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Atwater in North Dakota: Soccer Moms Beware, Sometimes

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ATWATER IN NORTH DAKOTA: SOCCER MOMS BEWARE, SOMETIMES

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In good law review style and tradition, Ms. Kristi Schatz, in her recent case comment on *Atwater v. City of Lago Vista*,[1] described the United States Supreme Court's holding that a warrantless arrest for Ms. Atwater's misdemeanor seatbelt violation, punishable by a fine only, was not unreasonable under the Fourth Amendment.[2] In her section on the application of the case in North Dakota, she observed, "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*."[3] The author noted that North Dakota Century Code section 39-07-07 permits an officer who cites a person for a seatbelt violation[4] to take the driver's name, address, and license plate number, and then issue a summons and notify the motorist of the right to request a hearing. She concluded that an

> 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 is considered noncriminal under North Dakota Century

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1. 532 U.S. 318 (2001).

2. Kristi Schatz, Comment, *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), 78 N.D. L. REV. 381, 383-84 (2002).

3. *Id.* at 407 (citing N.D. CENT. CODE § 39-07-07 (1997)).

4. Actually, the case comment author wrote "when a person is stopped because of a seatbelt violation" despite her recognition that the secondary enforcement provision of North Dakota Century Code section 39-21-41.5 arguably precludes a police officer from "stopping" a motorist for a seatbelt violation. *Id.* at 407 & n.308; N.D. CENT. CODE § 39-21-41.5 (1997) (stating a person may not be cited for a seatbelt violation "unless the officer lawfully stopped or detained the driver of the motor vehicle for another violation"). Section 39-21-41.5 does not explicitly limit an officer's authority to stop a person for a seatbelt violation; rather, it simply prohibits an officer from issuing a ticket for a seatbelt violation unless the motorist is stopped for another violation. N.D. CENT. CODE § 39-21-41.5. This paradoxical statute has not been interpreted to limit police authority to make investigative stops. Some, including co-author Lockney, find it troublesome to encourage officers to make investigative stops based on reasonable suspicion of a minor traffic offense. Thomas M. Lockney, *Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases*, 72 N.D. L. REV. 967, 974-82 (1996).

> Code section 39-06.1-02. Thus, North Dakota police officers may not conduct a full custodial arrest for a seatbelt violation.[5]

Her conclusion mirrors co-author Lockney's earlier reply to a question from a colleague, Professor Randy Lee, who, upon learning of the result in *Atwater*, sent an e-mail reacting as follows:

> I am still reeling from that opinion of a couple of days back on the full-bore arrest—handcuffs, throw in the cruiser, downtown, book, mug, print, and tank until initial appearance—of the woman for a misdemeanor no-jailtime-possible, citation authorized, seat-belt violation. As a matter of North Dakota state law, is there anything that makes that not possible here? I understand the majority's notion that an arrest is constitutional for Fourth Amendment purposes if authorized by state law, in that case an officer witnessed misdemeanor, unless some positive law gets in the way. What I want to know is whether in ND there is some positive law that gets in the way—something that denies arrest power where citation is allowed, or directs citation first and arrest only if citation is ignored, or limits sworn officers' arrest power to 'crimes' for which jail time is a legally possible punishment. If there is no such positive law here, I may start trying to get some enacted. And, yes, I do indeed recognize that her specific case would not happen here—that our seatbelt law does not work like theirs. Pick some other infraction.[6]

Lockney's blithe response foreshadowed Ms. Schatz's sanguine assurances that we need not worry about *Atwater* in North Dakota:

> You've focused on several big problems with the opinion, and with the law generally. But to answer your specific question: We are in pretty good shape in North Dakota. In the 1970s we decriminalized most traffic offenses. As part of that (*See generally* N.D.C.C. ch. 39-06.1, an admittedly Byzantine set of statutes), we also limited arrest powers. So, two important steps were taken. First, we decriminalized traffic offenses (Chapter 39-06.1; probably sufficient for your purposes are 39-06.1-02 & 05). Then, read N.D.C.C. 39-07-07 which says no arrest generally for noncriminal traffic offenses, and 39-07-09 for exceptions.

