154] As indicated by the Court in *Payton v. New York*,[155] the states were unanimous in allowing for warrantless misdemeanor arrests without considering whether a breach of the peace occurred.[156] The Court acknowledged that it has had limited opportunity to analyze warrantless misdemeanor arrest authority.[157] However, in its limited examination of the issue, the Court has always focused on whether the arresting officer witnessed the offense, not whether there was a breach of the peace.[158]

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146. *Id.*

147. *Id.* at 337.

148. *Id.* As support for this proposition, the Court cited the New Hampshire Constitution and the Pennsylvania Constitution, which served as models for the Fourth Amendment. *Id.*

149. *Id.* at 339.

150. *Id.*

151. *Id.*

152. *Id.* at 339-40.

153. *Id.* at 340.

154. *Id.*

155. 445 U.S. 573 (1980).

156. Atwater v. City of Lago Vista, 532 U.S. 318, 340 (2001) (quoting *Payton*, 445 U.S. at 590).

157. *Id.*

158. *Id.*

The Court cited a number of nineteenth century cases that upheld state and local laws authorizing warrantless misdemeanor arrests without requiring a breach of the peace.[159] For instance, the New Hampshire Supreme Court upheld a statute that allowed peace officers to stop and detain any person suspected of traveling without reason on the Lord's day.[160] The Connecticut Supreme Court of Errors upheld a statute which allowed a "justice of the peace" who had "personal knowledge of any person's [sic] being guilty of drunkenness, profane swearing, cursing or sabbath-breaking" to arrest that person without a warrant.[161] The Illinois Supreme Court determined that a Chicago ordinance, which allowed policemen to make warrantless arrests for unlawful behavior committed in an officer's presence, was acceptable.[162] The Ohio Supreme Court upheld a statute that permitted the arrest of any person guilty of unlawful behavior committed in the presence of a peace officer.[163] Finally, the New York Court of Appeals upheld a statute that allowed deputized individuals to arrest people who violated a statute created to prevent cruelty to animals.[164]

The Court further based its decision on the legislative custom of allowing warrantless misdemeanor arrests,[165] the judicial custom of sustaining such statutes under constitutional attacks,[166] and legal commentary acknowledging the constitutionality of warrantless arrests for misdemeanors.[167] In fact, the Court found that all fifty states, as well as the District of Columbia, statutorily permitted misdemeanor arrests by peace officers without the requirement that a breach of the peace occur.[168] The Court reasoned that current writings about the topic confirmed that warrantless misdemeanor arrests were dominant and had not been successfully disputed when the misdemeanor was committed within an officer's presence.[169] The Court determined that contrary to Atwater's contention, there

159. *Id.* at 342-43.

160. Mayo v. Wilson, 1 N.H. 53, 54, 60 (N.H. 1817).

161. Holcomb v. Cornish, 8 Conn. 375, 378-79 (Conn. 1931).

162. Main v. McCarty, 15 Ill. 441, 442 (Ill. 1854).

163. White v. Kent, 11 Ohio St. 550, 552-53 (Ohio 1860)).

164. Davis v. Am. Soc'y for the Prevention of Cruelty to Animals, 75 N.Y. 362, 366 (N.Y. 1878).

165. Atwater v. City of Lago Vista, 532 U.S. 318, 343-44 (2001) (quoting FISHER, LAWS OF ARREST § 59, at 130 (1967), which stated that many states have statutorily authorized warrantless misdemeanor arrests).

166. *Id.* at 344 (quoting BEALE, CRIMINAL PLEADING AND PRACTICE § 21, at 20 n.7 (1899), which stated that statutes permitting warrantless misdemeanor arrests for offenses committed within an officer's presence are constitutional).

167. *Id.* at 343-44. The Court explained that the constitutionality of these statutes was never based on a breach of the peace prerequisite. *Id.* at 345.

168. *Id.* at 344.

