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From Seat Belts to Handcuffs: May Police Arrest for Minor Traffic Violations?

Lisa Ruddy

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FROM SEAT BELTS TO HANDCUFFS: MAY POLICE ARREST FOR MINOR TRAFFIC VIOLATIONS?

LISA RUDDY*

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I. CASE HISTORY OF *ATWATER V. CITY OF LAGO VISTA*

A. Introduction

America's 185 million licensed drivers should take note of a startling statistic the next time they get into their cars: twenty-eight states permit a police officer to place otherwise law-abiding citizens under full custodial arrest (including handcuffs, a ride in the squad

* J.D. Candidate, May 2002, *American University Washington College of Law*; B.A., 1996, *Fairfield University*. I would like to thank Professor Stephen Wermiel for suggesting this topic, as well as my grandfather, Louis Salomone, for his comments after reading many drafts of this Note. I also thank my husband, mother, grandmother, and in-laws for their continuous support.

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car, booking, and mug shots) for minor, fine-only traffic offenses.¹ The remaining twenty-two states require the issuance of a citation in certain circumstances, but still leave officers with broad discretion regarding whether to arrest.²

Gail Atwater's story is an example of how the discretion afforded to police officers affects drivers in everyday situations. On March 26, 1997, Officer Bart Turek of the Lago Vista, Texas Police Department used his discretion to arrest Atwater for not wearing her seat belt and for failing to restrain her two children in seat belts.³ After Turek handcuffed Atwater in front of her children, the police searched and impounded her vehicle.⁴

Atwater sued the City of Lago Vista and Officer Turek, claiming the arrest violated her constitutional rights under the Fourth Amendment.⁵ The United States District Court for the Western District of Texas granted the city's motion for summary judgment, and Atwater appealed to the Fifth Circuit Court of Appeals.⁶ A panel of three Fifth Circuit judges ruled unanimously in Atwater's favor.⁷ However, the full Fifth Circuit later reversed the panel's decision,⁸ holding that Atwater did not suffer any abridgment of her constitutional rights.⁹ The Supreme Court subsequently granted certiorari on June 26, 2000, and decided on April 24, 2001 that the Fourth Amendment affords police officers the discretion to arrest and jail, rather than ticket, motorists who have committed minor traffic violations.¹⁰

1. See Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 250-51 (1989) (enumerating the degree of statutory discretion afforded officers in each of the fifty states).

2. See *id.* (identifying the states that require the issuance of citations instead of arrests in some situations).

3. See TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (authorizing police officers to arrest, without a warrant, any person who has committed a traffic violation in the officer's presence).

4. See Terrence Stutz, *Buckling In: Woman Drives Seat Belt Case to Supreme Court*, DALLAS MORN. NEWS, July 3, 2000, at 23A (describing the circumstances of Atwater's arrest).

5. See *Court to Study Arrest for Routine Traffic Violation*, LANCASTER NEW ERA, June 26, 2000, at A2.

6. See *Atwater v. City of Lago Vista*, 165 F.3d 380 (5th Cir.), *vacated*, 171 F.3d 258 (5th Cir.) (en banc), *reinstated in part*, 195 F.3d 242 (5th Cir. 1999), *cert. granted*, 530 U.S. 1260 (2000), *aff'd*, 532 U.S. 318 (2001), *reh'g denied*, 121 S. Ct. 2540 (2001).

7. *Atwater v. City of Lago Vista*, 165 F.3d 380, 389 (5th Cir. 1999) (finding the arrest unconstitutional).

8. See *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999) (en banc).

9. See *id.* at 246 (finding arrest was reasonable under the Fourth Amendment).

10. See *generally Atwater*, 532 U.S. 318 (2001); see also Scott Ritter, *High Court to*

Comparing both Fifth Circuit holdings in *Atwater* with prior search and seizure cases decided by the Supreme Court, this Note examines the competing interests of the state and the individual presented by the Fourth Amendment, and argues that the full custodial arrest of an otherwise law-abiding citizen for a fine-only, minor traffic offense is an unconstitutional violation of Fourth Amendment rights.¹¹ Part II analyzes both Fifth Circuit holdings, providing insight into the opposing viewpoints of the justices, while Part III discusses the social policy issues that are raised by this case, which have the potential to affect every licensed driver in the country.¹²

B. Background: The Fourth Amendment

The Fourth Amendment is one of the most fundamental provisions of the Constitution, since it protects citizens from arbitrary and oppressive intrusions by the government¹³ by requiring the police to show a reasonable standard of necessity before imposing on a person's right to privacy.¹⁴ The Fourth Amendment was drafted in response to the events surrounding the American Revolution,¹⁵ when arbitrary searches were permitted by general warrants and writs of assistance.¹⁶ In order to prevent such invasions of privacy and abuse of government power, the Amendment was framed to mandate that:

[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

Decide If Traffic Offenders Can Be Jailed, DOW JONES NEWS SERV., June 26, 2000 (discussing the Supreme Court's decision to grant certiorari to *Atwater*'s case).

11. See generally Salken, *supra* note 1.

12. See generally Matthew V. Hess, *Good Cop—Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149 (1993) (outlining the police officer's role in society and the impact of police misconduct on both individual citizens and society as a whole).

13. See Matthew S. Crider, *Criminal Procedure — Searches and Seizures — Police Officers Must Meet “Reasonable Officer” Standard to Withstand Pretext Claim* (State v. Haskell, 645 A.2d 619 (Me. 1994)), 36 S. TEX. L. REV. 629, 645 (1995) (highlighting the potential for police abuse if Fourth Amendment limitations are not imposed).

14. See *id.* at 645-46 (supporting the assertion that police actions must be reasonable while also observing that most police actions are purely discretionary).

15. See generally David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (discussing current Fourth Amendment jurisprudence and its revolutionary roots as protection against the British Parliament's use of writs of assistance).

16. See Salken, *supra* note 1, at 254 (noting that writs of assistance were harmful because they delegated a great deal of discretion to officers, giving them the power to decide whom and what to search).

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describing the place to be searched, and the persons or things to be seized.¹⁷

It is clear upon a reading of the Amendment itself that the limitations on police conduct are divided into two primary categories: reasonableness and probable cause.¹⁸ Thus, by definition, the government's power to search is limited by an inquiry into the objective reasonableness¹⁹ of the conduct, and the officer must have probable cause for conducting the search or seizure before a warrant will be issued.²⁰ An officer's power to search is further limited by the particularity requirement.²¹ Police officers applying for a search warrant must specify the places, persons, and things to be searched before a warrant can be issued.²² The Framers' goals were to preserve individuals' privacy interests and to insure that the government respects the rights of the people.²³

C. Factual Background

On March 26, 1997, Gail Atwater's Fourth Amendment rights became jeopardized as she drove her two children, ages four and six, home from soccer practice. Her son accidentally dropped a toy out of the window of their truck as they drove along a residential street.²⁴ Atwater turned the vehicle around to begin looking for the toy, and she and her children removed their seat belts in order to get a better view of the roadside.²⁵ As they drove down the street at fifteen miles per hour, Officer Turek noticed that the Atwaters were not wearing

17. U.S. CONST. amend. IV.

18. See *Payton v. New York*, 445 U.S. 573, 584 (1980) (describing the two clauses of the Fourth Amendment as protecting the right to be free from unreasonable searches and seizures and requiring that warrants be supported by probable cause).

19. See Crider, *supra* note 13, at 634 (noting that the Supreme Court requires an objective assessment of an officer's actions to determine whether police activity is reasonable).

20. See *Payton*, 445 U.S. at 584 (requiring that warrants be supported by probable cause).

21. See *id.* (emphasizing that the particularity requirement was designed to prevent the abuse of a general warrant).

22. U.S. CONST. amend. IV.

23. See Chris K. Visser, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683, 1699 (1999) (observing that the Framers created the Fourth Amendment as a direct response to the unrestrained and unsupervised searches associated with general warrants).

24. See Andrea Ball, *U.S. Supreme Court to Hear Seat Belt Case – Lago Vista Woman Contesting Texas Law That Allows Arrest for Not Wearing Restraint*, AUSTIN AM.-STATESMAN, June 27, 2000, at B1 (discussing the events leading up to the arrest).

25. See *id.*

their seat belts.²⁶ Turek stopped the vehicle, approached the car, and poked his finger aggressively toward Atwater's face, screaming that they had met before.²⁷ Months earlier, Turek had pulled Atwater over under the suspicion that Atwater's son was not wearing his seat belt, but found the boy safely restrained.²⁸

The officer's screaming frightened Atwater's children and they began to cry, and Atwater calmly asked him to lower his voice.²⁹ According to Atwater, this request further enraged the officer and he began screaming that she was going to jail.³⁰ He began to verbally abuse her in front of her neighbors and other bystanders, accusing her of not caring for her children.³¹ After telling Atwater that she was going to jail, Turek demanded her driver's license and insurance card, which had been stolen along with Atwater's purse the week before.³² Turek then ridiculed her, implying that she was a liar, and continued to verbally abuse her.³³

Although under Texas law Turek could have issued Atwater a ticket for such a minor infraction,³⁴ he instead chose to arrest her, handcuffing her behind her back and putting her in the back of his squad car in front of her neighbors and other onlookers.³⁵

Atwater asked Turek if she could bring her children to a friend's house down the block, but he refused and told Atwater that her children could come to the station with her.³⁶ A friend came to the scene to care for the children as Turek drove Atwater to jail.³⁷ The incident caused the children a great deal of anxiety, and Atwater's

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

27. See *id.*

28. See *id.* (noting that, despite the traffic stop, no citation was issued).

29. See James Kilpatrick, *From Unbuckled to Handcuffed in No Time*, NEWS & OBSERVER (Raleigh, NC), Apr. 17, 2000, at A11 (quoting U.S. Circuit Judge Robert M. Parker's recitation of the facts).

30. See *Atwater*, 165 F.3d at 382.

31. See *id.*

32. See Kilpatrick, *supra* note 29.

33. See *Atwater*, 165 F.3d at 382 (observing that Turek would have known that Atwater was telling the truth, since he had stopped her once before for a presumed seat belt violation and had already seen her license and proof of insurance).

34. See TEX. TRANSP. CODE ANN. § 545.413 (West 1999) (stating that a seat belt offense is a misdemeanor "punishable by a fine of not less than \$25 or more than \$50").

35. See *Atwater*, 165 F.3d at 382.

36. See *id.*

37. See *id.*

youngest child required counseling.³⁸

Atwater was booked and photographed at the police station, charged with seat belt violations, driving without a license and failure to provide proof of insurance.³⁹ Atwater pleaded no contest to the seat belt charges, and the charges of driving without a license or proof of insurance were later dismissed.⁴⁰ Atwater's shoes, glasses, jewelry and other personal items were taken away from her and she was locked in a jail cell, where she remained for one hour before paying a \$50 fine.⁴¹ Meanwhile, her car was impounded and the police conducted an inventory search, which revealed no contraband, but instead two tricycles and a bag of charcoal.⁴²

Atwater appealed to the city in the hopes of changing the policy that allowed Officer Turek to arrest her.⁴³ Although Turek is no longer a member of the Lago Vista Police Department,⁴⁴ the city has stood by Turek's actions and implied that they would seek attorney's fees from Atwater should she file suit.⁴⁵ Aside from the *Atwater* case, the City of Lago Vista was facing four other lawsuits filed against its police department stemming from allegations that officers had effected wrongful arrests using excessive force and other abuses of police power.⁴⁶ Atwater has named the city as well as the police chief in her lawsuit, suggesting that the city's policies encouraged unreasonable police behavior.⁴⁷

38. See *Case Summaries: Fifth Circuit*, 14 TEX. LAWYER 47 (Feb. 15, 1999) (noting that Atwater and her children suffered "extreme emotional distress" as a result of the encounter with Turek, and that Atwater had been prescribed medication for nightmares, insomnia, and depression).

39. See Allison Pries & David Mitchell, *Going to Jail Over Seatbelts*, MEDILL NEWS SERV., available at <http://www.medill.northwestern.edu/docket/99-1408fx.html> (last modified Feb. 16, 2001).

40. See *Atwater*, 165 F.3d at 383.

41. See *Atwater*, 195 F.3d at 248 (5th Cir. 1999).

42. See Susan Smith, *Shining a New Light on Search and Seizure*, AUSTIN AM.-STATESMAN, July 1, 2000, at B1 (detailing the facts of the *Atwater* case).