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5. Schatz, *supra* note 2, at 407.

6. E-mail from Randy Lee, Professor of Law, University of North Dakota School of Law, to Thomas Lockney, Professor of Law, University of North Dakota School of Law (Apr. 26, 2001, 10:23:28 CST) (on file with authors).

> Indeed, one might say that North Dakota in essence enacted by statutory law in the 1970s what 4 justices (and perhaps you) believe in 2001 should be the law of the Fourth Amendment. Given my experience here (municipal judge, writer of city ordinances, etc.), I have an additional quibble with the *Atwater* opinion's misleading cite in the appendix to the misdemeanor arrest statute, but failure to refer to the decriminalization statutes and others (cited above) that would not allow the *Atwater* result in North Dakota.[7]

Professor Lee replied, "I am MUCH relieved. At least as to traffic offenses."[8] And so matters might have stood, with two professors and the law review writer confident that, at a minimum, if Atwater had been driving without a fastened seatbelt in North Dakota, she would have been protected by North Dakota legislation against the Texas result (a custodial arrest).

But for a second opinion, Lockney sent his e-mail correspondence with Professor Lee to co-author Mark Friese, a Fargo attorney, Lockney's former student and research assistant, and most pertinent to analysis of *Atwater*, a former patrolman for over five years with the Bismarck, North Dakota, police department. Friese's reply cautioned:

> Ah, but there are always exceptions. What first comes to mind is the ND provision allowing arrest of the nonresident traffic violator (who is involved in an accident) (N.D.C.C. sec. 29-06-15.1). Similar to *Atwater*, I observed the peeved cop invoke the arcane statute to arrest a person for a seemingly insignificant violation. Moreover, how long does it take for a cop to incite someone to the point that their behavior becomes a criminal offense? (You don't want my cynical answer on this question.)[9]

Although Friese could recall from his five years as a police officer only a single incident of an officer invoking the provision permitting arrest of a nonresident traffic violator,[10] he subsequently emphasized the potential

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7. E-mail from Thomas Lockney, Professor of Law, University of North Dakota School of Law, to Randy Lee, Professor of Law, University of North Dakota School of Law (Apr. 26, 2001, 10:46 CST) (on file with authors).

8. E-mail from Randy Lee, Professor of Law, University of North Dakota School of Law, to Thomas Lockney, Professor of Law, University of North Dakota School of Law (Apr. 26, 2001, 10:50:56 CST) (on file with authors).

9. E-mail from Mark Friese, attorney at law, Vogel, Weir, Hunke & McCormick, Ltd., to Thomas Lockney, Professor of Law, University of North Dakota School of Law (Apr. 26, 2001, 22:57:26 CST) (on file with authors).

10. N.D. CENT. CODE § 29-06-15.1 (1991). The code permits a police officer to arrest a nonresident traffic violator at the scene of an accident if the officer's investigation provides "reasonable and probable grounds" that the person committed a traffic violation in connection with the

enormity of the loophole provided by section 39-07-09 to the "catch and release" provisions of section 39-07-07. Section 39-07-09 states:

> Section 39-07-07 does not apply to a person if:
>
> 1. The halting officer has good reason to believe the person guilty of any felony or if the person is halted and charged with an offense listed in section 39-06.1-05 but not listed in subsection 2; or
> 2. The halting officer, acting within the officer's discretion, determines that it is inadvisable to release the person upon a promise to appear and if the person has been halted and charged with any of the following offenses:
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> a. Reckless driving.
>
> b. Driving in excess of speed limitations established by the state or by local authorities in their respective jurisdictions.
>
> c. Driving while license or driving privilege is suspended or revoked for violation of section 39-06-42, or an equivalent ordinance.
>
> d. Operating a modified vehicle.
>
> e. Driving without liability insurance in violation of section 39-08-20.
>
> f. Failing to display a placard or flag, in violation of any rule implementing section 39-21-44, while transporting explosive or hazardous materials.
>
> g. Operating an unsafe vehicle in violation of subdivision b of subsection 1 of section 39-21-46.
>
> The halting officer forthwith shall take any person not released upon a promise to appear before the nearest or most accessible magistrate.[11]

