

C

South Texas Law Review
Summer 2002

Case Notes

***957 FASTEN YOUR SEATBELT OR GO TO JAIL--THE SUPREME COURT VALIDATES ARRESTS FOR FINE-ONLY OFFENSES AND IGNORES THE EXPLICIT PROTECTION OF THE FOURTH AMENDMENT IN ATWATER V. CITY OF LAGO VISTA, 532 U.S. 318 (2001)**

Nick Westbrook [FNa1][FNa1]

Copyright (c) 2002 South Texas Law Review, Inc.; Nick Westbrook

I.	Introduction.	958
II.	Historical Background of the Purpose of the Fourth Amendment and the Proper Analysis for Determining Reasonableness.	960
III.	Factual and Procedural History.	963
	A. The Fifth Circuit Panel Decision.	963
	B. The Fifth Circuit En Banc Decision.	965
IV.	Analysis: How the Supreme Court Abandoned Traditional Fourth Amendment Analysis in Atwater.	966
	A. What Happened to the Traditional Balancing Test for Determining Reasonableness Under the Fourth Amendment?.	968
	B. The Majority Failed to Consider Qualified Immunity or	971

Police Officers.

	C. What Have Other Courts Done About Minor Offense Ar- rests?.	972
V.	Future Implications and Con- clusion.	974

***958** I. Introduction

It is a spring afternoon in Lago Vista, Texas. [FN1][FN1] The sun is shining, the birds are chirping, and the smell of barbecue is in the air. A devoted citizen and mother of two rides slowly through her residential neighborhood. [FN2][FN2] She picks her children up from soccer practice and has few worries in life. [FN3][FN3] Only minutes from her home, the mother and children forget to fasten their seat belts. [FN4][FN4] Shortly thereafter, the flashing lights of a police car approach the mother's truck. [FN5][FN5] Realizing her mistake, the mother prepares to apologize, anticipating the expected traffic citation for this minor infraction. Like a tiger stalking its prey, the officer approaches the truck with callous disregard. [FN6][FN6] Before the mother can speak, the red-faced predator extends his finger near the woman's face, exclaiming how they had "met before" and that she was "going to jail." [FN7][FN7] In shocked disbelief of the situation, the mother tries to apologize and speak sensibly to the officer. [FN8][FN8] Nonetheless, the officer places the woman under arrest. [FN9][FN9]

The horrified mother sits in jail, where the police force her to remove her shoes, jewelry, and eyeglasses, empty her pockets, and have her mug-shot taken. [FN10][FN10] In the end, the city demands the maximum fine of fifty dollars for her seatbelt violation. [FN11][FN11] In light of the Fourth ***959** Amendment, can a police officer constitutionally arrest a citizen for a fine-only offense without a warrant? [FN12][FN12]

Though this seems like a fictional fact pattern from a law school exam, it became a reality for Gail Atwater, a citizen of Lago Vista, Texas. [FN13][FN13] Atwater filed suit against the City of Lago Vista, the Chief of Police, and the arresting officer Bart Turek, for alleged violations of her Fourth Amendment protection against unlawful seizures. [FN14][FN14] In *Atwater v. City of Lago Vista*, the Supreme Court delivered an alarming decision, finding Gail Atwater's arrest to be "inconvenient and embarrassing . . . but not so extraordinary as to violate the Fourth Amendment." [FN15][FN15]

This note demonstrates that the Supreme Court ignored several pertinent issues associated with a proper Fourth Amendment analysis in *Atwater v. City of Lago Vista*. While the Court properly analyzed the common law and current statutory trends for arrests of minor offenses, it failed to address the specific facts and circumstances surrounding this case. Moreover, the majority limited its focus to probable cause and statutory authorization. [FN16][FN16] Part II of this note provides historical background of the Fourth Amendment and examines the proper test for reasonableness. Part III highlights the factual and procedural history of *Atwater*. Part IV scrutinizes the ***960** Supreme Court's failure to completely evaluate *Atwater's* seizure and arrest, with respect to precedent and accepted Fourth Amendment analysis. It argues the holding is inconsistent with Supreme Court precedent that requires a review of the various interests involved in a full custodial arrest. It supports the Supreme Court's dissenting opinion in *Atwater*, which appropriately analyzes the case under the traditional standards for

reasonableness. Part V emphasizes the severe implications of this decision on U.S. citizens and future arrests. Moreover, police officers now have “unfettered discretion” to arrest “without articulating a single reason why such action is appropriate.” [FN17][FN17] To conclude, Part V emphasizes that it is unreasonable to allow a police officer to arrest for a fine-only offense where the only justification is probable cause and statutory authorization.