43. Pries & Mitchell, *supra* note 39, at 2.

44. See Susan Borreson, *Officer Immune From Suit for Seat Belt Arrest*, 15 TEX. LAWYER 38 (1999) (explaining that Turek now works at a higher paying job as a sheriff's deputy in another county). The City of Lago Vista claims Turek's new position is unrelated to the *Atwater* case. *Id.*

45. See *id.* (recounting that city officials also asked Atwater to apologize to Officer Turek).

46. See Ball, *supra* note 24, at B1 (noting that the city has since disposed of the other lawsuits).

47. Cf. Pries & Mitchell, *supra* note 39, at 2 (commenting that, before filing suit, Atwater appealed to the city in an attempt to change its policies regarding officers' discretion, and the city refused to modify them).

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D. Procedural History

After her unsuccessful attempt to change the city's policies, Atwater filed suit under Title 42, § 1983 of the U.S. Code, claiming that her Fourth Amendment rights and civil rights had been violated and that she had been subjected to excessive force and punishment.⁴⁸ The United States District Court for the Western District of Texas dismissed Atwater's petition by granting summary judgment to the City of Lago Vista for plaintiff's failure to state a constitutional claim, and also asserted that the city did not act unreasonably.⁴⁹

A three-judge panel of the United States Court of Appeals for the Fifth Circuit reinstated Atwater's constitutional claim, holding that "an arrest for a first-time seat belt offense is indeed an extreme practice[,] and a seizure conducted in an extraordinary manner . . . requires a balancing analysis to determine the reasonableness of the police activity."⁵⁰ The Fifth Circuit acknowledged the public's interest in the issue when it agreed to rehear the case *en banc*, which is normally granted only for issues considered to be of crucial importance to the public.⁵¹

The full Fifth Circuit reversed the opinion of the three-judge panel, holding by an eleven to six vote that Turek acted with probable cause, which makes the arrest, by definition, reasonable.⁵² Further, the court found that a balancing of interests test would be inappropriate in this case because the arrest was not conducted in an extraordinary manner; thus, according to the court's rationale, Atwater's Fourth Amendment rights had not been violated.⁵³

II. ANALYSIS OF FIFTH CIRCUIT HOLDINGS

A. Three-Judge Panel – January 29, 1999

In an unpublished opinion, the United States District Court for the Western District of Texas dismissed Atwater's suit for failure to

48. See ON THE DOCKET, *supra* note 28, at 3 (remarking that Atwater also filed state law claims for false imprisonment and intentional infliction of emotional distress).

49. See *id.*

50. See *id.*

51. See Petition for Writ of Certiorari, *supra* note 41, at 12.

52. See ON THE DOCKET, *supra* note 28, at 3 (noting that the full Circuit took probable cause into account in its definition of "reasonable").

53. See *id.*

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identify a constitutional right that had been violated.⁵⁴ In order to identify such an issue, a court typically looks at whether the facts were alleged with sufficient particularity in order to illustrate the suspected violation.⁵⁵

On appeal, the Fifth Circuit panel strongly disagreed with the District Court below. In an opinion laden with biting sarcasm and criticism of Officer Turek,⁵⁶ the panel consisting of Circuit Judges Garza, Stewart, and Parker unequivocally held that Gail Atwater's constitutional rights to freedom from unreasonable arrest and unreasonable seizure were in fact violated, and that Turek's actions were objectively unreasonable.⁵⁷

The panel first addressed the existence of a constitutional claim.⁵⁸ The court found that the facts alleged by Atwater in this case, notably the statements pertaining to Turek's verbal abuse and use of handcuffs for a "mere seatbelt violation,"⁵⁹ were particularly troubling and were sufficiently particular to uphold a constitutional claim.⁶⁰ Thus, the court reinstated Atwater's suit,⁶¹ as the panel found that the District Court failed to recognize that Turek's behavior violated Atwater's Fourth Amendment rights.⁶²

The panel then made an important distinction, referring to seat belt laws and other such ordinances which pose little or no threat to the public at large as "paternalistic."⁶³ Such laws are designed to protect a specific individual from his or her own conduct, as opposed to laws against speeding or driving while intoxicated, which can have

54. See *Case Summaries: Fifth Circuit*, *supra* note 38, at 2.

55. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 383 (5th Cir. 1999) (commenting on the standard applied by the District Court, and noting that the panel would apply the same standard).

56. See *id.* at 382 ("Neither Gail Atwater, her four-year-old son nor her six-year-old daughter were wearing their seat belts. Detecting this breach of the peace and dignity of the state, Lago Vista police officer, Bart Turek, set about to protect the community from the perpetration of such a crime.").

57. See *id.* at 389 (calling Turek's behavior under the circumstances "indefensible").

58. See *id.* at 383 (discussing Appellant's unreasonable seizure claim).

59. *Id.*

60. *Accord* *Ellison v. Connor*, 153 F.3d 247, 251 (5th Cir. 1998) (stating that a claim may not be dismissed "unless it appears certain that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief").

61. See *Atwater*, 165 F.3d at 389 (reversing the District Court's judgment and reinstating the constitutional claims against Officer Turek and the City of Lago Vista).

62. See *id.* at 383 (criticizing the District Court's analysis of Atwater's constitutional claim).

63. See *id.* at 384.

an immediate, detrimental impact on other citizens.⁶⁴

Noting that Atwater's offense was trivial in comparison to other traffic violations, the court implied that her arrest was unreasonable on its face and noted the importance of finding objective reasonableness when conducting a Fourth Amendment analysis.⁶⁵ As a means of reaching a proper analysis of objective reasonableness, the panel applied a balancing test in which the government's interest in enforcing the law should be measured against the individual's privacy interest under the Fourth Amendment.⁶⁶ The panel also noted the importance of the severity of the offense and whom the seat belt law seeks to protect.⁶⁷

The panel then addressed the constitutionality of Ms. Atwater's seizure, noting that violation of the seat belt law is a misdemeanor usually punishable by a fine.⁶⁸ Although the Texas Code allows an arrest to occur at the officer's discretion, it does not state that arrest is appropriate under all circumstances.⁶⁹ The court interpreted the statute to read that, instead of arrest in every circumstance, the officer shall use his or her discretion to arrest, and reasonableness must play a primary role in the exercise of that discretion.⁷⁰

The Supreme Court has recognized the logic of differentiating between minor and serious offenses, as the panel noted in its citation of *Welsh v. Wisconsin*,⁷¹ which held that when the state arrests a citizen in connection with a minor offense, the arrest should be allowed only upon a probable cause determination and warrant issued by a neutral magistrate.⁷² Applying this holding, the court noted that Turek's finding of probable cause led to an abuse of his discretion to arrest, for they found that if he had gone to a magistrate, there was very little

64. *See id.*

65. *See id.*

66. *See Atwater*, 165 F.3d at 385.

67. *See id.* (noting that no jail term is provided in the seat belt statute).

68. *See id.* (asserting that a statute which allows arrests "in every instance" for seat belt violations is subject to Fourth Amendment challenges).

69. *See* TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (stating that "any peace officer may arrest without warrant a person found committing a violation of this subtitle"). This statute may be interpreted as permitting an officer to use his or her discretion in making an arrest despite his or her ability to instead issue a citation. *See Atwater*, 165 F.3d at 385.

70. *See Atwater*, 165 F.3d at 385.

71. 466 U.S. 740 (1984).

72. *See id.* at 750 (noting that, when the government's interest is only to arrest minor offenders, the presumption of unreasonableness is difficult to overcome unless a neutral and detached magistrate has found probable cause to issue a warrant).

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chance that a warrant would have been issued.⁷³

The panel further documented Turek's abuse of discretion by citing Justice Jackson's concurrence in *McDonald v. United States*,⁷⁴ asserting that when an officer decides to make his own probable cause assesment, he ought to be in a position to justify it by pointing to some "immediate and serious consequences"⁷⁵ that would have occurred if he had stopped to obtain a warrant.⁷⁶ Here, the court found it highly unlikely that any immediate harm would have resulted if Turek failed to arrest Atwater for her seat belt violation.⁷⁷ The panel noted that the seriousness of the offense ought to be a determining factor in the officer's decision to arrest, considering the likelihood that the suspect will flee and escape if not arrested right away.⁷⁸ The "soccer mom" in question was hardly a flight risk, and her offense was undoubtedly minor so that she did not present a danger to society.⁷⁹ Under the totality of the circumstances, it appears that Turek acted unreasonably and was not justified in arresting Atwater; rather, he should have just issued her a citation.⁸⁰

In *Tennessee v. Garner*,⁸¹ the Supreme Court addressed the issue of whether the totality of the circumstances justified a particular search or seizure, holding that the use of deadly force was not justified to prevent the escape of a suspected burglar.⁸² Applying the holding to the facts at hand, *Garner* calls for an inquiry into the severity of the crime.⁸³ In Atwater's case, the use of handcuffs, verbal abuse, and jail time as punishment was disproportionate to the seat belt violation, which poses no harm to the general public.⁸⁴ Under the totality of circumstances presented in *Atwater*, the panel concluded that the full

73. See *Atwater*, 165 F.3d at 387.

74. 335 U.S. 451 (1948).

75. *Id.* at 459-60 (Jackson, J., concurring).

76. See *id.*

77. Cf. *Atwater*, 165 F.3d at 387 (observing that "not the slightest hint of exigent circumstances" were presented in this case).

78. See *id.*

79. See *id.* at 387-88 (detailing specific reasons why the seat belt law could have been enforced effectively in Atwater's situation by simply issuing a citation).

80. Cf. *Atwater*, 165 F.3d at 388 (discussing the absence of any facts in this case that would justify arrest).

81. 471 U.S. 1 (1985).

82. See *id.* at 4 (finding unconstitutional a Tennessee statute that authorized officers to use "all the necessary means" to stop a fleeing suspect and complete an arrest).

83. See *id.* at 21 (noting that even though *Garner* was a suspected burglar fleeing the scene of the crime, deadly force was not justified).

84. See *Atwater*, 165 F.3d at 382.

custodial arrest of Gail Atwater was inappropriate and that Turek violated her Fourth Amendment right to be free from unreasonable seizures.⁸⁵

In its interpretation of objective reasonableness, the panel acknowledged the existing case law,⁸⁶ which “appears” to indicate that all seizures based on probable cause are reasonable (and therefore constitutional) under the Constitution,⁸⁷ but specifically rejected such a narrow interpretation of the law as an oversimplification of the legal principles underlying the Fourth Amendment.⁸⁸ Under the Supreme Court’s guidelines established in *Whren v. United States*,⁸⁹ the only cases in which a balancing of governmental and individual interests is necessary are ones where searches or seizures have been performed in an extraordinary manner and are “unusually harmful”⁹⁰ to an individual’s privacy.⁹¹

The panel noted that in *Whren*, the balancing test was not applied by the Court based on the particular circumstances presented.⁹² But after consideration of the facts in *Atwater*, the panel readily concluded that an arrest for a first-time seat belt offense was an extreme practice and a seizure conducted in an extraordinary manner.⁹³ Turek’s extreme and extraordinary conduct prompted the Fifth Circuit panel to balance the intrusion on Atwater’s privacy and liberty against the government’s interest in enforcing the seat belt law.⁹⁴ The court concluded that enforcing the statute was the only

85. See *id.* at 389 (observing that while traffic violations may adversely affect public safety, Atwater’s seat belt violation was not cause for arrest).

86. See *id.* at 387 (declaring the theory that all seizures are reasonable if based upon probable cause to be an “oversimplification of the status of our Fourth Amendment jurisprudence”).

87. See *United States v. Watson*, 423 U.S. 411, 415 (1976) (holding that arrest for commission of a felony needs to be based on probable cause to be constitutional); see also *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (finding that probable cause is the only necessary determinant of the constitutionality of an arrest).

88. See *Atwater*, 165 F.3d at 387.

89. 517 U.S. 806 (1996) (holding that a police officer who temporarily detains a motorist based on probable cause to believe he has violated a traffic law does not infringe on the motorist’s Fourth Amendment right against unreasonable seizures).

90. *Id.* at 818.

91. See *id.*

92. See *Atwater*, 165 F.3d at 387.

93. See *id.* (distinguishing the facts of *Whren* from the current case by noting that *Whren* involved the arrest of a motorist found to be possessing drugs by a plainclothes officer).