While most of the violations section 39-07-09 exempts from section 39-07-07 are criminal traffic offenses, the authorization for a police officer to detain a speeder or a driver of a modified vehicle can hardly provide solace to Professor Lee. Speeding is one of the most common noncriminal

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accident, and "the officer has reasonable and probable grounds to believe the person will disregard a written promise to appear in court." *Id.*

11. N.D. CENT. CODE § 39-07-09 (Supp. 2001).

traffic offenses in North Dakota, and operating a modified motor vehicle can include a variety of seemingly insignificant traffic violations.[12]

North Dakota has complicated matters by classifying traffic offenses as either criminal offenses or noncriminal traffic violations. Most criminal offenses committed by drivers are class B misdemeanors, punishable by up to thirty days in jail, a fine of up to $1000, or both.[13] Some, however, are labeled "infractions," punishable by a maximum fine of $500 with no possibility of a jail sentence if a first offense.[14] The statute providing the punishment level for infractions specifies that:

> Any person convicted of an infraction who has, within one year prior to commission of the infraction of which the person was convicted, been previously convicted of an offense classified as an infraction [presumably the same offense, although the statute isn't explicitly so limited] may be sentenced as though convicted of a class B misdemeanor. If the prosecution contends that the infraction is punishable as a class B misdemeanor, the complaint shall specify that the offense is a misdemeanor.[15]

Section 39-06.1-02 specifies that a person cited under state law or municipal ordinance for a traffic violation not listed in section 39-06.1-05 is "deemed to be charged with a noncriminal offense."[16] Section 39-06.1-05 then lists "offenses excepted," for which the noncriminal procedures spelled out in Chapter 39-06.1 are not authorized.[17] The list includes a variety of offenses, including felonies (homicide resulting from operation of a motor vehicle); misdemeanors such as reckless driving, driving under the influence, and driving under suspension; and infractions.[18]

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12. N.D. CENT. CODE § 39-21-45.1 (1997). Section 39-21-45.1, Modification of a Motor Vehicle, contains a litany of enumerated modifications including: vehicles must have front and rear bumpers, the bumper height and body height must be within certain ranges, and tires and bumpers must conform to certain Department of Transportation standards. *Id.* Moreover, the statute permits the Director of the Department of Transportation to "promulgate rules to implement this section." *Id.* § 39-21-45.1(7). Those rules, contained in chapter 52-04 of the North Dakota Administrative Code, set forth a number of additional vehicle modifications that apparently constitute the offense of modification of a motor vehicle. Representative are steering wheel size, brake modifications, muffler modifications, steering adjustments, the number and type of mirrors required, door and hood latch requirements, and numerous others. *See generally* N.D. ADMIN. CODE § 52-04-02-01 to -05 (1984). Logically followed, while it seems one cannot be jailed for a seatbelt violation in North Dakota, one could arguably be jailed for driving a vehicle with a bumper that is too high, a steering wheel that is too small, or an inoperable door handle or hood latch.

13. N.D. CENT. CODE § 12.1-32-01(6) (1997).

14. *Id.* § 12.1-32-01(7).