II. Historical Background of the Purpose of the Fourth Amendment and the Proper Analysis for Determining Reasonableness

The states adopted the Fourth Amendment to limit the power and arbitrary discretion of government officials. [FN18][FN18] Prior to the Fourth Amendment's adoption, colonial America worried about governmental power and discretion. [FN19][FN19] The general warrants from England and writs of assistance in colonial America paved the way for the Fourth Amendment, as these “evils” represented unlimited *961 governmental power. [FN20][FN20] To combat these omnipotent forces, the states adopted the Fourth Amendment, which provides for “[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures.” [FN21][FN21]

A “seizure” occurs when a state actor intentionally restrains or deprives a citizen of her liberty in any way through physical force or show of authority. [FN22][FN22] A full custodial arrest, such as that in *Atwater*, exemplifies the “quintessential seizure.” [FN23][FN23] The arrest becomes unconstitutional when the seizure is “unreasonable.” [FN24][FN24] Accordingly, if the seizure is conducted in an “extraordinary manner,” without a warrant, or embodies an “extreme practice,” then the Fourth Amendment demands that the seizure be reasonable. [FN25][FN25]

When evaluating a custodial arrest under the Fourth *962 Amendment, there is no bright-line rule or exact definition for reasonableness. [FN26][FN26] Nonetheless, in *Graham v. Connor*, the Supreme Court determined that reasonableness “requires careful attention to the facts and circumstances of each particular case.” [FN27][FN27] In its reasonableness evaluation, the Court usually determines whether the common law afforded protection for the particular seizure in question. [FN28][FN28] When the common law does not provide a clear answer for the Court, the analysis will turn to balancing the interests of the violated individual against that of the government in instituting the custodial arrest. [FN29][FN29] Essentially, the Court considers the implications of the arrest on the citizen's privacy with respect to whether the arrest promotes any legitimate governmental interest. [FN30][FN30]

Probable cause plays a significant role in permitting the arrest for a fine-only offense. [FN31][FN31] However, when the common law fails to provide a clear answer about the reasonableness of the arrest, then probable cause, standing alone, cannot satisfy the reasonableness test under the Fourth Amendment. [FN32][FN32] Instead, the Court must examine the various *963 interests involved in the arrest. [FN33][FN33] A full custodial arrest involves a greater intrusion on the citizen's liberty and privacy interests than a traffic stop and subsequent citation. [FN34][FN34] Thus, the Court has even more reason to consider the governmental interests in conducting the full arrest. Where the arrest does not promote any legitimate governmental interests, the Court must favor the individual citizen and her rights because the arrest serves as an unconstitutional and unreasonable seizure of the citizen's person. [FN35][FN35]

III. Factual and Procedural History

After the District Court for the Western District of Texas granted summary judgment to every defendant in this case, Gail Atwater appealed her Fourth Amendment claim to the Fifth Circuit. [FN36][FN36]

A. The Fifth Circuit Panel Decision

A panel of the Fifth Circuit reversed the district court's decision with respect to Atwater's Fourth Amendment claim. [FN37][FN37] The panel discussed the clearly established constitutional right against unreasonable seizures, including an evaluation and balancing of interests between Atwater and the government. [FN38][FN38] Moreover, even where an officer has probable cause, the panel emphasized that courts must conduct a balancing test for reasonableness if the seizure was conducted in an extraordinary manner or constituted an extreme practice. [FN39][FN39] Section 543.001 of the Texas Transportation Code authorizes police officers to arrest citizens for certain minor offenses, including seatbelt violations. [FN40][FN40] Nonetheless, the court emphasized that the Transportation Code did not authorize officers to arrest in all circumstances. [FN41][FN41]