94. See *id.*; see also *Watson*, 423 U.S. at 428 (noting that “an arrest is a serious personal intrusion”); see also *Terry v. Ohio*, 392 U.S. 1, 17 (noting that an arrest is a “serious intrusion upon the sanctity of the person, which may inflict great

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relevant government interest, since there was no “hint of exigent circumstances” under which an arrest would have been appropriate.⁹⁵

The panel emphasized the importance of the timing of the arrest and noted that, according to their research, in every case in Texas where a motorist was placed under full custodial arrest after a traffic stop, the arrest did not commence until additional misconduct occurred or the police officer rightfully discovered some other factor justifying arrest.⁹⁶ Atwater maintains that Officer Turek stopped her vehicle and placed her under arrest right away for failure to wear her seat belt.⁹⁷ She attested that Turek began verbally abusing her and telling her she would be taken to jail almost as soon as he approached her truck.⁹⁸ The court interpreted these facts to mean that Turek’s mind was already made up, before any additional information or conduct was presented to him.⁹⁹

Furthermore, the panel also noted that Atwater posed no threat to the officer or others, was not a flight risk (especially since he knew she lived two blocks away),¹⁰⁰ and she was not a repeat offender.¹⁰¹ The court concluded that the only reason Turek decided to arrest Atwater instead of issuing a citation was to harass and punish her beyond the limits of the statute.¹⁰²

The judges voiced their disdain for overzealous police activity such as Turek’s and expressed sympathy for Atwater as a victim of the officer’s abuse of the power entrusted to him.¹⁰³ The court also emphasized the importance our society places on the individual’s inherent constitutional right “to be free from arbitrary and oppressive interference by government officials”¹⁰⁴ and the duty of

indignity . . . and it is not to be undertaken lightly”).

95. See *Atwater*, 165 F.3d at 387.

96. See *id.* at 388 (finding that a motorist’s arrest after being stopped for a seat belt violation was due to the motorist’s felony record and cocaine possession) (citing *Madison v. State*, 922 S.W.2d 610 (Tex. App. 1996)); see also *Valencia v. State*, 820 S.W.2d 397 (Tex. App. 1991) (upholding the lawful arrest of an intoxicated motorist who was swerving into oncoming traffic).

97. See *Atwater*, 165 F.3d at 382.

98. See *id.*

99. See *id.* at 387.

100. See *id.* at 388 (noting that Officer Turek knew where Atwater lived as a result of their previous encounter).

101. See *id.*

102. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 388 (maintaining that the facts presented in *Atwater* did not justify the arrest and handcuffing of a first time seat belt offender).

103. See *id.*

104. See *id.* at 389 (citing *United States v. Ortiz*, 422 U.S. 891, 895 (1975)) (finding that the Fourth Amendment prevents Border Patrol officers, in the absence of

police officers to protect citizens' liberty and privacy instead of violating these critical interests.¹⁰⁵

Since a seat belt violation affects only the passengers of the particular vehicle and not the community at large, the court reasoned that such a violation does not justify the personal intrusion and violation of privacy that is inherent in a full custodial arrest.¹⁰⁶ The judges called for putting this case into perspective, as compared to the more serious issues addressed in the *Whren* decision,¹⁰⁷ noting that while traffic violations can be serious matters affecting public safety, a fine-only offense such as the one presented in this case does not meet that same level of severity.¹⁰⁸ The court rejected the notion of elevating such a minor violation to the same level as, for example, a drug offense and emphasized the error of coming to a narrow conclusion merely because of the existence of probable cause.¹⁰⁹

After taking these factors into consideration, the three-judge panel found that Officer Turek's actions were objectively unreasonable, and further, that the officer was not entitled to qualified immunity.¹¹⁰ Qualified immunity is "the personal immunity accorded to a public official from liability to anyone injured by any of his actions that are the consequence of the exercise of his official authority or duty,"¹¹¹ and is typically evaluated with a two-step process. First, the court should determine whether the plaintiff has alleged a violation of a clearly established constitutional right, and second, whether the official's conduct was objectively reasonable in light of clearly established law as it existed at the time of the conduct in question.¹¹² The court relied on both of these factors in making its decision with regard to Turek's assertion of qualified immunity, as it established that Atwater did have a sustainable constitutional claim, and the freedom to be free from unreasonable searches and seizures is a

consent or probable cause, from searching private vehicles at traffic checkpoints).

105. See *Atwater*, 165 F.3d at 389.

106. See *id.*

107. See *id.*; cf. *Whren*, 517 U.S. at 809 (noting that after the motorists were stopped for a routine traffic violation, police officers discovered the passenger was holding a bag of cocaine).

108. See *Atwater*, 165 F.3d at 389.

109. See *id.*

110. See *id.* at 385.

111. BARRON'S LAW DICTIONARY 236 (4th ed. 1996).

112. See *Stefanoff v. Hays County*, 154 F.3d 523, 525 (5th Cir. 1998) (outlining the standard used to evaluate qualified immunity claims against a municipality or its employees).

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clearly established constitutional right.¹¹³ As discussed, the court was also clear that it found Turek's behavior to be objectively unreasonable.¹¹⁴

The panel noted that "Officer Turek cannot hide behind the Texas seat belt law to legitimize his actions . . . it is not that simple."¹¹⁵ The court continued, citing *Grossman v. City of Portland*,¹¹⁶ which held that "where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity."¹¹⁷

The existence of the seat belt law does not necessarily guarantee that the statute is constitutional,¹¹⁸ and the court interpreted the *Grossman* and *Stefanoff* holdings to determine that Turek did not enjoy qualified immunity in this case due to his patently unreasonable conduct.¹¹⁹ The court concluded by reinstating Atwater's Fourth Amendment unreasonable seizure claim, as well as all claims against Officer Turek and the City of Lago Vista.¹²⁰

B. Full Fifth Circuit – November 24, 1999

1. Majority opinion

In a very brief opinion, an eleven-judge majority of the full Fifth Circuit, relying heavily on *Whren*, vacated the panel's opinion¹²¹ and affirmed the District Court's ruling that Turek did not violate Atwater's Fourth Amendment rights.¹²² The court began by outlining a balancing of interests test, which weighs an individual's privacy interest against the government's interests, noting that such a test is applied to Fourth Amendment cases under certain circumstances.¹²³

113. See *Atwater*, 165 F.3d at 383.

114. See *id.* at 388.

115. See *id.* at 386.

116. 33 F.3d 1200 (9th Cir. 1994).

117. *Id.* at 1209.

118. See *Knowles v. Iowa*, 525 U.S. 113, 114 (1998) (holding that a full search of a vehicle pursuant to the issuance of a traffic citation, as authorized by an Iowa statute, violated the Fourth Amendment). The existence of such a statute did not preclude a Fourth Amendment inquiry. *Id.* at 117.

119. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999).

120. See *id.* at 389.

121. See *Atwater*, 195 F.3d at 246.

122. See *id.*

123. See *id.* at 244 (citing *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (discussing the need for a balancing test to determine the constitutionality of an officer's actions). Such a test would balance the extent of the governmental intrusion against the need to interfere with the individual's privacy. *Id.*

The court found that the determining factor in whether to apply this analysis is the existence of probable cause, since “with rare exceptions . . . the result of that balancing is not in doubt” when probable cause is evident.¹²⁴

Accordingly, the court declared that when probable cause exists to believe that any law is being broken, an arrest is therefore reasonable and the government’s interest outweighs any privacy interests claimed by the lawbreaker.¹²⁵ In cases where probable cause exists, the court will conduct a balancing of interests test only when an arrest is “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or physical interests.”¹²⁶ The court implied that it would consider the application of the balancing test only in situations involving deadly force, entry into a home without a warrant, a police officer’s unannounced entry into a home, or physical penetration of a suspect’s body.¹²⁷

Therefore, the court’s primary focus was on the existence of probable cause, which it easily found since Atwater did not contest the fact that she and her children removed their seat belts in order to look for the lost toy.¹²⁸ Atwater violated § 545.413 of the Texas Transportation Code,¹²⁹ and the court interpreted Texas law to hold that it was within the officer’s statutorily granted discretion to arrest her for such an offense.¹³⁰

124. See *Atwater*, 195 F.3d at 244 (citing *Whren*, 517 U.S. at 817) (holding that the balancing of interests test does not apply to cases where probable cause exists).

125. See *Atwater*, 195 F.3d at 244 (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)) (concluding that “a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment”).

126. *Atwater*, 195 F.3d at 244 (citing *Whren*, 517 U.S. at 818) (setting forth the bright line rule that where probable cause exists, the only cases in which courts find it necessary to perform a balancing test involve searches or seizures conducted in an “extraordinary” manner).

127. See *Atwater*, 195 F.3d at 245 (reviewing prior Supreme Court cases, including *Tennessee v. Garner*, 471 U.S. 1 (1985), where the balancing test was found to be necessary due to extraordinary circumstances).

128. See *Case Summaries: Fifth Circuit*, *supra* note 38, at 2 (observing that Atwater conceded that the officer had probable cause to make the stop since she was not wearing her seat belt).

129. See TEX. TRANSP. CODE ANN. § 543.413 (West 1999) (stating that a person commits an offense if the person without a seat belt is (1) at least fifteen years of age; (2) riding in the front seat of a passenger car while the vehicle is being operated; (3) occupying a seat that is equipped with a safety belt; and (4) is not secured by a safety belt . . . or allows a child who is at least four years of age but less than fifteen years of to ride in the vehicle without requiring the child to be secured by a safety belt).

130. See *Atwater*, 195 F.3d at 245-46; see also TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (providing for the warrantless arrest of a citizen who is in violation of the transportation code).

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Finally, the court asserted that Atwater's arrest was not conducted in an extraordinary manner since there was no evidence that Atwater was physically harmed during the arrest.¹³¹ The only physical contact between Turek and Atwater occurred when she was handcuffed.¹³² Therefore, the court concluded that her privacy or physical interests were not sufficiently violated to invoke the balancing of interests test.¹³³

Ultimately, the full Circuit held that because probable cause existed, Atwater was not physically harmed during the arrest, and a reasonable officer in the same circumstances would have realized that an offense was being committed, Atwater's full custodial arrest for a traffic violation was reasonable under the Fourth Amendment.¹³⁴ The Fifth Circuit majority thereby affirmed the summary judgment granted by the District Court and vacated the opinion of the three-judge panel.¹³⁵

2. Dissent: Judge Garza

Judge Garza, who sat on the three-judge panel, was incredulous that the majority of the Fifth Circuit had vacated the panel's opinion, and could not fathom why his colleagues did not find Atwater's seizure by Officer Turek unreasonable.¹³⁶ He emphasized the paternalistic nature of the seat belt law, and argued that the court should not allow an officer to be "immunized to do whatever he please[s]"¹³⁷ once probable cause has been established.

As he had previously proclaimed in the Fifth Circuit panel opinion, Judge Garza concluded there was no evidence to show that Turek had any reason to seize Atwater and take her to the police station.¹³⁸ Having served as a judge for over sixty years, he noted that he was able to recognize the necessity of the traffic stop and subsequently, a citation, but suggested that the majority erred in failing to

131. See *Atwater*, 195 F.3d at 245-46.

132. See *id.* at 246 (applying a balancing test to searches and seizures where probable cause existed in order to determine whether they were "conducted in an extraordinary manner, [or were] unusually harmful to an individual's privacy or even physical interests") (citing *Whren v. United States*, 517 U.S. 806, 818 (1996)).

133. See *Atwater*, 195 F.3d at 246.

134. See *id.*

135. See *id.*

136. See *Atwater*, 195 F.3d at 246 (Garza, J., dissenting).

137. See *id.* at 247 (arguing that probable cause "will never immunize a constitutional violation").

138. See *id.* (proclaiming that, based on the nature of the violation, Turek should instead have given Atwater a citation and notice to appear before a judge).

differentiate the stop from the arrest.¹³⁹ Judge Garza commented that the stop was authorized by probable cause as evidenced by Turek's observance of a seat belt violation, but in the absence of another, more serious offense,¹⁴⁰ he concluded that Atwater's arrest was uncalled for and clearly unreasonable.¹⁴¹ Further, he indicated that the arrest should have been isolated from the stop, which was supported by probable cause, and then separately analyzed under the reasonableness standard.¹⁴²

Judge Garza remarked that the majority also failed to mention an "eye-opening"¹⁴³ affidavit submitted by Keith A. Campbell, who was a member of the Austin, Texas Police Department's recruitment unit from August 1994 to March 1997. Campbell reviewed Turek's personnel file and said he could "state without reservation that he would not have recommended this individual to be hired by the Austin Police Department"¹⁴⁴ for the following reasons: Turek failed two out of three psychological tests conducted at the Austin Police Department; demonstrated a lack of maturity (based on his own answers on his employment application); and failed to provide complete information to the department.¹⁴⁵ Judge Garza suggested that this information should have been addressed by the majority, as it lent credibility to Atwater's claim that the city had improperly hired and trained Officer Turek.¹⁴⁶

3. *Dissent: Judge Dennis*

Judge Dennis took a different analytical approach, relying on

139. *See Atwater*, 195 F.3d at 246.