15. *Id.*

16. N.D. CENT. CODE § 39-06.1-02 (1997).

17. N.D. CENT. CODE § 39-06.1-05 (Supp. 2001).

18. *Id.*

In 1986, the North Dakota Attorney General interpreted the relationship of the motor vehicle modification statute and the North Dakota statute permitting a traffic violator to be jailed until disposition of the offense.[19] The attorney general concluded that operating a modified motor vehicle constitutes an infraction, and one who violates the statute, and is unable to post bond, can be jailed "until disposition of the offense."[20] In a subsequent opinion, the attorney general stated:

> Prior to 1977, N.D.C.C. § 39-21-46 established the penalty for a violation of a provision of N.D.C.C. ch. 39-21 as a fee of $20.00. However, in 1977, Senate Bill 2272 changed the $20.00 fee assessment to the current infraction penalty. . . .
>
> There is no question that Senate Bill No. 2272 as adopted by the 1977 Legislature changed the penalty provision by increasing the penalty for a violation of the provision of N.D.C.C. ch. 39-21.
>
> An examination of those statutory provisions in which a N.D.C.C. ch. 39-21 violation is treated as a noncriminal offense fails to disclose substantial legislative changes since the 1977 amendments of N.D.C.C. § 39-21-46(1).
>
> In the 1985 Legislative Session, N.D.C.C. § 39-21-45.1, pertaining to the modification of a motor vehicle, was made a criminal offense by specific exclusion from N.D.C.C. § 39-06.1-05. In the amendments to N.D.C.C. § 39-21-45.1, no penalty provision was adopted. Rather, the criminal penalty provision of N.D.C.C. § 39-21-46(1) was utilized to provide the criminal penalty for the previous section. In N.D. Op. Att'y Gen 86-1, I concluded that a violation of N.D.C.C. § 39-21-45.1 constituted an infraction, a criminal offense.[21]

The legislative effort to classify offenses based on their seriousness is muddled by the grant of broad discretion to officers to arrest drivers for relatively trivial offenses such as operating a motor vehicle with inoperable door handles, misaligned bumpers, or nonconforming tires.[22] Furthermore, because first offense infractions are "fine-only" offenses, similar to but more expensive than the statutory fees assessed for noncriminal traffic

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19. 1986 N.D. Op. Att'y Gen. No. 1, 1.

20. *Id.* at 6.

21. 1987 N.D. Op. Att'y Gen. No. 25, 117-18.

22. *See* N.D. CENT. CODE § 39-21-45.1 (1997) (modification of a motor vehicle); N.D. ADMIN. CODE ch. 52-04; *see also* N.D. ADMIN. CODE § 52-04-02-01 (1984) (providing that a modified motor vehicle may not be operated without operational door handles and latches for all doors permitting entry or exit from the passenger compartment).

violations, violation of a modified motor vehicle provision is not substantially distinguishable from a noncriminal traffic violation.[23]

In addition to permitting arrest for the infraction of operating a modified motor vehicle, section 39-07-09 also permits officers, in their discretion, to arrest motorists for speeding—a noncriminal traffic offense.[24] The remainder of section 39-07-09's exceptions to section 39-07-07's arrest prohibition are criminal offenses such as reckless driving, a class B misdemeanor,[25] which reflects the legislature's judgment that they are more serious, presumably because they constitute more dangerous driving. For example, a speeder, who presents a serious danger, may be arrested and charged with the misdemeanor of reckless driving. The officer who is unsure about what to charge may still charge the misdemeanor and utilize the alternative citation approach without taking the driver into custody.[26] The primary question is why the legislature sought fit to allow arrests for any noncriminal offenses or equipment-related infractions.

To clarify some potential consequences of the current situation in North Dakota, imagine the following *Atwater*-like scenario. Fargo Police Officer Kerut and Gale Bylake, like Texas Police Officer Turek and Gale Atwater, have had a previous hostile encounter. Ms. Bylake is driving her two children home to Moorhead, Minnesota, from their soccer game in Fargo, North Dakota. Because the game went into overtime, she is hurrying home to prepare dinner—driving thirty-nine miles per hour in a thirty mile