169. *Id.* at 345 (quoting Higbee v. San Diego, 911 F.2d 377, 379 (9th Cir. 1990)).

was never a clear rule requiring a breach of the peace before a warrantless misdemeanor arrest could be made.[170]

The Court next decided whether to grant Atwater's request for a new constitutional rule.[171] The proposed rule was termed by the Court as a "modern arrest rule," which would prohibit custodial arrests when there is no possibility of a jail sentence and no compelling need to detain.[172]

The Court reasoned that the rule might have been appropriate based on the facts of Atwater's case.[173] However, it determined that Fourth Amendment inquiry into governmental need should not be determined on a case-by-case basis.[174] The Court supported this position by stating that police must apply the Fourth Amendment almost instantaneously in the field.[175] The Court ascertained that there is a need for easily administrable rules; and therefore, clear and simple standards of reasonableness, which will sustain judicial review after the event, should be established.[176]

The Court stated that Atwater's proposed rule initially appeared uncomplicated; however, further investigation revealed that inherent complications would arise if it was adopted.[177] Atwater's proposal included a system where the line would be drawn between "jailable" and "fine-only" offenses.[178] The Court determined that problems would arise when applying this criterion because a street officer may be unable to determine whether an offense is "jailable" or "fine-only."[179] The Court stated that one reason for the inability to make this determination is because similar offenses lead to different penalties based on facts difficult to know at the time of an arrest.[180] Some of the specific questions the Court used to illustrate this were these: "Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only

170. *Id.* (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)).

171. *Id.* at 346.

172. *Id.* Atwater stated that this "modern arrest rule" would not necessarily require a breach of the peace. *Id.*

173. *Id.* The Court stated that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case." *Id.* at 347.

174. *Id.* A case-by-case determination could have the effect of causing every discretionary judgment to become "an occasion for constitutional review." *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 347-48.

178. *Id.* at 348.

179. *Id.* This is partially because "penalty schemes" are often quite elaborate. *Id.*

180. *Id.*

line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge?"[181]

Atwater's proposed "modern arrest rule" did not end at a determination of whether an offense was "jailable" or "fine-only."[182] She said a qualifying provision should be added, which would authorize warrantless arrests when compelled by the traffic laws or when there was danger to others.[183] The Court determined that this created even more difficulties, including uncertainty in administration.[184] The Court deduced that difficulties would occur when applying the exceptions to situations like speeding.[185] The Court determined that

> there is a world of difference between making that judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest, and making the same judgment when the question is the lawfulness of the warrantless arrest itself. It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or (as here) personal § 1983 liability for the misapplication of a constitutional standard, on the other.[186]

The Court determined that the proposed "modern arrest rule" would cause police great difficulty in the administration of justice and would increase litigation over many arrests.[187] This was because the current rule, which gives an officer discretion in choosing between issuing a summons and making an arrest, would be modified to a form where the issue would become whether the warrantless arrest itself was lawful.[188] The Court determined that this clearly conflicted with previous holdings and statutes, which specifically allowed warrantless arrests to occur based on probable cause, without requiring exigent circumstances to exist.[189]

The Court stated that a "tie-breaker"[190] would also not work because it would, in essence, be a "least-restrictive–alternative limitation,"[191] which

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181. *Id.* at 348-49.
182. *Id.* at 349.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 350.
187. *Id.*
188. *Id.*
189. *Id.* at 350 n.21.
190. *Id.* at 350. A tie-breaker means that if the police are in doubt as to whether a custodial arrest is appropriate, they should not arrest. *Id.*
191. In referring to the least-restrictive-alternative, the Court was discussing the least-restrictive-means test, a concept that requires a law to be drafted so that it is "only as restrictive as

would be inappropriate for a Fourth Amendment analysis.[192] The Court decided that these least-restrictive-alternative limitations were inappropriate for a Fourth Amendment analysis because, after the fact, it would almost always be possible to hypothesize some alternative action that could have reached governmental objectives.[193] The Court reasoned that the costs of a "tie-breaker" system would outweigh the benefits because an officer, who was unsure whether an offense was jailable, and thus a violation that justified custodial arrest, would opt not to arrest.[194] "Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked."[195]