140. *See id.* (contending that citizens are typically taken into custody for more serious offenses, including when "the officer sees a gun on the seat of the car; the car smells of marihuana [sic]; the officer sees packages of cocaine or . . . a check of the license number of the person stopped shows that the person is a fugitive or has another charge pending . . ."). No such factors were evident at the time of Atwater's arrest. *Id.*

141. *See id.*

142. *See id.*

143. *Id.* at 247.

144. *Atwater*, 195 F.3d at 247 (illustrating the judge's negative assessment of Turek's character and Turek's unfitness to be a police officer). Judge Garza also expressed his disgust with Turek's refusal to allow Atwater to bring her frightened children to a friend's home before taking her to jail. *Id.*

145. *See id.* (summarizing a list of factors leading to Campbell's conclusion). However, the court did not specify the nature of the information excluded from Turek's application. *Id.*

146. *See id.* (commenting that this information was in the Record Excerpts reviewed by the full Circuit and was ultimately ignored).

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*Wyoming v. Houghton*¹⁴⁷ to maintain that the majority ignored an important step mandated by the Supreme Court in analyzing Fourth Amendment claims.¹⁴⁸ *Houghton* was decided by the Supreme Court in April 1999 and provided a new standard¹⁴⁹ by which courts should assess Fourth Amendment violations.¹⁵⁰ Under *Houghton*, a court should begin assessing an alleged Fourth Amendment violation by looking to the common law at the time the Amendment was drafted.¹⁵¹ If an answer cannot be found under this analysis, a court should then look to a reasonableness standard and use a balancing of interests test.¹⁵²

Applying *Houghton*, Judge Dennis concluded that a full custodial arrest under the circumstances presented in *Atwater* was unnecessary and constituted an unreasonable seizure under the Fourth Amendment.¹⁵³ Judge Dennis defined the state of the common law at the time the Fourth Amendment was framed by again referring to Supreme Court precedent, this time in *Carroll v. United States*.¹⁵⁴

In cases of misdemeanor, a peace officer . . . 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 the peace is about to be committed . . . in his presence.¹⁵⁵

At the time of the Fourth Amendment's enactment, the common law permitted the warrantless arrest of an individual for a misdemeanor only when a breach of the peace was committed in the officer's presence.¹⁵⁶ Furthermore, the misdemeanors for which

147. 526 U.S. 295 (1999) (holding that police officers with probable cause to search a vehicle may inspect any belongings found in the car if they are capable of concealing the object of the search).

148. See *Atwater*, 195 F.3d at 251-52 (Dennis, J., dissenting).

149. But cf. *Whren*, 517 U.S. 806 (setting forth a different standard in June, 1996, three years prior to the *Houghton* rule).

150. See *Houghton*, 526 U.S. at 295.

151. See *id.* at 300 (remarking that the court must first determine whether the action would have been considered an unlawful search or seizure at the time the Amendment was drafted in order to determine whether the action violated the Fourth Amendment).

152. See *id.* at 299-300 (holding that the court should balance the individual's privacy interests against the government's legitimate interests in effective law enforcement).

153. See *Atwater*, 195 F.3d at 253 (Dennis, J., dissenting) (applying the *Houghton* test to the facts presented in *Atwater*).

154. 267 U.S. 132 (1925).

155. See *Carroll*, 267 U.S. at 156 (citing 9 HALSBURY'S LAWS OF ENGLAND 612).

156. See *State v. Jones*, 727 N.E.2d 886 (Ohio 2000) (holding that a full custodial arrest for a misdemeanor offense violated the Fourth Amendment in addition to Ohio Const. § 14, art. 1).

custodial arrest was permitted under the common law included assaults, public disturbances, and other dangerous behavior.¹⁵⁷

However, it must be noted that, while the Supreme Court has often recognized the importance of the common law in deciding modern cases, it has also stated that the practices at the time the Fourth Amendment was framed have not been “frozen”¹⁵⁸ into our constitutional law today.¹⁵⁹ The Court has stated that, while it will look to the common law, the Fourth Amendment will still be interpreted in light of contemporary norms and conditions.¹⁶⁰

In applying common law principles to the facts of the *Atwater* case, Judge Dennis found it difficult to believe that a woman driving her children home from soccer practice without seat belts would have constituted a public disturbance under the common law.¹⁶¹ He therefore concluded that there was substantial, even conclusive, evidence that the seizure in question would have been considered unlawful at the time the Amendment was framed, and *Atwater*’s constitutional right to be free from unlawful seizures was thus violated by Officer Turek.¹⁶²

Therefore, under the *Houghton* rule, no additional reasonableness inquiry would be necessary, since a Fourth Amendment violation had been established using a historical analysis.¹⁶³ However, Judge Dennis declared that even if a reasonableness test was necessary, the panel opinion had successfully demonstrated that Turek’s actions were unreasonable under the Fourth Amendment.¹⁶⁴

157. See *Atwater*, 195 F.3d at 253 (Dennis, J., dissenting) (citing Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 572-77 (1923-24)).

158. See *Payton v. New York*, 445 U.S. 573, 592 (1979) (reversing and remanding two criminal cases for further proceedings because the Fourth Amendment generally prohibits police from making nonconsensual, warrantless entry into suspects’ homes).

159. See *id.* (citing examples of the evolution of common law principles that were necessary to adapt to our society today). Some of these differences include the expansion of the types of property that can be seized under the Fourth Amendment, as well as modifications for electronic eavesdropping. *Id.* The future promises similar changes to accommodate the pervasiveness of the Internet and other technological developments in our society today.

160. See *id.*

161. See *Atwater*, 195 F.3d at 253 (asserting that *Atwater*’s seat belt violations “did not constitute or portend any disturbance that would even approach a breach of the peace”).

162. See *id.* at 254.

163. See *Houghton*, 526 U.S. at 295 (asserting that the Court would utilize a balancing of interests analysis if it found no answer under the first prong of the test regarding the lawfulness of the search or seizure under the common law).

164. See *Atwater*, 195 F.3d at 254 (concluding that the panel came to the correct conclusion by finding that the degree to which an arrest intrudes upon an

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Finally, Judge Dennis emphasized that the full Circuit was mistaken in applying the *Whren* probable cause test,¹⁶⁵ which was established in 1996 (three years before *Houghton*)¹⁶⁶ and also by engaging in an oversimplification of the court's obligation to "carefully scrutinize" intrusions on Americans' Fourth Amendment rights.¹⁶⁷

4. Dissent: Judge Wiener

The most strongly worded dissent from the *en banc* court came from Judge Wiener, who found the majority's opinion to be "so counterintuitive"¹⁶⁸ and the facts so clearly demonstrative of an unreasonable seizure that he claimed something must be very wrong with the majority's reasoning.¹⁶⁹ Judge Wiener asserted that the facts did not present an ordinary arrest, but instead suggested that Turek had a vendetta against Ms. Atwater.¹⁷⁰

The judge then cited *Terry v. Ohio*,¹⁷¹ noting that under the Fourth Amendment, the scope of a search or seizure must be justified by the situation presented.¹⁷² The *Terry* Court also utilized a balancing test to determine the reasonableness of a search and seizure, emphasizing that, to be constitutional, the state must justify such an intrusion upon the constitutionally protected interests of the individual.¹⁷³ The Supreme Court applied a similar test in *Tennessee v. Garner*,¹⁷⁴ where the Court found that a burglary suspect's constitutional rights were

individual's privacy "undoubtedly outweighs" the government's interest in law enforcement).

165. See *Whren*, 517 U.S. at 818.

166. Compare *Whren*, 517 U.S. at 817 (1996) (establishing that, where probable cause exists, a balancing of interests test is required only in cases where the arrest was conducted in an extraordinary manner), with *Houghton*, 526 U.S. at 299-300 (setting forth a more recently applied test which examines the permissibility of the seizure under the common law before addressing the reasonableness issue).

167. *Atwater*, 195 F.3d at 254 (Dennis, J., dissenting).

168. *Atwater*, 195 F.3d at 248 (Wiener, J., dissenting).

169. See *id.* (asserting that the result reached by the majority "cries out for a deeper look").

170. *Id.* (suggesting that Turek was satisfying his own personal crusade under the guise of enforcing the state's laws and noting that a jury could reasonably infer that Turek had been "eagerly awaiting the opportunity to threaten, frighten and humiliate Gail Atwater"). Judge Wiener also expressed his disappointment with the majority for "go[ing] out of its way to sanitize" the facts of this case. *Id.*

171. 392 U.S. 1 (1968).

172. See *Atwater*, 195 F.3d at 248 (citing *Terry*, 392 U.S. at 19) (arguing for restrictions on police officers' ability to search and seize).

173. See *Terry*, 392 U.S. at 21 (outlining the test for determining whether a search or seizure will infringe on Fourth Amendment rights).

174. 471 U.S. 1 (1985).

violated by an officer's use of deadly force.¹⁷⁵

Citing these two landmark Supreme Court decisions, Judge Wiener argued that the majority overlooked the importance of the balancing analysis and also underestimated the extent of the intrusion that an arrest imposes on an individual's liberty and privacy interests.¹⁷⁶ He agreed with Atwater's assertion that issuing a traffic citation would have fully protected and vindicated all of the government's interests, and found that Atwater's full custodial arrest was unnecessary and excessive under the circumstances.¹⁷⁷

Judge Wiener argued that a police officer must, at a minimum, have some articulable reason for conducting the further intrusion¹⁷⁸ of a full custodial arrest. If the personal invasion of an arrest cannot be supported by specific, legitimate reasons for such an intrusion, then the arrest is by definition "unreasonable."¹⁷⁹ He emphasized that Turek and the City of Lago Vista could not justify Atwater's arrest, and there was no plausible, objective reason for arresting her for a minor traffic violation.¹⁸⁰ Judge Wiener found that the record clearly demonstrated that the arrest was unreasonable under the circumstances, and that, by process of elimination, Turek's only reason for arresting Atwater was his desire to punish her beyond the means called for by the seat belt statute.¹⁸¹

The judge declared that an arresting officer's personal desire to punish an individual is constitutionally unacceptable under the

175. See *Garner*, 471 U.S. at 2 (applying the balancing test to find that the individual's right to be free from unreasonable seizure outweighed the government's interest in effective law enforcement).

176. See *Atwater*, 195 F.3d at 249 (Wiener, J., dissenting) (noting that the majority overemphasized the importance of probable cause, and by doing so excluded other important variables such as the significant intrusion that a full custodial arrest imposes on an individual).

177. See *id.* (arguing that the mere fact that Officer Turek was justified in issuing Atwater a citation does not mean he was justified in effecting her full custodial arrest).

178. See *id.* (proclaiming that state interference with an individual's right to privacy and liberty must be justified by specific facts, since arrest is such a significant encroachment on personal freedom).

179. *Id.* at 250 (asserting that the officer must also prove that the initial means of enforcement, in this case a traffic citation, was inadequate to fully satisfy the governmental interest, and therefore the additional intrusion was necessary to enforce the law).

180. See *id.* (noting that Atwater did not demonstrate any of the typical grounds for arrest in a traffic situation). Atwater was not wanted by the police in connection with any other crimes, she posed no threat to the officer's safety, and she was a local resident who was well-known to the officer. *Id.*

181. See *Atwater*, 195 F.3d at 250 (Wiener, J., dissenting).

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Fourth Amendment.¹⁸² He also suggested that Turek's behavior violated Atwater's due process rights under the Fifth and Fourteenth Amendments, which require punishment to be inflicted only after a formal procedure.¹⁸³ Judge Wiener predicted dire future consequences if police officers were permitted to have such broad discretion to arrest, concluding that unless Turek was punished for his actions, the court would essentially be giving police officers "carte blanche to be a one-person cop cum judge cum jury cum executioner: In effect, he can arrest, charge, try, convict, and both assess and inflict punishment."¹⁸⁴ He contended that the majority opinion would give "rogue police officers [the power to] inflict vigilante punishment on a citizen under the guise of an arrest," which is certainly not permissible under the Constitution.¹⁸⁵

In addition, Judge Wiener acknowledged the majority's interpretation of *Whren*, noting that the basis for its application of a balancing test only to arrests conducted in an extraordinary manner stemmed from dicta in the *Whren* case.¹⁸⁶ Turning to the dictionary, he claimed that such dicta supported his own judgment rather than the majority's because "[e]xtraordinary" is defined in *Webster's Dictionary* as "going beyond what is usual, regular, or customary."¹⁸⁷ Although what is considered customary is entirely dependent on individual circumstances, Judge Wiener asserted that a full custodial arrest, complete with handcuffs, booking, transportation to jail, and a search of the vehicle is not a customary or usual response to a local mother's seat belt violation.¹⁸⁸

The judge concluded by summarizing his straightforward issue with the majority's decision: before a police officer may interfere with a citizen's personal freedom by placing him or her under full custodial arrest, even with the existence of probable cause, the officer must have a plausible, articulable reason for executing such an intrusion.¹⁸⁹

182. *See id.*

183. *See id.* (suggesting that Turek abused the power entrusted to him by inflicting his own punishment on Atwater without any procedural due process).