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23. 1986 N.D. Op. Att'y Gen. No. 1, 3. The North Dakota Attorney General noted that a violator of the modified motor vehicle provision "can be held in custody pending such violator's appearance or trial before the court" and suggested a bail-setting procedure and possible release on personal recognizance. *Id.* at 6. According to the attorney general, a bail-setting procedure would "ensure that a person not be needlessly detained when detention serves neither the ends of justice nor the public interest." *Id.* at 7. Finally, the attorney general indicated his intention to notify the legislature of the "potentially harsh results" of his opinion and the legislation classifying the motor vehicle modification provision. *Id.*

24. N.D. CENT. CODE § 39-07-09 (Supp. 2001).

25. N.D. CENT. CODE § 39-08-03 (1997).

26. At least this is true for the offenses listed in North Dakota Century Code section 39-07-09(2). Any reader who doubts Lockney's characterization of section 39-06.1 as Byzantine in his e-mail to Professor Lee can decide for him or herself by engaging in the mental gymnastics required to read section 39-06.1-02 (specifying some, but not all, violations of Title 39 traffic offenses as noncriminal) together with section 39-06.1-05 (exempting specified Title 39 offenses from the noncriminal procedures specified in sections 39-06.1-02 and -03 without using the words "criminal" or "noncriminal"), together with section 39-07-07 (specifying certain offenses for which it appropriate to issue a summons, but prohibiting taking into custody anyone charged with a section 39-06.1-02 noncriminal offense), together with section 39-07-09 (which specifies that section 39-07-07 does not apply to felons, or offenses listed in section 39-06.1-05, unless listed in subsection 2, presumably subsection 2 of section 39-07-09, not section 39-06.1-05, the section cited immediately before the words "but not listed in subsection 2," and then, in subsection two listing a variety of misdemeanors, infractions, and the noncriminal offense of speeding). "Byzantine" is defined as "very complex or intricate." RANDOM HOUSE WEBSTER'S DICTIONARY 90 (1993).

per hour zone. Officer Kerut is running radar and turns on his red lights to stop her for speeding. As she pulls over, in her hurried and agitated state, she runs up on the curb, hits, and slightly bends a post supporting a sign boldly proclaiming, "Welcome to North Dakota, the Peace Garden State." As Officer Kerut walks up to her window to get her license, he notices that the bumper on her husband's pickup, which she is driving because her car is in the shop, seems a bit high. Using the tape measure that he carries in his glove compartment, Officer Kerut verifies that he is correct—the bumper is twenty-eight inches high.[27] Officer Kerut breaks the bad news to Ms. Bylake, stating, "You'll be getting a couple of tickets today." Ms. Bylake responds, "I'm never paying another ticket in this state again!"

Officer Kerut, a keen student of the law, realizes that for most traffic offenses, because of section 39-07-07, he would be authorized only to write her a ticket. But today is his lucky day. He contemplates sections 29-06-15.1 and 39-07-09 and determines that he may exercise his discretion. Because he has three possibilities, section 29-06-15.1 for the "accident" of hitting the post,[28] section 39-07-09(b) for the speeding violation, and section 39-07-09(d) because of the modified vehicle,[29] it is permissible for him to do to Ms. Bylake what he remembers reading the United States Supreme Court allowed his Texas colleague, Officer Turek, to do to Ms. Atwater. Since it is just after closing time at the courthouse, he decides that he will simply arrest her and take her to the local jail. At the jail, Ms. Bylake can either post a bond according to a bond schedule, or if she lacks the cash bond—or if a bond amount is not set for the offense—she will spend the evening in jail, awaiting an appearance before a judge the following morning.[30]

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27. *See* N.D. CENT. CODE § 39-21-45.1(3) (noting the maximum permissible bumper height is twenty-seven inches when measured "from a level ground surface to the highest point on the bottom of the bumper").

28. N.D. CENT. CODE. § 29-06-15.1 (1991). In addition to the accident, Officer Kerut would have to determine reasonable and probable grounds exist to believe both that Ms. Bylake "has committed any offense" in the traffic code and that Ms. Bylake "will disregard a promise to appear in court." *Id.* The term "reasonable and probable grounds" is not defined, but Ms. Bylake's statement indicating she would not pay a ticket would arguably provide a sufficient basis for the officer's decision to arrest.