The Court stated that, in reality, warrantless misdemeanor arrests probably were not of such significance that they needed to be addressed constitutionally.[196] As a basis for this statement, the Court explained that anyone arrested has the right to a probable cause hearing within forty-eight hours.[197] Further, the Court stated that Atwater was given a probable cause hearing without delay.[198] The Court stated that certain jurisdictions have actually imposed restrictions on warrantless arrests for minor offenses.[199] According to the Court, it is easier to impose such limitations statutorily, rather than judicially, because legislatures can create statutory limitations if there is a rational relationship between the statute and what the statute is meant to control.[200] Also, the Court stated that it is in the states' own interests to impose limitations on warrantless arrests for misdemeanor offenses because the costs of arresting for "petty-offense[s]" outweigh the bene-

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is necessary to accomplish a legitimate governmental purpose." *Id.*; BLACK'S LAW DICTIONARY 901 (7th ed. 1999).

192. Atwater v. City of Lago Vista, 532 U.S. 318, 350 (2001).

193. *Id.* (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 629 (1989)).

194. *Id.* at 351-52.

195. *Id.* at 351. Atwater conceded this point. *Id.*

196. *Id.* at 351-52.

197. *Id.* at 352. The probable cause hearing is guaranteed whether an arrest is for a felony or a misdemeanor. *Id.* This is because the government has no interest in detaining individuals who have been arrested without probable cause. *Id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991)).

198. *Id.* Texas law states that persons arrested for traffic offenses are to be taken before a magistrate immediately. TEX. TRANSP. CODE ANN. § 543.002 (West 1999).

199. Atwater v. City of Lago Vista, 532 U.S. 318, 352 (2001). In support of this proposition, the Court cited statutes from a number of states. *Id.*; *see also* ALA. CODE § 32-1-4 (1999); CAL. VEH. CODE § 40504 (West 2000); KY. REV. STAT. ANN. § 431.015(1)-(2) (Michie 1999); LA. REV. STAT. ANN. § 32:391 (West 1989); MD. CODE ANN., TRANSP. § 26-202(a)(2) (1999); S.D. CODIFIED LAWS § 32-33-2 (Michie 1998); TENN. CODE ANN. § 407-7-118(b)(1) (1997); VA. CODE ANN. § 46.2-936 (Michie Supp. 2000).

200. *Atwater*, 532 U.S. at 352. The Court could create a limitation only if that limitation could be subsumed under a broader Constitutional principle. *Id.*

fits.[201] Perhaps most importantly, the Court reasoned that individuals could still seek judicial review of an arrest to determine whether it was done in a manner that was abnormally harmful to their interests.[202] Combined, this led to the Court's determination that warrantless arrests for arguably trivial misdemeanors rarely occur.[203] In the Court's words, there is not an "epidemic of unnecessary minor-offense arrests."[204]

The Court determined that probable cause is the standard to determine the appropriateness of an arrest, without requiring individual facts to be taken into consideration.[205] The Court stated that if an officer has probable cause to believe that an offense occurred in the officer's presence, the offender could be arrested.[206] The Court determined that the probable cause requirement ensures that the Fourth Amendment is not violated.[207]

The Court concluded that Atwater's arrest was constitutional, and that Officer Turek had probable cause to presume she committed an unlawful act by failing to wear her seatbelt.[208] In fact, she even admitted to the seatbelt violation in court.[209] Thus, the Court determined that Officer Turek was authorized to make a full custodial arrest.[210] The Court reasoned that Officer Turek was not required to determine that a governmental interest would be furthered before arresting Atwater.[211]

Furthermore, the Court stated that the arrest was not extraordinarily damaging to Atwater's privacy or physical interests.[212] The Court reasoned that the determination of whether an arrest was "extraordinary" depends on

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201. *Id.* The amount of officer time and energy that could be put into making arrests for petty offenses would exceed any sort of societal benefit from those arrests. *Id.* Thus, state legislatures have an interest in limiting the situations in which police officers have custodial arrest power. *Id.*

202. *Id.* at 352-53 (citing Whren v. United States, 517 U.S. 806, 818 (1996)).