184. *Id.* (proclaiming that a dangerous precedent will be set by allowing Turek and other officers too much authority).

185. *Id.*

186. *See Atwater*, 195 F.3d at 251 (citing *Whren*, 517 U.S. at 818) (noting that the *Whren* Court was assessing the validity of a traffic stop, not a full custodial arrest).

187. *Id.* at 251 (concluding that Atwater's arrest was by definition "extraordinary" and impermissible under the Constitution) (citing WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 296 (1965)).

188. *Id.*

189. *See id.* (contending that a demand for a specific reason for arrest is hardly burdensome on police, and will serve the important purpose of protecting citizens'.

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The judge also expressed his outrage at Turek's conduct for his eagerness to punish Atwater by significantly intruding on her rights without valid justification.¹⁹⁰ Furthermore, he found no other reason for the officer's decision to arrest Atwater other than to satisfy his own personal crusade, which on its own is a violation of Atwater's constitutional rights.¹⁹¹

III. FURTHER LEGAL SUPPORT FOR ATWATER'S POSITION

A. *Atwater's Arrest was an Unconstitutional Seizure*

As noted in the dissenting opinions, the majority's reasoning was flawed because the court failed to properly emphasize the importance of reasonableness in its Fourth Amendment analysis.¹⁹² The Fourth Amendment explicitly states that citizens are to be free from unreasonable searches and seizures¹⁹³ and undue government interference, and therefore a reasonableness inquiry is crucial to determining whether a citizen's rights have been violated.¹⁹⁴

In this case, the majority overlooked the significance of Turek's objectively unreasonable¹⁹⁵ behavior because of the existence of probable cause. However, the Supreme Court has held that, even where probable cause does exist, the degree of force applied to enact the seizure must be proportional to the offense.¹⁹⁶ In *Tennessee v.*

Fourth, Fifth, and Fourteenth Amendment rights from violation by rogue police officers). Judge Wiener also noted that such analysis calls for the application of an objective standard rather than a subjective one. *Id.*

190. See *Atwater v. City of Lago Vista*, 195 F.3d 242, 251 (1999) (lamenting Turek's decision to arrest, handcuff, transport, book, and jail Atwater).

191. See *id.* (concluding that Turek's sole purpose for arresting Atwater was to inflict an illegitimate and unconstitutional punishment on her).

192. See *id.* at 247 (Wiener, J., dissenting) (arguing that the majority turns a "blind eye" to the extreme facts of the case, which clearly demonstrate an unreasonable seizure).

193. See U.S. CONST. amend. IV (proclaiming that citizens have the right to be free from unnecessary and intrusive government interference).

194. See Susan McPherson, Note, *Warrantless Arrest for Misdemeanor Traffic Violation Does Not Violate Fourth Amendment Protection Against Unreasonable Seizure*, 32 CUMB. L. REV. 265, 275 (2001) (discussing the reasonableness test in the context of the Fourth Amendment).

195. See *Atwater*, 195 F.3d at 250 (Wiener, J., dissenting) (explaining that an objective standard should be applied in determining the reasonableness of an officer's behavior). Turek's decision to arrest was unreasonable viewed under an objective standard because a reasonable officer in a similar position would not always have arrested a driver for failure to wear a seat belt. *Id.*

196. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (stating that the mere existence of a statute permitting the use of deadly force to apprehend a suspect does not make it constitutional in all circumstances).

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Garner,¹⁹⁷ a police officer fatally shot a burglary suspect while trying to prevent the suspect's escape, and the use of such force was permitted under a Tennessee statute.¹⁹⁸

The *Garner* Court found that when a police officer restrains the freedom of a person to walk away, the officer has "seized" that person,¹⁹⁹ and such seizures are constitutional only if they are reasonable.²⁰⁰ The Court cited substantial precedent and concluded that the test to determine the constitutional permissibility of a seizure is to balance the extent of the intrusion on the individual's Fourth Amendment rights against the importance of the governmental interests.²⁰¹

Under the circumstances presented in *Garner*, the Court applied this balancing test and found that, notwithstanding probable cause, an officer may not seize an unarmed, nonviolent suspect by killing him.²⁰² The Court also found that an officer must consider the totality of the circumstances before using deadly force to prevent the escape of a felony suspect,²⁰³ and to do otherwise is constitutionally unreasonable since "[i]t is not better that all felony suspects die than that they escape."²⁰⁴ Thus, the use of deadly force was not proportional to the offense of burglary when the suspect posed no threat of harm to the officer or others,²⁰⁵ and was therefore unreasonable and a violation of *Garner*'s Fourth Amendment

197. 471 U.S. 1 (1985).

198. See *Garner*, 471 U.S. at 4-5 (explaining that the statute permits an officer to use "all the necessary means to effect the arrest" if a suspect flees or forcibly resists arrest). Such "necessary means" can also be interpreted to mean deadly force. *Id.*

199. See *id.* at 7 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); see also *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (holding that a person has been seized within the meaning of the Fourth Amendment if, in view of the totality of the circumstances, a reasonable person would believe that he or she was not free to leave).

200. See *Garner*, 471 U.S. at 7.

201. See *id.* at 8 (citing *United States v. Place*, 462 U.S. 696, 703 (1983)); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976) (highlighting the need for a balancing test to determine reasonableness under the Fourth Amendment).

202. See *Garner*, 471 U.S. 1, 9 (commenting that "the intrusiveness of a seizure by means of deadly force is unmatched" and undoubtedly outweighs the government's interest in crime prevention). However, the Court maintained that deadly force may be constitutionally justified in situations where the suspect poses a threat of death or injury to the police officer or others. *Id.* at 11-12.

203. See *id.* at 11 (noting that an officer must consider, for example, whether the suspect poses an immediate threat to the officer and the public before using deadly force).

204. *Id.*

205. See *id.* at 21 (stating that the officer did not have probable cause to believe *Garner* was armed and dangerous).

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rights.²⁰⁶

Applying this holding to the facts of the *Atwater* case, it is evident that *Atwater*'s arrest also fits the Court's definition of "unreasonable" under the *Garner* standard, as her seizure was disproportionate to the offense committed.²⁰⁷ The statute reflects the Texas state legislature's belief that a sufficient penalty for a seat belt violation should consist of "a fine of not less than \$25 or more than \$50."²⁰⁸ The Texas legislature did not specify arrest as a possible penalty in this statute; however, it did permit arrest as a possible punishment under a different, more generalized statute²⁰⁹ that allows the officer to arrest a motorist for a traffic violation when there is evidence of wrongful conduct in addition to the traffic infraction.²¹⁰

The Texas Code outlines statutory punishments for a variety of crimes, including seat belt and traffic violations.²¹¹ When the legislature deems arrest to be necessary and proportional to the offense, it typically identifies "arrest" or "imprisonment" in the particular statute.²¹² For example, section 29.03 of the Texas Penal Code specifies that aggravated robbery is a first-degree felony, carrying a sentence ranging from five years to life imprisonment, and the state may also impose a fine not to exceed \$10,000.²¹³ Class A misdemeanors carry a punishment of a maximum one-year jail term,

206. See *Garner*, 47 U.S. at 11 (concluding that the state's interest in shooting an unarmed, fleeing suspect is not "so vital as to outweigh the suspect's interest in his own life").

207. Cf. *Atwater*, 195 F.3d at 249 (Wiener, J., dissenting) (arguing that the "far more intrusive step" of a full custodial arrest was excessive under the circumstances).

208. TEX. TRANSP. CODE ANN. § 545.413 (West 1999).

209. See TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (authorizing arrest without warrant for violations of the transportation code).

210. Cf. *Atwater*, 195 F.3d at 246-47 (Garza, J., dissenting) (examining the need to arrest a motorist who has engaged in wrongful conduct aside from the traffic violation for which he or she was originally stopped for).

211. See TEX. PENAL CODE ANN. § 12.21-12.23; § 12.32-12.34 (West 1999) (specifying the applicable punishments for classes of felonies and misdemeanors, varying from steep fines to imprisonment); see also TEX. TRANSP. CODE ANN. § 545.413 (specifying the punishment for a seat belt violation, which is a small fine).

212. See, e.g., TEX. PENAL CODE ANN. § 30.02(c); § 12.32-12.33 (West 1999) (stating that the punishment for burglary could be up to ninety-nine years imprisonment and/or a \$10,000 fine because the offense is characterized as either a first degree felony punishment or a second degree felony punishment).

213. See TEX. PENAL CODE ANN. § 29.03(b), § 12.32 (West 1999). Under the Texas Code, a crime is separated into a class based on specific factors such as intent, amount of damage caused, and the individual's prior record. See also TEX. PENAL CODE ANN. § 28.03 (West 1999). For example, criminal mischief can be classified under a range of categories, from a Class C misdemeanor (if the monetary loss caused is less than \$20) to a first degree felony (if the monetary loss caused is greater than \$200,000). *Id.*

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a \$4,000 maximum fine, or both a fine and imprisonment,²¹⁴ while less serious Class C misdemeanors are punishable by a fine not to exceed \$500.²¹⁵ Class C misdemeanors make no mention of arrest in addition to the fine, while misdemeanor Classes A and B carry prison terms.²¹⁶

Contrasting these offenses with a seat belt violation accentuates the nominal nature of the punishment suggested by the Texas legislature: a maximum fine of \$50, which is one-tenth of the punishment required of the least serious misdemeanor.²¹⁷ In Texas, the punishment for offenses decreases proportionally with the seriousness of the crime.²¹⁸ If arrest is not required for a Class C misdemeanor, it would be difficult to justify the arrest of a motorist for a violation which, in the legislature's opinion, is one-tenth as serious as a Class C misdemeanor.²¹⁹

While the City of Lago Vista correctly contended that Officer Turek had statutory authority to arrest Atwater, the existence of the statute granting the officer discretion to arrest does not mean such arrest is appropriate under all circumstances.²²⁰ An officer should take a number of factors into consideration when making a decision to arrest, including, *inter alia*, the seriousness of the offense and whether the individual is a repeat offender, a flight risk, or poses a threat to society.²²¹

As Judge Parker illustrated in the *Atwater* panel decision, seat belt laws are paternalistic in nature, and are designed to protect an individual from his or her own conduct, and such conduct is

214. See TEX. PENAL CODE ANN. § 12.21-12.22 (West 1999).

215. See TEX. PENAL CODE ANN. § 12.23.

216. See *id.*; see also TEX. PENAL CODE ANN. § 12.21-12.22.

217. See TEX. TRANSP. CODE ANN. § 543.413 (West 1999) (listing penalties for seat belt violations).

218. Compare TEX. PENAL CODE ANN. § 12.32 (West 1999) (relaying the greater degree of punishment for a first-degree felony), with TEX. PENAL CODE ANN. § 12.23 (referring to the penalty for a less serious Class C misdemeanor). The amount of prison time and/or fine is reflected in the nature of the offense and increases or decreases in relation to the seriousness of the crime. *Id.*

219. Compare TEX. TRANSP. CODE ANN. § 543.413 (listing the punishment for seat belt violation as a fine of no more than \$50), with TEX. PENAL CODE ANN. § 12.23 (noting that the punishment for a Class C misdemeanor is a fine of no more than \$500).

220. Cf. *Riding Without a Seatbelt is a Serious Crime in Texas*, VICTIMS OF OVER-ZEALOUS POLICE OFFICERS (June 29, 2000) (suggesting that Turek acted inappropriately by arresting Atwater simply because the law states that a motorist "may" be arrested for a seat belt violation) at http://www.forensic-evidence.com/site/Police/Pol_Atwater.html.

221. See *Sibron v. New York*, 392 U.S. 40, 66-67 (1968) (discussing several factors that might influence an officer's decision to arrest).

generally not a threat to the public at large.²²² An armed robber fleeing the scene of a crime poses a significantly greater threat to the community than a “soccer mom” who allowed her children to remove their seat belts to search for a lost toy. The Texas legislature has recognized this distinction between serious and minor offenses, and meted out its punishments accordingly.²²³

Since Atwater was not a repeat offender, not a flight risk (Officer Turek knew her home was around the corner),²²⁴ and posed little or no threat to society, her full custodial arrest was disproportionate to the seriousness of her offense. Under the rule set forth in *Garner*, her arrest was therefore “unreasonable”²²⁵ and a violation of her Fourth Amendment right to be free from unreasonable seizures.