29. N.D. CENT. CODE § 39-07-09(d) (Supp. 2001); *see also* N.D. CENT. CODE § 39-21-46(1) (1997) (requiring it to be proven beyond a reasonable doubt that Ms. Bylake knew her vehicle was unsafe or improperly equipped). Officer Kerut, however, would hardly be the first officer to determine that, if contested, such mental state requirements are best left for determination at trial.

30. Or perhaps days later depending on the intervention of weekends and holidays, and on the concern, or lack thereof, with the dictates of the Fourth Amendment that up to forty-eight hours detention is presumptively reasonable although circumstances might render a shorter time unreasonable or a longer time reasonable. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 144 (1975).

Assume further that Officer Kerut's underlying motive was not enforcing the alleged traffic violations, but was rather to seek a means of conducting an exploratory search of Ms. Bylake's car.[31] *Whren v. United States*,[32] quickly followed by *State v. Storbakken*[33] in North Dakota, assures Officer Kerut that if he stopped the car on a suspicion, mere hunch, or even an off chance that Ms. Bylake might be in possession of an illegal substance, his stop or arrest would not be invalid as long as he had probable cause[34] to believe a traffic violation had been committed.[35] Once the officer decided not to release Ms. Bylake, under the discretion permitted by sections 29-06-15.1 and 39-07-09, the officer would undoubtedly conduct a search incident to arrest of both Ms. Bylake's person and the passenger compartment of her car.[36] If Officer Kerut believes the noncriminal nature of the offense may invalidate his search, he might still conduct an inventory search for the "protection" of the vehicle or property therein.[37]

Ms. Bylake then would suffer not only the indignity of being taken into custody, but also the added invasion of privacy occasioned by a search of her vehicle. If the legislature truly believes, in the spirit of the 1970s decriminalization of minor traffic offenses, and the language of section 39-07-07, that persons halted for noncriminal offenses should be released, the "loopholes" provided by section 29-06-15.1 and section 39-07-09 should be eliminated. Speeding should be removed from the list of offenses for which an arrest is permitted because seriously dangerous speeding may be prosecuted criminally as reckless driving.[38]

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31. Or, assume that Officer Kerut possessed some other illicit or ill-conceived motive for stopping Ms. Bylake's vehicle.

32. 517 U.S. 806 (1996).

33. 552 N.W.2d 78 (N.D. 1996).

34. State v. Stadsvold, 456 N.W.2d 295, 296 (N.D. 1990) (stating "traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops"). While the purported standard for stopping a motorist is the lesser reasonable suspicion standard, in *Whren*, the parties stipulated that probable cause existed for the stop. *Whren*, 517 U.S. at 810.

35. *See Whren*, 517 U.S. at 810 (stating that an automobile stop is reasonable when police have probable cause to believe a traffic violation has occurred); *Storbakken*, 552 N.W.2d at 80 (stating that even minor traffic violations "provide officers with requisite suspicion for conducting investigatory stops").

36. *See, e.g.*, New York v. Belton, 453 U.S. 454, 462-63 (1981) (permitting a police officer to search the passenger compartment of a car and the persons therein incident to the lawful arrest of an occupant of the car).

37. *See* South Dakota v. Opperman, 428 U.S. 364, 384 (1976) (permitting police to inventory the contents of a lawfully seized car); *see also* State v. Muralt, 376 N.W.2d 25, 26-27 (N.D. 1985) (embracing the holding of *Opperman*).