203. *Id.* at 353. In fact, during oral arguments, Atwater's attorney offered only one instance of a "comparably foolish, warrantless misdemeanor arrest." *Id.* His example was an instance where a twelve-year-old girl was arrested for eating french fries in a subway station. *Id.* at 353 n.23. In that instance, the girl was arrested during a one-week long crackdown devised to enforce the law against eating on Metro cars and in Metro stations. Petula Dvorak, *Metro Snack Patrol Puts Girl in Cuffs: 12-year-old Eating Fries Among 35 Cited or Arrested in Zero-Tolerance Crackdown*, THE WASHINGTON POST, Nov. 16, 2000, at A1. Because she was a juvenile charged with a criminal offense, it was statutorily required that she be taken into custody. *Id.* She was handcuffed, searched, transported to the detention center, and fingerprinted. *Id.*

204. *Atwater*, 532 U.S. at 353.

205. *Id.* at 354.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

the method by which it was executed.[213] The Court acknowledged that Atwater's arrest was humiliating, but not more harmful than a typical custodial arrest.[214] The Court determined that "[t]he arrest and booking were inconvenient and embarrassing to Atwater," but were not violations of the Fourth Amendment.[215]

B. JUSTICE O'CONNOR'S DISSENT

Justice O'Connor authored the dissenting opinion, which Justices Stevens, Ginsburg, and Breyer joined.[216] The dissent began by stating that the majority's position was "inconsistent with the explicit guarantee of the Fourth Amendment."[217]

According to Justice O'Connor, "[a] full custodial arrest . . . is the quintessential seizure" because it is the seizure of one's person.[218] In addition, she reasoned that a full custodial arrest made without a warrant must be reasonable.[219] According to Justice O'Connor, the measure of a Fourth Amendment analysis should be the reasonableness of the government's actions under the totality of the circumstances.[220] She determined that common law has often been used in determining the reasonableness of police activity.[221] When common law is not conclusive, Justice O'Connor stated that traditional standards of reasonableness must be used.[222] This requires balancing the individual's privacy interests against the government's interests.[223] Justice O'Connor determined that reasonableness must be determined on a case-by-case basis.[224] According to Justice O'Connor, the majority's decision, which allowed an officer to conduct a warrantless misdemeanor arrest, was not supported by precedent or by Fourth Amendment principles.[225]

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213. *Id.* at 354.

214. *Id.*

215. *Id.* at 355.

216. *Id.* at 360 (O'Connor, J., dissenting).

217. *Id.*

218. *Id.* (citing United States v. Watson, 423 U.S. 411, 428 (1976)).

219. *Id.* at 361. Justice O'Connor noted that the reasonableness requirement is stated in the plain language of the Fourth Amendment. *Id.*

220. *Id.*

221. *Id.* This common law history is just one consideration when determining the reasonableness of police activity. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 362. Justice O'Connor noted that "the majority allow[ed] itself to be swayed" by the possibility of excessive constitutional review. *Id.* at 361.

Contrary to the Court's holding, Justice O'Connor determined that previous dicta indicated disapproval of warrantless arrests for misdemeanor offenses punishable only fines.[226] As support, she stated that, at a minimum, probable cause must be present in order to make an arrest.[227] According to Justice O'Connor, common law did not provide a consistent rule for warrantless misdemeanor arrests, so a balancing test was required.[228] Furthering this proposition, Justice O'Connor stated that probable cause to make a warrantless arrest for a fine-only misdemeanor was a necessary condition, but not a sufficient condition.[229] An officer must have probable cause to make a warrantless arrest, but the balancing test should also be required to determine Fourth Amendment reasonableness.[230]

Justice O'Connor determined that there are crucial differences between a traffic stop and a full custodial arrest.[231] Both are seizures, but according to Justice O'Connor, a custodial arrest involves a significantly greater invasion into an individual's interests.[232] For example, during a traffic stop, the driver expects a short delay and a citation, but then expects to be free to leave.[233] Thus, violating a traffic law leads to a limited invasion of the individual's interests.[234] However, Justice O'Connor stated that probable cause to believe a fine-only offense was committed does not necessarily justify invading an individual's interests by making a full custodial arrest.[235] She reasoned that "[j]ustifying a full arrest with the same quantum of evidence that justifies a traffic stop . . . defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."[236]

Justice O'Connor explained that an individual's liberty and privacy are invaded when a full custodial arrest occurs.[237] According to Justice

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226. *Id.* Previous discussions were dicta because the Court has "never considered the precise question asked here." *Id.* at 362. The previous cases that have indicated disapproval for warrantless misdemeanor arrests punishable only by a fine include *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) and *United States v. Robinson*, 414 U.S. 218, 238 (1973). *Id.*

227. *Id.* For felonies with the potential for imprisonment, probable cause is a sufficient condition to make a warrantless arrest. *Id.* Thus, a warrantless arrest for a felony has consistently been permitted. *Id.*

228. *Id.* at 363.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 363-64.