Furthermore, Atwater was seized by Officer Turek,²²⁶ and according to *Garner*, such a subordination of a person’s Fourth Amendment rights must be justified by a compelling government interest.²²⁷ Applying the balancing test called for by *Garner*, it is necessary to weigh the importance of the government’s interest against the intrusion on an individual’s Fourth Amendment rights.²²⁸

The City of Lago Vista has an interest in enforcing the laws of the state of Texas and protecting its citizens from harm, but the small fine called for by the seat belt statute indicates a diminished

222. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999) (defining a “paternalistic” law and noting that violators of these laws do not threaten society as a whole).

223. Compare TEX. PENAL CODE ANN. § 12.32 (stating that “an offense under this section is . . . [punishable by long-term] imprisonment . . . and in addition to imprisonment, [the offender] may be punished by a fine”), with TEX. TRANSP. CODE ANN. § 543.413 (stating that “an offense under this section is . . . punishable by a fine of not less than \$25 or more than \$50”).

224. See *Atwater*, 195 F.3d at 250 (Wiener, J., dissenting) (noting that Atwater was a local resident and well-known to Turek).

225. See *Garner*, 471 U.S. at 1 (noting that the use of disproportionate force to prevent the escape of all felony suspects, whatever the circumstances, is “constitutionally unreasonable”).

226. See generally *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (citing examples of circumstances that could, in a reasonable person’s mind, constitute a seizure: an officer’s threatening presence, display of a weapon, use of physical touching, and “use of language or tone of voice indicating that compliance with an officer’s request might be compelled”); see also *Terry v. Ohio*, 392 U.S. 1, 16 (recognizing that when an officer accosts an individual and restricts his or her freedom to walk away, that individual has been seized). Therefore, Atwater was “seized” under the interpretation adopted by the Supreme Court because she was not free to leave.

227. See *Garner*, 471 U.S. at 8 (holding that a balancing test is required to determine the constitutionality of a seizure) (citing *United States v. Place*, 462 U.S. 696, 703 (1983)).

228. See *Petition for Writ of Certiorari*, *supra* note 41, at 14.

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governmental interest in its enforcement²²⁹ as compared to other crimes carrying much more severe penalties. On the other hand, Atwater was subjected to a full custodial arrest, which is “one of the most extreme governmental intrusions imaginable from the perspective of the average citizen.”²³⁰ There can be little debate that the extensive imposition on Atwater’s Fourth Amendment rights outweighed the state’s minimal interest in punishing a seat belt offender, and also that Turek acted unreasonably by handcuffing Atwater behind her back, in front of her terrified children, in order to enforce a seat belt law.

However, the full Fifth Circuit disagreed, finding that such a balancing test was unnecessary because Turek had probable cause to arrest Atwater²³¹ under Texas law²³² and, by employing a very narrow interpretation of the *Whren* decision, found that an arrest is constitutionally proper when there is probable cause to believe that any crime is being committed.²³³ With such an application of a bright line rule,²³⁴ the full Circuit erroneously ignored the distinction between minor and serious offenses.²³⁵

The Fifth Circuit has recognized such a distinction in recent years.²³⁶ In *Morgan v. City of DeSoto*,²³⁷ four teenage girls were arrested

229. See *id.* at 15 (arguing that “the government’s side of the scale is basically empty”).

230. See *id.* at 13.

231. See *Atwater*, 195 F.3d at 246 (holding Turek’s arrest of Atwater to be reasonable under the Fourth Amendment); see also TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (stating that an officer may make a warrantless arrest if a crime is being committed in his presence). Atwater did not contest the existence of probable cause. See Petition for Writ of Certiorari, *supra* note 41, at 10.

232. See *Rosalez v. State*, 875 S.W.2d 705, 718 (Tex. App. 1993) (holding that an officer must obtain a warrant before arresting an individual, but this requirement does not apply if probable cause exists and the offense falls within the exceptions to the warrant requirement). An offense committed in the presence of the officer is one such exception. See TEX. TRANSP. CODE ANN. § 543.001 (West 1999).

233. See *Atwater v. City of Lago Vista*, 195 F.3d 242, 245-46 (1999) (finding that the arrest was not committed in any “extraordinary manner”); see also *Whren v. United States*, 517 U.S. 806, 807 (1996).

234. Bright line rules are often applied by courts in response to the need for efficiency, predictability and ease of application. See generally Albert M. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984). However, some cases demonstrate evidence of unreasonableness, and the bright line rule should be abandoned in fairness to the individual’s Fourth Amendment and privacy rights. See *id.* at 242 (deriding bright line rules that permit certain police actions which, if considered on their facts alone, would otherwise be considered unconstitutional and criticizing the Court for expanding police discretion “beyond the limits that a regime of case-by-case adjudication would establish”).

235. Cf. *Salken*, *supra* note 2, at 259 (noting that custodial arrest for minor offenses is a recent development in the law, not followed historically at common law).

236. See, e.g., *Morgan v. City of DeSoto*, 900 F.2d 811, 813-14 (5th Cir. 1990)

and prosecuted for criminal trespass after they inadvertently crossed the path of Dallas police officers who had been arresting individuals loitering in a shopping center parking lot.²³⁸ Like Gail Atwater, the girls were arrested, handcuffed behind their backs, and transported to jail.²³⁹ After their arrests, they were booked at the county jail and spent the night in a cell with prostitutes and a screaming inmate.²⁴⁰

The Fifth Circuit judges hearing the case were outraged by the facts presented,²⁴¹ despite the evidence that, as in the *Atwater* case, an offense was actually committed and there was probable cause for the officers to arrest.²⁴² However, despite the factual similarities to *Atwater*, the *Atwater* court's opinion was clearly inconsistent with the Fifth Circuit's precedent in *Morgan*.²⁴³

The *Morgan* court held that, regardless of probable cause and the government's interest in preventing the litter problem, they could find no explanation for arresting, handcuffing, and jailing every teenager found on the parking lot under any circumstances.²⁴⁴ The court reasoned that the girls were not threats to society, and therefore their arrests were unjustified.²⁴⁵

By applying the *Whren* bright line rule, the full Circuit in *Atwater* ignored the *Morgan* precedent, possibly for the sake of judicial economy.²⁴⁶ If the court had instead followed *Morgan*, it may have

(finding that the criminal justice system operated as an "instrument of oppression" when police officers arrested, handcuffed, jailed, and charged four high school girls with criminal trespass for loitering).

237. 900 F.2d 811 (5th Cir. 1990).

238. See *id.* at 812 (noting that the police were responding to complaints from shopping center managers about the litter problem created by groups of teenagers who would congregate and 'cruise' there nightly).

239. See *id.* at 813 (noting that, like *Atwater*, the girls were first time offenders who complied with the officers at all times).

240. See *id.*

241. See *Morgan*, 900 F.2d at 814 (finding no justification for arresting every teenager found in a particular shopping center's parking lot).

242. Signs were posted on the property stating that trespassing was not permitted, and that entry into the parking lot would result in prosecution under § 30.05 of the Texas Penal Code, Criminal Trespass. See *id.* The offense was committed in front of the arresting officers, thus probable cause existed. See TEX. TRANSP. CODE ANN. § 14.01 (West 1999).

243. See *Morgan*, 900 F.2d at 814 (declaring that arrest is not the appropriate punishment under every set of circumstances).

244. See *id.* (holding that the police officers' behavior was completely unjustified under the circumstances presented).

245. See *id.* (stating that the police used the criminal justice system as an "instrument of oppression" in this case).

246. See Alschuler, *supra* note 234, at 229 (arguing that the Court's use of "prophylactic" bright line rules in Fourth Amendment cases increases the likelihood

recognized the similarities between it and *Atwater* and reached a consistent result.²⁴⁷ However, the court failed to sufficiently analyze either the totality of the circumstances²⁴⁸ or the unreasonableness of a full custodial arrest for a minor offense²⁴⁹ which was so apparent to the same court in *Morgan*.

As Judge Dennis pointed out in his dissenting opinion,²⁵⁰ the majority also erred by failing to heed the Supreme Court's mandate in *Wyoming v. Houghton*,²⁵¹ which stated that a presiding court must first look to the common law in deciding Fourth Amendment cases²⁵² and then to a balancing of interests test, if necessary.²⁵³ Several courts, including the Supreme Court,²⁵⁴ have applied the *Houghton* precedent,²⁵⁵ while others have used it to find that a full custodial arrest for a minor misdemeanor is a violation of an individual's Fourth Amendment rights.²⁵⁶

In *State v. Jones*, the Ohio Supreme Court applied the *Houghton* test to conclude that, absent one of the statutory exceptions which would permit arrest,²⁵⁷ a full custodial arrest for a minor misdemeanor offense²⁵⁸ violated both the Fourth Amendment and the state

of injustice).

247. Compare *Atwater*, 195 F.3d 242 (1999) (recognizing probable cause as a determinative factor of constitutionality), with *Morgan*, 900 F.2d 811 (1990) (disregarding the existence of probable cause when the circumstances demonstrate unreasonable police conduct).

248. See *Monday v. Oullette*, 118 F.3d 1099, 1104 (6th Cir. 1997) (holding that "because the test of reasonableness under the Fourth Amendment is incapable of precise definition . . . its proper application requires careful attention to the facts and circumstances of each particular case").

249. See *Morgan*, 900 F.2d at 814.

250. See *Atwater*, 195 F.3d at 254 (Dennis, J., dissenting).

251. 526 U.S. 295 (1999).

252. See *id.* (outlining the two-pronged test that should be applied in Fourth Amendment cases).

253. See *id.* (observing that the reasonableness prong of the test should be applied only if a decision cannot be made based on the common law).

254. See *Florida v. White*, 526 U.S. 559 (1999) (following the *Houghton* two-pronged test in its Fourth Amendment inquiry).

255. See *State v. Friedel*, 714 N.E.2d 1231, 1237 (Ind. Ct. App. 1999) (applying a balancing of interests test after recognizing that an answer could not be obtained by looking to the common law); see also *Schmidt v. City of Lockport, Illinois*, 67 F. Supp. 2d 938, 941 (N.D. Ill. 1999) (holding that the warrantless arrest of an individual was constitutional under the circumstances presented since it was permissible at the time the Amendment was framed).

256. See *State v. Jones*, 727 N.E.2d 886 (Ohio 2000).

257. Some of these statutory exceptions permitting arrest include the offender's refusal to sign a citation, the offender's need for medical care, or the offender's inability to provide for his own safety. *Id.* at 891.

258. *Jones*, the appellee, was arrested for the minor misdemeanor of jaywalking. See *id.* at 888.

constitution.²⁵⁹ There were several factual similarities between the *Atwater* and *Jones* cases,²⁶⁰ leading to the conclusion that a similar result would have been reached in *Atwater* if the Fifth Circuit majority had not ignored the *Houghton* rule in favor of the narrow interpretation of *Whren* that it applied instead.²⁶¹

Like *Atwater*, Jones was told by his arresting officers that he was going to be taken to jail for the offense of jaywalking²⁶² in the absence of any evidence that he had committed another crime.²⁶³ Jones, like *Atwater*, was handcuffed and escorted to jail in a squad car for an offense punishable by a \$100 fine.²⁶⁴ Also, the *Jones* court concluded, as the Fifth Circuit had in *Atwater*,²⁶⁵ that probable cause existed for the officer to make the initial stop.²⁶⁶ However, the *Jones* court made a distinction between the legality of the stop and that of the arrest,²⁶⁷ as Judge Garza had called for in his full Circuit dissent.²⁶⁸

As illustrated by the *Jones* case, the full Fifth Circuit erred in its failure to apply the *Houghton* test to *Atwater*'s Fourth Amendment claim against Officer Turek and the City of Lago Vista.²⁶⁹ *Houghton*

259. See *id.* at 895.

260. Compare *Atwater*, 195 F.3d at 242 (setting forth the case of a woman who was arrested, handcuffed, and booked for not wearing her seat belt, a crime carrying a statutory penalty of \$50), with *Jones*, 88 727 N.E.2d 886 (noting that Jones was also arrested, booked, and taken to jail for a statutory "minor misdemeanor"). Neither *Atwater* nor *Jones* had outstanding warrants for their arrest. *Id.* However, the respective courts hearing these cases came to very different results despite the factual similarities.

261. See *Atwater*, 195 F.3d at 246 (holding that, in accordance with *Whren*, an arrest based on probable cause is constitutional).

262. See *Jones*, 727 N.E.2d at 888.

263. See *id.* (noting that the police had originally stopped Jones because they suspected him of selling drugs). However, the police did not find any evidence of drug activity, and Jones was not wanted by the police in relation to any other crimes. *Id.* Similarly, Turek told *Atwater* she was going to jail based solely on her seat belt violations, without any additional evidence of wrongdoing. See *Atwater*, 195 F.3d at 388.