38. Of course an occasional soccer mom may turn out to be in possession of something illegal. If Officer Kerut's underlying pretextual suspicions bore fruit, she would face a charge for possession of any illegal substance uncovered. If drugs were discovered in soccer mom Bylake's car, the result in the general view of "law and order" advocates would be seen as a good

Modified vehicle violations, as infractions, present a more complicated picture, with no apparent quick fix. Legislators who believe Ms. Bylake, in the hypothetical case above, should be subject to arrest for the bumper height violation, will be content with the existing situation. They will trust the halting officer to exercise sound discretion, and they will be sympathetic to the officer's difficulty in determining whether the offense is a first time, fine-only offense, or a subsequent offense that may result in a jail sentence. By allowing for the custodial arrest of the modified vehicle driver, the legislature may have anticipated the *Atwater* majority's solicitude for an officer's difficulty in determining on the spot whether an offense is an infraction, for which no jail time is provided, or a subsequent offense, which can result in a jail sentence.[39] In rejecting the Atwaters' proposed line between "jailable" offenses and "fine-only" offenses as a way of distinguishing between offenses for arrest purposes, the United States Supreme Court noted, "The trouble with this distinction, of course, is that an officer on the street might not be able to tell."[40] The Court noted that in addition to the general difficulty of knowing the details of complex penalty schemes, an officer may not know at the scene of an arrest whether the offense is a first offense.[41] Legislators who object to the possibility posed by the hypothetical may wish either to revise section 39-21-45.1 either to provide clearly that a violation is a noncriminal offense and not an infraction or, at least, to provide in section 39-07-09 for arrests only for specified dangerous modifications.

Regarding the nonresident accident provision of section 29-06-15.1, legislators should consider whether any driver, even from another state, should ever be arrested for a noncriminal offense. The failure to pay a fine or appear to contest such a charge is itself a class B misdemeanor.[42] Moreover, the interstate agreements between North Dakota and most states provide that both administrative sanctions and criminal convictions imposed because of North Dakota traffic offenses may be reported to, and then must be enforced by, the compacting states.[43] Thus, arrest, developed in the con-

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thing—another criminal caught as the result of effective and creative use of the law. But the cost in terms of invasions of privacy similar to the invasion prompting the unsuccessful civil suit of Mr. and Mrs. Atwater could be quite high. Mr. and Mrs. Atwater were reported to have spent "about $100,000 on the case, using equity in their home and borrowing money from their mothers." Marcia Coyle, *The Hidden Costs of Litigation*, NAT'L L. J., Mar. 16, 2001, *available at* http://www.law.com (last visited Oct. 30, 2002).

39. N.D. CENT. CODE § 12.1-32-01(7) (1997).

40. Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001).

41. *Id.*

42. N.D CENT. CODE § 39-06.1-04 (Supp. 2001).

43. *See, e.g.*, N.D. CENT. CODE §§ 39-06-26 to -27 (1997 & Supp. 2001).

text of true "crimes," may be both inappropriate and unnecessary, even for nonresident drivers offending in North Dakota.[44]

Absent legislative action, we may hope, given the general trend toward decriminalization and the consequent adjustment of procedures from those traditionally followed in criminal cases, that the North Dakota courts, ultimately the North Dakota Supreme Court, would come to the sensible conclusion that an arrest for a noncriminal offense would, in present day North Dakota, be unreasonable under Article I, section 8 of the North Dakota Constitution's Declaration of Rights. North Dakota seems to be exceptional in the clarity of its delineation of offenses as noncriminal for procedural and punishment purposes. But even in states that continue to label minor traffic offenses as "criminal" misdemeanors, however petty or minor, some state courts have rejected *Atwater* on state constitutional grounds.[45]

Perhaps the clearest and closest example, albeit in a case involving a minor in possession of alcohol, not a traffic case, was *State v. Bauer*,[46] which held under the Montana Constitution that "it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest."[47] The Montana Supreme Court required an arresting officer in such cases to show "special circumstances such as a concern for the safety of the offender or the public" to justify an arrest instead of a notice to appear.[48] North Dakota courts could also accomplish the same result by statutory interpretation, without employing the heavy artillery required for a state constitutional challenge.[49] Section 39-07-09(2)'s authorization of police discretion to arrest instead of issuing a promise to appear could be limited by a requirement that the officer's discretion to arrest be based on a specific circumstance indicating some danger to the offender or others as the common element of the seven listed offenses authorizing discretionary arrest in lieu of release on a promise to appear.