234. *Id.* at 364.

235. *Id.*

236. *Id.*

237. *Id.* Some invasions that can occur during a full custodial arrest include a search of the person, confiscation of possessions, and a search of the vehicle. *Id.*

O'Connor, this invasion occurs because it may be forty-eight hours before there is a hearing on probable cause.[238] This detention time may be dangerous to those arrested for misdemeanor violations because alleged perpetrators of all offenses may be housed together.[239] Justice O'Connor further reasoned that the arrest also becomes incorporated into the public record.[240]

According to Justice O'Connor, the Court previously asserted that a state's interest in arresting an individual is most clearly determined by the penalty assigned to the particular offense.[241] She further explained that if an offense's penalty is a fine, there is limited state interest in conducting a full custodial arrest.[242] Clarifying her position, Justice O'Connor stated that there may be certain occasions when such an arrest would be deemed appropriate, such as when it was necessary to "abate criminal conduct[,] . . . to verify the offender's identity[,] and, if the offender poses a flight risk, to ensure her appearance at trial."[243] According to Justice O'Connor, absent these circumstances, a citation serves governmental interests as effectively as an arrest.[244]

Justice O'Connor stated that the reasonableness of a full custodial arrest is determined by whether it was necessary to advance governmental interests.[245] A full custodial arrest is not reasonable when the punishment for the offense can only be a fine.[246] Justice O'Connor determined that a rule allowing police officers to make an arrest every time a fine-only misdemeanor has occurred is contrary to the reasonableness requirement of the Fourth Amendment.[247] She determined that instead

> 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.[248]

Justice O'Connor explained that the majority used probable cause as a bright-line rule for the purpose of easy administration, even though prob-

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238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 365.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).
246. *Id.* at 365-66.
247. *Id.* at 366.
248. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

able cause has never been particularly well-defined.[249] Justice O'Connor stated that probable cause, by definition, requires a case-by-case determination of reasonableness.[250] She acknowledged that clarity is important, but it does not trump the Fourth Amendment's requirements.[251]

Justice O'Connor stated that the majority's reasons for requiring a bright-line rule—the potential for 42 U.S.C. § 1983 liability and the "disincentive to arrest . . . where . . . arresting would serve an important societal interest"—could be solved through qualified immunity.[252] She explained that reasonableness of searches and seizures is different from reasonableness under qualified immunity.[253] Justice O'Connor further explained that reasonableness under qualified immunity protects officials from liability when performing discretionary functions, as long as their conduct did not violate "statutory or constitutional rights of which a reasonable person would have known."[254] According to Justice O'Connor, reasonableness under the Fourth Amendment protects an officer from liability when he or she mistakenly determined that a search or seizure was constitutional, if the mistake was reasonable.[255]

Justice O'Connor asserted that Atwater's arrest was not reasonable.[256] She explained that Officer Turek acted appropriately in making the stop, but nothing supported his judgment in making the arrest.[257] According to Justice O'Connor, "Officer Turek's actions severely infringed Atwater's liberty and privacy."[258] Justice O'Connor asserted that some of his inappropriate actions included being "loud and accusatory," frightening her children, failing to inform Atwater of her Miranda rights immediately after deciding that he was going to arrest her, and refusing her request to take the

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249. *Id.*

250. *Id.* Justice O'Connor further stated that her rule would require a legitimate reason for turning the seizure into a full custodial arrest. *Id.*

251. *Id.* For example, the *Terry* Rule, although arguably imprecise, has proven to be easily administrable. *Id.* The *Terry* Rule allows police officers to briefly detain, question, and search an individual when the officer has reasonable suspicion to believe that the person has committed, or is about to commit, a crime. *Terry*, 392 U.S. at 27-28.