The panel found Atwater's seatbelt violation “paternalistic,” in that it posed no threat to the public. [FN42][FN42] In addition, the appellate court *964 weighed Atwater's interests in liberty and privacy against that of the government's interests in permitting the arrest. [FN43][FN43] While the government may have had an interest in protecting the public from certain transportation violations, the court found that a seatbelt violation could not possibly satisfy the government's concern for public safety. [FN44][FN44]

The defendants argued that Officer Turek was authorized to arrest Atwater because he had probable cause to believe she was committing a crime. [FN45][FN45] The court rejected this argument, finding that Officer Turek could not “hide behind the Texas seat belt law to legitimate his actions.” [FN46][FN46] More importantly, the panel held that all statutes must be interpreted to prevent constitutional dilemmas. [FN47][FN47] Thus, the court narrowed the interpretation of the Texas statute to protect individuals, like Gail Atwater, from governmental abuse and discretion. [FN48][FN48] The court mandated reasonableness, rejecting the standard of unfettered authority urged by the various defendants.

The panel found the arrest for a first time seatbelt offense to be an “extreme practice.” The Fifth Circuit panel did not agree with the defendants' contentions concerning the legitimacy of Officer Turek's *965 actions. [FN49][FN49] Moreover, Atwater was neither a repeat offender, a flight risk, nor a threat to herself, the officer, or others. [FN50][FN50] Essentially, Officer Turek overstepped his statutory authority in arresting Atwater, attempting to hide behind the shield of probable cause. [FN51][FN51]

B. The Fifth Circuit En Banc Decision

The Fifth Circuit reviewed Atwater's case en banc, several months following the panel decision. [FN52][FN52] After essentially disregarding the logic and persuasive analysis of the panel's decision, the majority of the Fifth Circuit reversed the panel's decision and affirmed the district court's summary judgment on all counts. [FN53][FN53] Applying a broad, per se rule for reasonableness, the Fifth Circuit found that probable cause was enough to arrest an individual and support the government's interests in enforcing state laws. [FN54][FN54] Unlike the prior panel decision, the en banc court did not discuss the concept of “extreme practice.” [FN55][FN55] Instead, it relied on whether the arrest affected Atwater's *966 privacy interests. [FN56][FN56] Concluding that the arrest was not out of the ordinary, the en banc panel reversed the prior decision, completely ignoring the original panel decision. Following this split within the Fifth Circuit, Atwater ap-

pealed to the United States Supreme Court. [FN57][FN57]

IV. Analysis: How the Supreme Court Abandoned Traditional Fourth Amendment Analysis in Atwater

In Atwater the Supreme Court abandoned the clear language and intent of the Fourth Amendment. [FN58][FN58] Accordingly, Americans have exhibited a universal condemnation of this decision. [FN59][FN59] The majority *967 failed to balance Atwater's liberty interests with any legitimate governmental interests of the defendants. [FN60][FN60] Furthermore, the majority should have decided Atwater on the facts and circumstances surrounding this case, as stipulated by the dissent. [FN61][FN61] After all, Gail Atwater had never committed any crime in her life and was definitely not a threat to society-- especially with respect to her seat belt infraction. [FN62][FN62]

In essence, the Supreme Court concerned itself with police discretion and split-second decision-making. [FN63][FN63] The Court's analysis is not applicable to the facts and circumstances of the case. Furthermore, police officers may claim qualified immunity in instances of questionable arrests. [FN64][FN64] The dissent acknowledged that the majority took the easy way out in its complete deference and reliance on probable cause. [FN65][FN65] The majority utilizes administrative convenience rather than sound reasoning, which has never been proper for any case at the Supreme Court level. [FN66][FN66] Other courts have analyzed the issue of arrests for fine-only offenses and followed the reasoning behind the dissent's opinion in Atwater. [FN67][FN67] In essence, the Court erred *968 in its analysis and should have recognized the dissent's logical reasoning.