264. Accord TEX. TRANSP. CODE ANN. § 545.413 (West 1999) (stating that a seat belt violation such as *Atwater*'s is punishable by a maximum fine of \$50).

265. See *Atwater*, 195 F.3d at 245.

266. See *Jones*, 727 N.E.2d at 888 (noting that the trial court found probable cause to stop, but not to arrest since Jones' circumstances did not fall within a statutory exception).

267. See *id.* (holding that a full custodial arrest for a minor misdemeanor is unconstitutional).

268. Similarly, Judge Garza's full Circuit dissent in *Atwater* also distinguished probable cause to make the traffic stop from the arrest itself. 195 F.3d at 247.

269. Cf. Petition for Writ of Certiorari, *supra* note 41, at 21 (advocating that the Fifth Circuit majority erroneously avoided consideration of the common law in its failure to apply the *Houghton* test).

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held that courts shall apply a two-pronged test²⁷⁰ to consider whether the individual's Fourth Amendment rights were violated, and this mandate was not considered by the full Circuit in *Atwater*.²⁷¹

As the *Atwater* majority could have done, the Ohio Supreme Court applied the *Houghton* test to determine that, despite the existence of probable cause,²⁷² a balancing of interests test²⁷³ demonstrated that Jones' privacy rights clearly outweighed the government's interests in making a full custodial arrest for jaywalking.²⁷⁴ The court reasoned that it was unnecessary to arrest a petty offender, thereby subjecting him to a great intrusion upon his privacy, unless the officer had reason to believe that the offender would not pay the fine or respond to a summons.²⁷⁵

Applying such reasoning to the *Atwater* case, it can be argued that Officer Turek did not have any such reason to believe that *Atwater* would ignore a citation,²⁷⁶ should he have issued one. He had previously stopped her under suspicion of another seat belt violation,²⁷⁷ but found that he was mistaken and no citation was issued.²⁷⁸ Turek had seen *Atwater*'s identification and insurance information during this first stop²⁷⁹ and knew she was a member of the community.²⁸⁰ He clearly recognized her from the previous stop, as evidenced by his screaming at *Atwater* that they had had this

270. See *Houghton*, 526 U.S. at 300 (describing the test as first evaluating the police conduct in question under the traditional standard of reasonableness, and then balancing the intrusion of the person's privacy interest with the government's interest in making the arrest).

271. See *Atwater*, 195 F.3d at 253 (Dennis, J., dissenting) (stating that he could not join in the majority's opinion because it failed to recognize or address the Supreme Court's mandate in *Houghton*).

272. See *Jones*, 727 N.E.2d at 888.

273. See *id.* at 893 (holding that the balancing test was necessary since the court could not conclusively determine whether arrests for minor misdemeanors were prohibited under the common law). However, Judge Dennis' dissent found that, under *Carroll*, such arrests were disallowed under the common law and a balancing test was unnecessary. *Atwater*, 195 F.3d at 254 (Dennis, J., dissenting). However, if a balancing test was applied, *Atwater*'s privacy rights would have outweighed the government's interest in the enforcement of a petty crime. *Id.*

274. See *Jones*, 727 N.E.2d at 894-95 (noting that an arrest necessarily brings about a serious intrusion upon a person's liberty and privacy). In contrast, the government's interest in preventing jaywalking is comparatively minimal. *Id.*

275. See *id.*

276. See TEX. TRANSP. CODE ANN. § 545.413(d) (stating that a seat belt offense was to be punishable by a fine of \$25 to \$50).

277. See Kathryn R. Urbonya, *Four on the Fourth*, ABA J., Oct. 2000, at 32.

278. See ON THE DOCKET, *supra* note 28, at 1.

279. See Petition for Writ of Certiorari, *supra* note 41, at 10.

280. See *id.*

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conversation before.²⁸¹ According to the facts of the case, Atwater gave no indication that she would have been unwilling to pay a fine.²⁸² She complied with the officer at all times,²⁸³ and did not resist arrest.

As Judge Wiener suggested in his full Circuit dissent,²⁸⁴ the circumstances of this case could lead to the conclusion that Turek's primary motivation was to harass Gail Atwater. Most citizens would expect to be, and are, issued a ticket for committing a minor traffic violation,²⁸⁵ but such was not the case in Gail Atwater's encounter with Officer Turek.

Absent any evidence of additional wrongdoing, Officer Turek arrested a mother in the presence of her two terrified, crying children, without allowing her to take the children to a friend's house before going to jail.²⁸⁶ Despite his familiarity with Atwater, and despite the fact that she was driving fifteen miles per hour down a residential street in broad daylight, Turek chose to arrest her.²⁸⁷ As Judge Wiener advocated,²⁸⁸ it appears that Turek wanted to use his authority to teach Atwater a difficult lesson.

B. Search Incident to Arrest and Future Implications of the Full Circuit's Reliance on Whren v. United States

As the Supreme Court set forth in *United States v. Robinson*,²⁸⁹ a search of an individual incident to a valid arrest is a well-settled exception to the Fourth Amendment warrant requirement.²⁹⁰ In this case, Officer Turek was free to search Atwater and her vehicle after

281. See *Atwater*, 165 F.3d at 382 (recounting that Turek had verbally abused Atwater and screamed at her that she was going to jail).

282. See *id.*

283. However, Atwater did ask Officer Turek to lower his voice since he was frightening her children. See *Case Summaries: Fifth Circuit*, *supra* note 38, at 47. According to Atwater, this request seemed to "trigger his wrath," and he subsequently used his discretion to arrest her. *Id.*

284. See *Atwater*, 195 F.3d at 248 (Wiener, J., dissenting) (remarking that "the only conceivable reason for the full custodial arrest . . . was Officer Turek's illegitimate desire to punish Atwater").

285. But see *Salken*, *supra* note 1, at 222 (noting that, while a citizen may expect a ticket, it is permissible for the officer to arrest in many states).

286. See *Atwater*, 165 F.3d at 382.

287. The arrest could have been considered reasonable if, for example, Atwater had been driving at an excessive rate of speed or in inclement weather. Cf. *Atwater*, 195 F.3d at 248 (Wiener, J., dissenting).

288. See *Atwater*, 195 F.3d at 248 (Wiener, J., dissenting).

289. 414 U.S. 218 (1973).

290. See *Robinson*, 414 U.S. at 224.

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using his statutorily granted discretion to arrest.²⁹¹ He also may have used this power as an additional instrument with which to harass Atwater, despite the fact that her crime was readily apparent and he could not find any fruits or further evidence²⁹² of the offense in her vehicle.²⁹³

Furthermore, officers have the ability to search as a result of the state's heightened interest in protecting the officers' safety.²⁹⁴ A police officer may search a citizen as incident to a valid arrest²⁹⁵ in case the arrestee is concealing a weapon, could otherwise be a threat to the officer, or is in possession of additional evidence.²⁹⁶ It is not in dispute as to whether Turek had the authority to search Atwater's car.²⁹⁷ However, whether the law was used here as a means of harassment, since it was unlikely that Turek feared for his safety when approaching and subsequently arresting a woman with her two young children in the car, is at issue.²⁹⁸

The Supreme Court recently addressed the issue of police harassment and unreasonable seizures with its decision in *Knowles v. Iowa*,²⁹⁹ holding that a full automobile search after the issuance of a citation was unconstitutional under the Fourth Amendment.³⁰⁰ Under *Knowles*, the Court refused to extend the search incident to arrest doctrine to circumstances where the motorist could have been arrested, but was given a citation instead.³⁰¹

Patrick Knowles was stopped for speeding by an Iowa policeman who, like Officer Turek, had the authority to either ticket or arrest

291. *Cf. id.*

292. *Cf. Robinson*, 414 U.S. at 218.

293. It was highly unlikely that Turek would find any additional evidence of Atwater's failure to wear her seat belt by searching her car. However, under the *Robinson* rule, such a search is permitted, even if no incriminating items are later found. *Id.*

294. *See Robinson*, 414 U.S. at 234-35 (declaring that an officer is in far greater danger of being hurt by a suspect during the course of an arrest than he would be during an ordinary traffic stop).

295. *See Robinson*, 414 U.S. at 224.

296. *See McPherson*, *supra* note 194, at 275 (discussing circumstances under which warrantless searches are acceptable under the Fourth Amendment).

297. *See Robinson*, 414 U.S. at 223-24.

298. *Cf. Atwater*, 165 F.3d at 382 (noting that Atwater was not acting suspiciously and did not pose any threat to the officer).

299. 525 U.S. 113 (1998).

300. *See id.* at 113.

301. *See* Stephanie Gioia, *Knowles v. Iowa: No "Search Incident to Citation" Exception*, 26 AM. J. CRIM. L. 193 (1998) (discussing the Court's rationale for the *Knowles* decision).

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the traffic offender.³⁰² The officer decided to issue a citation in lieu of arrest,³⁰³ but proceeded to conduct a full search of the car without probable cause or Knowles' consent based on a statute authorizing him to do so.³⁰⁴ The officer found marijuana in Knowles' car and subsequently arrested him on drug possession charges.³⁰⁵

The United States Supreme Court reversed the Iowa Supreme Court's decision, concluding that the Iowa statute was unconstitutional and that an actual arrest must be made before a search will be upheld.³⁰⁶ As previously discussed, the rationale for a search incident to arrest under *United States v. Robinson*³⁰⁷ focuses on two premises: ensuring the safety of the officer³⁰⁸ and preserving evidence.³⁰⁹ Applying *Robinson* to the facts of *Knowles*, the Court found that neither criteria had been satisfied by the issuance of a citation,³¹⁰ and that the search of Knowles' car was a violation of his Fourth Amendment rights.³¹¹

In the context of a routine traffic stop, the Court found that concern for the officer's safety does not justify the "considerably greater intrusion"³¹² of a full scale search. The officer could have taken steps to protect himself by other means, such as asking Knowles to step out of the car³¹³ or by conducting a *Terry* pat-down.³¹⁴ Furthermore, the Court declared that no further evidence of

302. See *Knowles*, 525 U.S. at 115 (stating that Iowa police officers may arrest a motorist if he or she has cause to believe the motorist has violated any traffic or motor vehicle law) (citing IOWA CODE ANN. § 321.485(1)(a) (West 1997)).

303. See *id.* at 114.

304. See *id.* at 115 (permitting an officer to conduct a search if arrest was possible) (citing IOWA CODE ANN. § 805.1(1) (West 1997)). In this case, the officer was permitted to search the vehicle because he could have arrested Knowles for speeding. *Id.*

305. See *id.* at 114.

306. See *id.* at 115-16 (reversing the Iowa Supreme Court's "search incident to citation" exception to the warrant requirement).

307. 414 U.S. 218 (1973).

308. See *id.* at 226 (illustrating the need to locate weapons on the arrestee's person which may be used against the officer).

309. See *id.* at 232 (discussing the need to preserve evidence that may otherwise be destroyed by the arrestee).

310. See *Knowles*, 525 U.S. at 118.

311. See *id.*

312. See *id.* at 117.

313. See *id.* at 118 (declaring that an officer may ask a motorist to get out of his car during a traffic stop in the interest of the officer's safety) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977)).

314. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (allowing officers to pat the outer clothing of individuals suspected of possessing a firearm).

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excessive speed was going to be found in the vehicle,³¹⁵ and therefore there was no need to search for the sake of preserving evidence.³¹⁶

The *Knowles* case should have had a powerful impact on *Atwater* because it set forth the Court's recent intention to protect motorists from unconstitutional assertions of police power.³¹⁷ By declining to extend the power to search in *Knowles*, the Court provided protection to the average citizen against intrusive searches conducted without the motorist's consent or probable cause.³¹⁸

However, an officer looking to search a motorist's car in the absence of probable cause need only place the motorist under arrest for the traffic violation to avoid the *Knowles* mandate,³¹⁹ and the search incident to arrest doctrine would permit a full search of the motorist and her vehicle.³²⁰ Gail Atwater is a perfect example of such a possibility. If Turek's subjective intent was in fact to harass Atwater,³²¹ he may legally have advanced this goal by arresting her instead of issuing her a citation.³²²

The current legal precedent set forth by the full Fifth Circuit³²³ does not protect motorists from such arbitrary exercises of malicious intent by a police officer. Ignoring the Court's more recent holding in *Wyoming v. Houghton*,³²⁴ the Fifth Circuit erroneously relied on *Whren v. United States*,³²⁵ which held that an officer's motivations or

315. See *Knowles*, 525 U.S. at 118.

316. See *id.*

317. Cf. Gioia, *supra* note 301, at 193 (observing the Supreme Court's decision not to extend a police officer's power to search, which in effect emphasizes an individual's Fourth Amendment rights).