252. Atwater v. City of Lago Vista, 532 U.S. 318, 366-67 (2001) (citing the majority opinion). Qualified immunity protects government agents from civil liability "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 367 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

253. *Id.*

254. *Id.* (citing *Harlow*, 457 U.S. at 818).

255. *Id.*

256. *Id.* at 368.

257. *Id.* According to Justice O'Connor, Officer Turek did not properly balance Atwater's interests with the interests of Texas, which is required to determine the reasonableness of Fourth Amendment seizures. *Id.*

258. *Id.*

children to a nearby friend's house.[259] Justice O'Connor explained that all of these actions occurred prior to taking Atwater to jail and booking her.[260]

According to Justice O'Connor, the City claimed two interests in arresting Atwater even though Officer Turek never stated any reasons for his actions.[261] Those interests were "the enforcement of child safety laws and encouraging [Atwater] to appear for trial."[262] Justice O'Connor stated that neither of these supposed interests was valid because Atwater posed no danger to the community and she likely would have placed her children in seatbelts if she had been cited.[263] Justice O'Connor further stated that the arrest was actually detrimental in regards to child welfare.[264]

According to Justice O'Connor, there was no reason to arrest Atwater to ensure her appearance in court because she was not a flight risk, nor was she "likely to abscond."[265] Justice O'Connor reasoned that when governmental interests in arresting Atwater were balanced with her privacy interests, it was clear that Officer Turek's actions were excessive.[266]

According to Justice O'Connor, the majority's per se rule allowing warrantless misdemeanor arrests for fine-only offenses has the potential for serious backlash because a wide spectrum of offenses constitutes fine-only misdemeanors.[267] While such laws are a valid exercise of the state's power, Justice O'Connor stated that the potential for unjust enforcement of them is troubling.[268] According to Justice O'Connor, warrantless misdemeanor arrests for fine-only offenses are now completely within the discretion of the officer, without requiring the officer to articulate his or her reasoning.[269] Justice O'Connor reasoned that officer discretion has a strong likelihood for abuse.[270] She explained that the reasonableness of a traffic stop is not determined by a police officer's subjective intent so there must be vigilance in

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259. *Id.*

260. *Id.* Justice O'Connor found it ironic that Officer Turek did not fasten Atwater's seatbelt after placing her into the police car. *Id.* at 369.

261. *Id.*

262. *Id.*

263. *Id.* at 369-70.

264. *Id.* at 370. After witnessing the event, one child had to see a psychologist, and both children were "terrified at the sight of any police car." *Id.*

265. *Id.* She was a sixteen-year resident of the small town of Lago Vista, population 2,486. *Id.* Officer Turek knew that she was a local resident. *Id.* at 371.

266. *Id.*

267. *Id.*

268. *Id.* at 371-72. For example, if an officer has probable cause to believe that a traffic violation has occurred, he may make an arrest, search the driver, search the passenger compartment of the car, impound the car, and inventory the car's contents. *Id.* at 372.

269. *Id.*

270. *Id.*

requiring an officer's actions to be reasonable.[271] According to Justice O'Connor, the majority's desire for administrative ease camouflaged Atwater's arrest with reasonableness.[272]

Justice O'Connor determined that a custodial arrest, because it is a seizure, must be reasonable in order to be constitutional under the Fourth Amendment.[273] In order to determine reasonableness, an individual's right to privacy must be balanced against legitimate governmental interests.[274] Justice O'Connor stated that the majority created a per se rule allowing warrantless arrests of individuals who have committed fine-only traffic offenses.[275] According to Justice O'Connor, this was contradictory to the Fourth Amendment, which explicitly requires that a seizure be reasonable.[276]

IV. IMPACT

The Supreme Court's decision in *Atwater* has been cited in several cases.[277] While the decision may impact federal law, it will have little, if any effect on North Dakota law.[278] This is because North Dakota statutory law grants officers the authority to issue a citation when an individual is violating the seatbelt laws, but not the authority to make a full custodial arrest in such a situation.[279]

A. SUBSEQUENT DECISIONS

In *Garrett v. City of Bossier City*,[280] Garrett was stopped by a police officer for a seatbelt violation.[281] He was then placed under full custodial arrest for not being in possession of his driver's license.[282] While the officer's decision to stop Garrett was lawful, it was the subsequent arrest for

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271. *Id.*

272. *Id.* at 373.