A. What Happened to the Traditional Balancing Test for Determining Reasonableness Under the Fourth Amendment?

In its Fourth Amendment analysis, the Court typically examines different treatises, cases, and other common law guidance in determining whether the Framers viewed certain police activity as unreasonable. [FN68][FN68] In Atwater the majority revealed an overly exhaustive common law perspective regarding warrantless arrests for minor offenses. [FN69][FN69] The Court worked diligently to counter Atwater and every piece of her common law authority. [FN70][FN70] Through its extensive analysis, there was no clear answer, treatise, or relevant case to favor Atwater's contentions. [FN71][FN71]

When history is inconclusive, as it is in this case, [FN72][FN72] the Court must further evaluate any Fourth Amendment claim under the traditional balancing test for reasonableness. [FN73][FN73] Under this analysis, the Court considers all of the facts and circumstances of each case, rather than entertaining a broad, sweeping rule. [FN74][FN74] This test weighs the intrusion of the seizure upon the individual's privacy with the need for promoting legitimate governmental interests. [FN75][FN75] Nonetheless, the majority held that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations." [FN76][FN76]

The Court relied on Officer Turek's statutory authorization and evident probable cause to arrest. [FN77][FN77] The reliance on probable cause flies *969 in the face of traditional and accepted Fourth Amendment analysis. [FN78][FN78] As the dissent emphasized, probable cause is "not a model of precision." [FN79][FN79] Furthermore, even where there is evidence of probable cause, Fourth Amendment cases must still be determined through an evaluation of the specific facts of the case. [FN80][FN80] Despite this logical approach and prior Court precedent, the majority failed to balance or even consider Atwater's overriding

privacy interests and rights in this case. [FN81][FN81]

First, there were no legitimate governmental interests to justify the custodial arrest of Ms. Atwater. [FN82][FN82] Despite Officer Turek's failure to communicate any justification for the arrest, the City of Lago Vista argued that arresting Atwater enforced the City and State's child safety laws and assured Atwater would appear at trial. [FN83][FN83] Clearly, the government's interest in enforcing the seat belt law could have been accomplished with a typical traffic citation. [FN84][FN84] There is every indication that Atwater accepted responsibility for her actions and apologized for her actions. [FN85][FN85] Though the City may have had a legitimate interest in enforcing child safety laws, the contention does not hold up in this case. Moreover, Atwater's children witnessed her arrest and the verbal berating by Officer Turek. [FN86][FN86]

Obviously, a citation would have served the children's interests more appropriately than this horrific encounter with an abusive police *970 officer. [FN87][FN87] In terms of law enforcement, Atwater was neither a flight risk nor a repeat criminal offender. [FN88][FN88] Overall, there really were no legitimate governmental interests that necessitated a full custodial arrest in this case.

Despite the lack of any legitimate interest in arresting Atwater, the majority did not find an unreasonable seizure. Instead, the Court reasoned that probable cause justified this arrest without any balancing test for the reasonableness of the custodial arrest. [FN89][FN89] The fact that Texas law authorizes police officers to make an arrest for fine-only traffic violations does not mean they should have the right to arrest at will. [FN90][FN90] Thus, for a police officer to intrude on a citizen's privacy and liberty interests, the law must require that he give some adequate reason for conducting a full custodial arrest. [FN91][FN91] This requirement would not place an extra burden on the police but would actually reflect the reasoning and purpose behind the Fourth Amendment. [FN92][FN92] Without any justification, the seizure is, by definition, unreasonable. [FN93][FN93]

The Court failed to consider the grave implications of this arrest on Atwater's protected liberty and privacy interests. [FN94][FN94] After all, Officer Turek treated Atwater like a common criminal. He handcuffed her, placed her in the squad car, and sent her to jail. [FN95][FN95] She *971 had to surrender her possessions, remove her shoes, and remain in a holding cell until the magistrate could see her. [FN96][FN96] Though Atwater posted bail a couple of hours following this abuse of power, the harmful effects of the arrest did not magically disappear. Rather, the arrest became a part of the public record that employers and other officials can peruse at any time. [FN97][FN97]

Officer Turek's abusive manner and obvious lack of concern for Atwater's children strengthens the unreasonable nature of this arrest. [FN98][FN98] Judge Weiner of the Fifth Circuit, found that Officer Turek's sole purpose for the arrest was "to inflict an illegitimate and unconstitutional punishment" against Atwater. [FN99][FN99] Essentially, Atwater's privacy and liberty interests undoubtedly outweighed the need for promoting the government's interests or lack thereof. [FN100][FN100]