318. See *Knowles*, 525 U.S. at 113.

319. See Petition for Writ of Certiorari, *supra* note 43, at 16.

320. See *Robinson*, 414 U.S. at 224 (authorizing a full search of the person incident to a lawful arrest). In 28 states, such an arrest would be permissible at the officer's discretion. See Salkin, *supra* note 1, at 250-51.

321. See *Atwater v. City of Lago Vista*, 195 F.3d 242, 251 (5th Cir. 1999) (Wiener, J., dissenting) (observing that Turek's purpose in arresting Atwater was to "inflict vigilante punishment" under the guise of an arrest).

322. If Turek had decided to issue a citation for Atwater's seat belt violation, he could not legally have searched her car under the *Knowles* doctrine. See *Knowles*, 525 U.S. at 113.

323. See *Atwater*, 195 F.3d at 244-45 (following the *Whren* decision instead of the more current holding set forth in *Houghton*, which mandated a different analytical approach to Fourth Amendment cases).

324. See 526 U.S. 295 (1999) (stating that, while an officer with probable cause to search a vehicle may search all containers in which the object of the search could be concealed, the officer may not search a container that the officer knows or should know belongs to a passenger not suspected of criminal activity, unless somebody had the opportunity to conceal contraband within it to avoid detection).

325. 517 U.S. 806, 813 (1996).

subjective intent played no role in Fourth Amendment analysis.³²⁶

The *Whren* precedent is troublesome because it offers little or no protection³²⁷ to victims of pretextual stops.³²⁸ As long as there is probable cause to believe that a traffic violation had occurred, an officer may arrest and search a motorist who has not engaged in any illegal activity³²⁹ other than simply looking “suspicious”³³⁰ in a particular neighborhood.

The Fourth Amendment was enacted in order to protect citizens from arbitrary and unreasonable searches and seizures.³³¹ The *Whren* standard, as applied in the *Atwater* case,³³² maintains that the warrantless arrest of a citizen is reasonable for the violation of any law, however minor,³³³ as long as probable cause exists.³³⁴ This bright-line standard fails to consider the totality of the circumstances,³³⁵ which presents issues of serious importance to the average motorist and society as a whole. Because every motorist can be caught violating a traffic law at one point or another, the Court’s holding in *Whren* places most of America’s 185 million motorists³³⁶ at risk as

326. See *id.* at 813.

327. *But cf. Whren*, 517 U.S. at 813 (concluding that victims of pretextual stops have the Equal Protection Clause to protect their constitutional rights and should not look to the Fourth Amendment). However, a case under the Equal Protection Clause is extremely difficult to prove because the motorist will have to prove discriminatory intent, and that similarly situated individuals of a different race or group were not stopped. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

328. See generally Timothy P. O’Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 694 (1998) (defining “pretext arrest” as a police officer’s stop of a vehicle for a minor violation which the officer had no intention of enforcing, so that the officer could look for drugs or other contraband without probable cause).

329. See TEX. TRANSP. CODE ANN. § 543.001 (West 1999) (stating that an officer is permitted to enact a warrantless arrest of a motorist who has violated the Transportation Code).

330. “Suspicious” is a subjective standard, based entirely on the officer’s opinion. Under the *Whren* bright-line rule, the officer’s subjective intent is irrelevant. 517 U.S. at 813. Therefore, this standard provides no protection to potential victims of racial profiling.

331. See U.S. CONST. amend. IV.

332. See *Atwater v. City of Lago Vista*, 195 F.3d 242, 244-45 (5th Cir. 1999).

333. See *Petition for Writ of Certiorari*, *supra* note 43, at 18.

334. See *Whren v. United States*, 517 U.S. 806, 807 (1996) (holding that a balancing test is required only when the arrest in question was conducted in a manner unusually harmful to the individual).

335. *Cf. Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5th Cir. 1999) (criticizing Turek’s decision to arrest *Atwater* for the violation of a “paternalistic” law, in the absence of more serious wrongdoing).

336. See *Court to Study Arrest for Routine Traffic Violation*, *supra* note 5.

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potential victims of police abuse.³³⁷

IV. CONCLUSION — THE SUPREME COURT

On April 24, 2001, four months after this Note was written, the Supreme Court ruled 5-4 that placing an otherwise law-abiding citizen under full custodial arrest for a minor traffic violation does not violate the Fourth Amendment.³³⁸

Justice Souter, writing for the majority,³³⁹ thoroughly examined English and colonial American common law with regard to Atwater's contention that the *Houghton* two-pronged test should apply rather than the bright-line rule advocated in *Whren*.³⁴⁰ The Court acknowledged the relevance of Atwater's argument with regard to the circumstances permitting a warrantless arrest at common law, but concluded that there was conflicting evidence which indicated that arrests were, in fact, permitted at common law for violations that were not breaches of the peace such as, ironically enough, negligent carriage driving.³⁴¹ The Court ultimately concluded that Atwater's interpretation of the conflicting case law was not necessarily the better of the two.³⁴²

The Court also agreed with Atwater that her right to be free from "pointless indignity"³⁴³ and "gratuitous humiliations"³⁴⁴ such as the ones she suffered clearly outweighed any interest the city may have had in enforcing its seat belt statute, and that based exclusively on the "uncontested" facts of this particular case, Atwater could have successfully overcome the city's argument. However, the Court reasoned that Fourth Amendment analysis should not be conducted on a case-by-case basis, but instead requires a blanket rule that is uniformly applicable, "lest every discretionary judgment in the field be converted into an occasion for constitutional review."³⁴⁵ Thus, the Court has set forth a new rule – if *any* law is violated in an officer's

337. See Visser, *supra* note 23, at 1708; see also Salken, *supra* note 1, at 222.

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

339. Justice Souter was joined by Justices Rehnquist, Scalia, Thomas and Kennedy. *Id.*

340. See *Atwater*, 532 U.S. at 326-47.

341. See *id.* at 335.

342. See *Atwater*, 532 U.S. at 332.

343. *Id.* at 345-46.

344. *Id.*

345. *Id.* The Court went on to discuss the various complications that might arise under Atwater's proposal, and the difficulty of drawing a line between minor and serious offenses. The Court found that such a distinction would be especially difficult for police officers to make in the field. *Id.* at 345-47.

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presence, no matter how insignificant, this constitutes probable cause and the individual may be lawfully subjected to a full custodial arrest.

Justice O'Connor, in her strongly worded dissent,³⁴⁶ set forth more compelling arguments. She suggested that the principles of the Fourth Amendment should not be foregone for the sake of judicial efficiency.³⁴⁷ The dissent also criticized the majority's application of the test to determine reasonableness under the Fourth Amendment. Justice O'Connor outlined the two-pronged test under *Wyoming v. Houghton*,³⁴⁸ noting that when history is inconclusive, as the majority had indicated it is, the next step is to apply a balancing test under "traditional standards of reasonableness,"³⁴⁹ noting that the majority had already conceded that the invasion of Atwater's privacy interests clearly outweighed any government interest that was asserted.³⁵⁰

Furthermore, Justice O'Connor claimed that a distinction does need to be made between minor and serious violations, and such a rule can realistically be administered without placing too much of a burden on police.³⁵¹ She remarked that police officers could, as they now routinely do with the *Terry* rule, find a way to apply the rule on an everyday basis,³⁵² and any mistakes in judgment that they might make would be covered by the doctrine of qualified immunity.³⁵³

The first step toward following this suggested new standard, according to the dissenting justices, would be to recognize the difference between a traffic stop and an arrest for purposes of the Fourth Amendment.³⁵⁴ Judge Garza, in his dissenting opinion to the full Fifth Circuit opinion, also recommended such a distinction.³⁵⁵ Justice O'Connor pointed out that there is a significant difference between a stop and an arrest, since an arrest is a much more

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

347. See *Atwater*, 522 U.S. at 366 (O'Connor, J., dissenting) (asserting that, while "clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections").

348. 526 U.S. 295 (1999).

349. See *Atwater*, 532 U.S. at 360-61 (O'Connor, J., dissenting) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

350. See *id.* at 347.

351. See *id.* at 366 (O'Connor, J., dissenting).

352. *Id.*

353. See *supra* text accompanying notes 110-20 for a discussion of the doctrine of qualified immunity.

354. See *Atwater*, 532 U.S. at 362-65.

355. See *Atwater*, 195 F.3d at 245 (Garza, J., dissenting).

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substantial intrusion on an individual's liberty and privacy interests.³⁵⁶ Accordingly, Justice O'Connor remarked that the justification for an arrest should be held to a higher standard than that of a traffic stop,³⁵⁷ and proclaimed that the arrest of an individual for a fine-only offense³⁵⁸ "defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."³⁵⁹

The dissent also recognized that the per se rule adopted by the majority will potentially have serious ramifications for all Americans. Justice O'Connor wrote that giving police officers unbridled discretion to arrest is opening the door to abuse, both in and out of the context of traffic offenses.³⁶⁰ Americans will now be subject to arrest for a variety of fine-only misdemeanors, such as littering and driving with expired license plates,³⁶¹ not to mention the rogue police officer who now has the freedom to stop a motorist for a very insignificant traffic violation – even if only with the intention to harass the motorist and conduct a search.³⁶²

The potential for such harassment is a significant concern for minority groups. According to a study recently published in *The Washington Post*, more than half of all black men report that they have been a victim of racial profiling by police.³⁶³ The *Atwater* case had the potential to help shield people of color from the *Whren* bright-line rule which offers victims of racial profiling too little protection.³⁶⁴ Instead, the Court's affirmation of the *Whren* decision

356. See *Atwater*, 532 U.S. at 364-65 (O'Connor, J., dissenting).

357. Justice O'Connor suggests that police should be held to a higher standard of justification before conducting an arrest, as they are required to under the *Terry* rule, for the same reason of protecting an individual's right to liberty and privacy. She maintains that this standard should require police to "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." *Id.* at 362-68 (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). This standard would be more likely to deter officers from harassing motorists at random, since officers would be expected to reasonably justify their actions.

358. Justice O'Connor also discussed the significance of the statute's permitted punishment of a seat belt offender, as also discussed in Part III.A, *infra*. The seat belt statute calls for a maximum punishment of a \$50 fine. See TEX. TRANSP. CODE ANN. § 513.413 (West 1999).

359. *Atwater*, 532 U.S. at 365.

360. See *id.* at 372.

361. See *id.*

362. Under the *Whren* bright-line rule that the Court upheld in this case, a police officer's subjective intent "play[s] no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813 (1996).

363. See Richard Morin & Michael H. Cottman, *Discrimination's Lingering Sting*, WASH. POST, June 22, 2001, at A1.

364. See Amanda Onion, *Soccer Mom at Highest Court*, at

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further enhances the likelihood that more American motorists will be subjected to police harassment, as virtually every driver will be guilty of a minor traffic violation at some point in time. Should a driver encounter an officer with a penchant for exercising his authority or who might be having a bad day,³⁶⁵ the driver may be subject to arrest, search, imprisonment in a potentially dangerous environment,³⁶⁶ and remain with a public record of his or her arrest. Though the majority acknowledged that Turek exercised “extremely poor judgment”³⁶⁷ with his arrest of Atwater, such a situation may be repeated and other citizens could be adversely affected.³⁶⁸

In recognition of this fact, the Court noted that the most effective way to eradicate this problem would be for state governments to specifically prohibit arrest for minor, fine-only offenses, since the Court has otherwise deemed such arrests to pass constitutional muster. The Court further noted that it may be in the states’ best interests to do so anyway, since these “petty-offense arrests carry costs that are simply too great to incur without good reason.”³⁶⁹ Clearly, arbitrary arrests for minor offenses impose steep costs on both states and citizens; it can only be hoped that all fifty states will soon heed the Court’s recommendation.

<http://abcnews.go.com/sections/us/DailyNews/soccermom001201.html> (last visited Dec. 12, 2000).

365. Chicago resident Steve Jaime, who is Mexican-American, told his story of racial profiling to the *Washington Post*, relating how an officer ordered him out of his car and put a gun to his head without explanation, then let him go. Jaime claims, “[The police] were [ticked] off about something and they took it out on us, because we’re Hispanic.” See Morin & Cottman, *supra* note 363, at A16.

366. Justice O’Connor points out that the detention period after an arrest could be dangerous, since both violent and non-violent offenders are housed in the same jails. See *Atwater*, 532 U.S. at 364-65 (O’Connor, J., dissenting).

367. *Atwater*, 532 U.S. at 345.

368. As for Gail Atwater, after spending more than \$100,000 on the case, she and her family have sold their house and moved out of Lago Vista. See Onion, *supra* note 364.

369. See *Atwater*, 532 U.S. at 351.