273. *Id.* at 360.

274. *Id.*

275. *Id.* at 371.

276. *Id.*

277. *See generally* West v. Commonwealth, 549 S.E.2d 605 (Va. Ct. App. 2001); Garrett v. City of Bossier City, 792 So. 2d 24 (La. Ct. App. 2001); Hilgeman v. State, 790 So. 2d 485 (Fla. Dist. Ct. App. 2001); Caldwell v. State, 780 A.2d 1037 (Del. Super. Ct. 2001); United States v. Swanson, 155 F. Supp. 2d 992 (C.D. Ill. 2001).

278. *See generally* N.D. CENT. CODE § 39-07-07 (1997) (giving police officers the authority to stop an individual violating the seatbelt law).

279. *Id.*

280. 792 So. 2d 24, 25 (La. Ct. App. 2001).

281. *Garrett*, 792 So. 2d at 25.

282. *Id.*

failure to produce a driver's license that was at issue.[283] The Louisiana Court of Appeals stated that *Garrett* was distinguishable from *Atwater*.[284] The Louisiana statute specifically stated that only a summons could be issued after determining that a driver was not in possession of his license, as long as the license was not suspended, revoked, or cancelled.[285] This was different from the statute at issue in *Atwater*, which gave discretion to the officer in determining whether to issue a citation in lieu of arrest.[286] While the police officer in *Garrett* was ultimately found not liable on other grounds, it was determined that the arrest was statutorily prohibited, and therefore, the city was liable.[287]

In *Hilgeman v. State*,[288] Hilgeman was approached by officers while sitting in a parked taxi because they believed that he was violating the law by drinking alcohol in public.[289] Hilgeman was subsequently searched and arrested for possessing cocaine.[290] When the officers approached the vehicle, they had no suspicion of any crime other than the suspected open container violation.[291] However, it was ultimately determined that Hilgeman was not violating the open container law, and as such, the officers had no basis for arresting him.[292] This was distinguished from *Atwater* because in *Hilgeman* the State admitted that there had been no violation of the open container ordinance, and thus the State had no statutory authorization to arrest Hilgeman.[293] The Florida Appellate Court determined that his conviction for possession of cocaine, which was discovered pursuant to an unlawful search, should be dismissed.[294]

In *Caldwell v. State*,[295] a motorist was stopped for parking in a fire lane, which was statutorily prohibited.[296] The officer who made the stop admitted that his decision was partially based on his recognition of

283. *Id.* at 26.
284. *Id.*
285. *Id.* at 27; *see also* LA. REV. STAT. ANN. § 32:411.1(C)(1) (2001).
286. *Garrett*, 792 So. 2d at 26.
287. *Id.* at 28. The officer was deemed unaccountable because the arrest was made based on a "*de facto* departmental policy" stating that individuals who were unable to produce a license should always be jailed. *Id.* This policy was initiated based on a judge's recommendation. *Id.*
288. 790 So. 2d 485 (Fla. Dist. Ct. App. 2001).
289. *Hilgeman*, 790 So. 2d at 486.
290. *Id.*
291. *Id.*
292. *Id.* at 487.
293. *Id.* at 487 n.2.
294. *Id.* at 487.
295. 780 A.2d 1037 (Del. Super. Ct. 2001).
296. *Caldwell*, 780 A.2d at 1042.