B. The Majority Failed to Consider Qualified Immunity for Police Officers

Basing its decision on probable cause, [FN101][FN101] the majority established two reasons why a bright line rule is necessary in arrests for fine-only offenses. [FN102][FN102] First, the Court argued that requiring police officers to justify their actions and distinguish between different kinds of offenses would be problematic and open a floodgate of civil rights litigation. [FN103][FN103] *972 Second, the Court found that disallowing arrests where there is probable cause would decrease legitimate arrests involving important societal interests.

[FN104][FN104]

The majority failed in its reasoning. Indeed, government officials, including police officers, already possess qualified immunity, which protects them from civil liability in certain situations. [FN105][FN105] The privilege protects government officials when their discretion conforms to established constitutional and/or statutory authority of which a reasonable person would have known. [FN106][FN106] Thus, when a police officer believes he has the right to infiltrate a full custodial arrest but is mistaken, the qualified immunity will provide some protection against civil litigation. [FN107][FN107] The majority failed to consider this privilege or even mention its relevance to Atwater's argument.

Requiring police officers to justify their reasoning in performing a full custodial arrest does not undermine the importance of probable cause. [FN108][FN108] Furthermore, qualified immunity will afford protection against any reservations the majority may have regarding increased litigation or decreased arrest rates. [FN109][FN109] Despite this applicable privilege, the Court ignored Atwater's plea for relief and continued to rely on the flawed, bright-line rule of probable cause.

C. What Have Other Courts Done About Minor Offense Arrests?

Atwater illustrates the problem of overzealous police activity. The Fifth Circuit dealt with this issue prior to the Atwater decision. [FN110][FN110] In *Morgan*, police officers arrested a group of high school students for violating a city ordinance that prohibited persons from littering in certain parking lots. [FN111][FN111] The court labeled the criminal justice system “an instrument of oppression” and could not find any determination for the arrests, despite the officers' probable cause. [FN112][FN112]

The Ohio Supreme Court recently dealt with an arrest in connection with a jaywalking offense. [FN113][FN113] In that case, the court applied *973 the balancing test for determining whether an arrest for a fine-only offense violated the reasonableness requirement of the Fourth Amendment. [FN114][FN114] In the end, the court held that the arrest was unreasonable and violated the Fourth Amendment. [FN115][FN115]

Prior Supreme Court decisions reflect criticism of minor offense arrests. [FN116][FN116] In *Gustafson v. Florida*, a police officer arrested an individual for failure to carry a driver's license while driving a motor vehicle. [FN117][FN117] Though *Gustafson* did not argue that the arrest was unreasonable, Justice Stewart reasoned that an arrest for a fine-only offense would potentially violate the Fourth Amendment. [FN118][FN118] In fact, the Court has found Fourth Amendment violations in many prior cases, despite the rare or peculiar nature of the circumstances of the case. [FN119][FN119]

*974 Clearly, courts around the nation require a balancing test to determine whether a full custodial arrest is reasonable under the Fourth Amendment. The Supreme Court's reliance upon probable cause in *Atwater* neglects this dominant view. The majority should have acknowledged *Atwater*'s deprivation of liberty and privacy and ruled her arrest unreasonable. Instead, the Court favored a bright-line rule regarding probable cause, thereby ignoring the “Fourth Amendment's express command in the name of administrative ease.” [FN120][FN120]

Though requiring police officers to justify their reasons for an arrest may impose some added costs, the Court should never ignore the express purpose and intent of the Fourth Amendment. [FN121][FN121] More importantly, the Court should not disregard constitutional protections in the name of administrative ease, as this leads to improper results. [FN122][FN122] Ultimately, *Atwater* reflects the Supreme Court's failure to protect

the Constitution and the citizens of the United States. This failure exposes disastrous consequences and implications for the future of arrests.