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44. *Id.*

45. *See, e.g.*, State v. Bauer, 36 P.3d 892, 897 (Mont. 2001).

46. 36 P.3d 892 (Mont. 2001).

47. *Bauer*, 36 P.3d at 897.

48. *Id.; see also* State v. Brown, No. 18972, 2001 WL 1657828, at *1 (Ohio App. 2 Dist. Dec. 28, 2001) (stating that Ohio could provide more, but not less, protection than federal Fourth Amendment jurisprudence). For further critiques of *Atwater*, see Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanch*, 77 IND. L.J. 419 (2002); David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815 (2002).

49. State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147, 151 (stating "[a] party raising a constitutional challenge should bring up his 'heavy artillery' or forego the attack entirely") (citations omitted).

Could *Atwater* occur in North Dakota? Ms. Schatz's conclusion is probably correct: a motorist in North Dakota cannot be jailed for failure to wear a seatbelt. Shocking to some, however, a motorist in North Dakota may be arrested and jailed for traffic violations that are equally insignificant, at least in terms of fine and punishment, as a seatbelt violation.[50]

50. Our suggestions for reform, and indeed our analysis generally, assume that North Dakota officers will be aware of, and follow, the rules proscribed by the legislature and the courts. Thus, we have not attempted to assess the complicated questions raised by considering appropriate remedies for the odd violation. The remedy issue might depend on the source of the rule, be it the United States Constitution, the North Dakota Constitution, or North Dakota legislation. But even for the "least" of the three, the state statutes, Professor LaFave has observed in an analogous statutory violation context that "[m]ost jurisdictions, without hesitation, suppress evidence obtained in a search incident to an arrest which is illegal only in the sense that it is contrary to a state provision on when an arrest warrant is required." WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE, § 5.1(b) (3d ed. 1996). But, he also cautions that there "would appear to be no Fourth Amendment barrier to a state court holding, as a few have, that the exclusionary rule will not be utilized to deter violation of state statutory provisions limiting warrantless arrests." *Id.*

For an example of the North Dakota Supreme Court wrestling with the often complex interaction of state and federal constitutional law, as well as a state statute and the remedy question, see *State v. Sakelleson*, 379 N.W.2d 779, 784 (N.D. 1985). In *Sakelleson*, the North Dakota Supreme Court, prior to *Wilson v. Arkansas*, 514 U.S. 927 (1995) making the knock and announce requirement a matter of Fourth Amendment reasonableness, addressed the remedy for violating the North Dakota announcement statute. *See Sakelleson*, 379 N.W.2d at 784 (citing N.D. CENT. CODE § 29-29-08). The court, citing the constitutional underpinnings of the statute, held that police violation of the statute required suppression of the evidence at the defendant's trial because the officers' conduct "violated both Article I, § 8, of the North Dakota Constitution and the Fourth and Fourteenth Amendments to the United States Constitution thereby necessitating the suppression of the evidence obtained." *Id.; see also* State v. Herrick, 1999 ND 1, ¶¶ 7-27, 588 N.W.2d 847, 848-52 (debating whether the North Dakota Constitution provides greater protections than the federal constitution).

Professor Moran, after concluding that under current federal law the police can search any car at any time, also noted that state statutory limits on the federal carte blanche for car stops and searches provide a limitation that is "hardly comforting for the great majority of motorists who travel in states without such limitations. Even in those states with statutes limiting police minor-offense arrest authority, it is not clear that an arrest violating such a statute would require exclusion of the evidence found incident to the arrest." Moran, *supra* note 48, at 832-33. He cited federal cases ignoring the state illegality for suppression purposes, but we are confident, not only that our North Dakota officers will generally follow the law, but also that our state courts will fashion an appropriate remedy for exceptional police illegality that violates the privacy of drivers in North Dakota. *Id.* at 820-37.