Caldwell as a person involved in drug dealing.[297] Drugs and drug paraphernalia were ultimately discovered in the car.[298] Caldwell was convicted of a variety of drug-related offenses.[299] He appealed the lower court's decision on six different grounds.[300] One of Caldwell's contentions on appeal was that even though the initial stop may have been valid, "the officer's conduct during the stop was not reasonably related to the justification for the traffic stop and therefore violated his constitutional rights."[301]

The Delaware Supreme Court determined that the traffic stop, which included a pat down search and the use of handcuffs, was not justifiably related to the stop for the parking violation, and therefore, the officer's conduct was not justified.[302] The court reasoned that the officer had authority to make a warrantless arrest for the traffic violation, but the officer could only arrest the individual for an unrelated criminal offense if the officer had probable cause.[303] Thus, the court determined it was error to deny Caldwell's motion to suppress the evidence obtained as a result of the unlawful arrest.[304]

B. APPLICATION TO NORTH DAKOTA LAW

It remains to be seen exactly how *Atwater* will affect the jurisprudence of North Dakota courts. The North Dakota Century Code does provide authority for warrantless misdemeanor arrests.[305] North Dakota Century Code section 29-06-15 lists eight situations in which a peace officer may

297. *Id.*

298. *Id.* at 1043. Drugs were also found at Caldwell's residence due to information provided by the passenger in Caldwell's vehicle at the time of the stop. *Id.* at 1043-44.

299. *Id.* at 1044.

300. *Id.*

301. *Id.*

302. *Id.* at 1049.

303. *Id.* at 1051 n.33.

304. *Id.* at 1059-60.

305. N.D. CENT. CODE § 29-06-15 (Supp. 2001) (listing when warrantless arrests may occur).

arrest without a warrant.[306] However, none of these situations involves seatbelt violations.[307]

North Dakota law requires the use of seatbelts in vehicles designed for fewer than eleven passengers if the vehicle was originally manufactured with seatbelts.[308] However, the statutory duty of a police officer when making a stop based on a violation of a traffic regulation provides the citizen with more protection than that allowed in *Atwater*.[309] According to North Dakota statutory law, when a person is stopped because of a seatbelt violation, the officer is allowed to take the name and address of the individual, take the license plate number of the vehicle, and issue a summons or notify the person in writing of his right to request a hearing.[310] The officer is not allowed to make a custodial arrest or require the individual to go with the officer to a different location if the traffic violation was considered noncriminal under North Dakota Century Code section 39-06.1-02.[311] Thus, North Dakota police officers may not conduct full custodial arrests for seatbelt violations.[312]

V. CONCLUSION

The issue in *Atwater* was a question of first impression for the Supreme Court of the United States.[313] In making its decision, the Court thoroughly analyzed the history of warrantless misdemeanor arrest jurisprudence.[314] It

306. N.D. CENT. CODE § 29-06-15(1)(a)-(h). According to the relevant provisions, an officer may make a warrantless misdemeanor arrest for committing or attempting a public offense in the officer's presence, committing felonies, committing a public offense not considered a felony and not committed in the officer's presence, driving or being in actual physical control of a vehicle while under the influence of alcohol, violating a protective order, engaging in domestic violence, or being under the influence of volatile chemical vapors. *Id.* North Dakota also statutorily provides for instances when an individual may not be entitled to release based on officer discretion. N.D. CENT. CODE § 39-07-09 (Supp. 2001). However, this provision involves situations in which the individual has engaged in a second offense in addition to the seatbelt violation. *See id.*

307. N.D. CENT. CODE § 29-06-15(1)(a)-(h).

308. N.D. CENT. CODE § 39-21-41.4 (1997). However, a police officer can only issue a citation for a seatbelt violation if that officer has stopped the driver for a different violation. N.D. CENT. CODE § 39-21-41.5 (1997). Thus, seatbelt violations can only be secondarily enforced; they cannot be the source of the initial stop. *Id.*

309. N.D. CENT. CODE § 39-07-07 (1997); *see generally* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

310. N.D. CENT. CODE § 39-07-07.

311. *Id.* Any person charged under section 39-07-07 is charged with a noncriminal offense. N.D. CENT. CODE § 39-06.1-02 (1997).

312. N.D. CENT. CODE § 39-07-07.

313. *Atwater*, 532 U.S. at 362.

314. *See generally id.*

ultimately determined that making warrantless misdemeanor arrests for fine-only offenses, such as traffic stops, is constitutional.[315]

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315. *Id.* at 354.