V. Future Implications and Conclusion

The majority discounts the potential abuse this decision will have on future arrests for fine-only offenses. [FN123][FN123] The Court seems to require an epidemic of police abuse before it will conduct a proper Fourth Amendment analysis and balancing test. [FN124][FN124] Unfortunately, the Court failed to consider the 250,000 individuals who are arrested each year for minor traffic offenses. [FN125][FN125] Like Atwater, thousands of Americans are subjected to an abuse of police discretion and governmental power each day. Although the Fourth Amendment guarantees security against this sort of unfettered discretion, the Supreme Court *975 disregarded any discussion of this potential abuse in the future. [FN126][FN126]

Indeed, the consequences are obvious. Nearly every state has minor offenses that may be subject to an arrest. [FN127][FN127] Despite the country's overcrowding and increasing jail population, the Supreme Court, in effect, encouraged the utilization of limited jail space for citizens like Ms. Atwater. [FN128][FN128] Essentially, the Court has forgotten its own precedent and rules. [FN129][FN129] The decision allows police officers to not only search an individual and her car, but also to perform a full arrest and impound the car. [FN130][FN130] This decision simply lacks sense--common or legal. [FN131][FN131]

Overall, Atwater jeopardizes the Fourth Amendment's protection against both unlawful searches and seizures. Allowing these unfettered searches and seizures on the basis of minor traffic infractions clearly subjects citizens to a resulting abuse of police power. [FN132][FN132] Ultimately, this decision encourages police officers to arrest *976 at will, without any justification for their actions. [FN133][FN133] The States adopted the Fourth Amendment to counter this sort of dominant behavior by the government; however, the Court overlooks this vital historical point in its analysis.

The decision raises a further concern involving racial profiling. [FN134][FN134] This decision may lead to increased prejudice and harassment of certain individuals. Today, the police have the power to arrest anyone for a minor traffic infraction, without any justification. The holding encourages unqualified, overzealous, and unreasonable police officers to arrest whomever and whenever. [FN135][FN135] Furthermore, the Court's decision provides no safeguards against biased police officers and may encourage this reprehensible behavior. Thus, police officers like Officer Turek can stand behind the Court's decision and effectively defend themselves against all claims of harassment and racial profiling. [FN136][FN136]

In essence, the Supreme Court's decision in Atwater disappointed the country, legal community, and citizens of the United States. The majority failed to consider the most fundamental and traditionally used balancing tests for a proper Fourth Amendment analysis. Four justices, on the other hand, realized the importance of balancing the rights and privacy interests of a citizen against that of the government. The Framers ratified the Fourth Amendment to prevent police officers like Officer Turek from having the power to abuse citizens and arrest at will. Despite the obvious intent and clear language of the Fourth Amendment, the majority failed to utilize the proper analysis in this case.

Atwater deserved to prevail in this matter. Atwater should have *977 been successful had the Court analyzed this case and supporting facts through the totality of the circumstances test. The majority took the easy way out, however, in its absolute reliance on mere probable cause and statutory authority. Consequently, the Supreme

Court's decision represents the erosion of an already decaying Fourth Amendment protection.

[FN1]. Candidate for J.D., South Texas College of Law, May 2003; Member of the South Texas Law Review; B.A. Biology, University of Texas at Austin, 1999. Thanks to Professor Ursula Weigold for her guidance and expertise concerning legal research and writing. Special thanks to Erin for convincing me to go to law school and supporting me during these last three years. Finally, I want to thank my parents for their love and support throughout my life.

[FN1]. See *Atwater v. City of Lago Vista*, 165 F.3d 380, 382 (5th Cir. 1999) [hereinafter *Atwater I*], rev'd en banc, 195 F.3d 242 (5th Cir. 1999) [hereinafter *Atwater II*], aff'd, 532 U.S. 318 (2001) [hereinafter *Atwater III*].

[FN2]. See *Atwater III*, 532 U.S. at 369 (O'Connor, J., dissenting).

[FN3]. See *Atwater I*, 165 F.3d at 382.

[FN4]. See *id.*; see also *Tex. Transp. Code Ann. § 545.413* (Vernon 2000). This section of the Transportation Code stipulates that persons over fifteen years of age who fail to secure a safety belt may be subject to a misdemeanor with a maximum penalty of \$50. *Id.* §545.413(a)(1), (a)(4), (d). Additionally, a person commits a seat belt offense if she allows a child over four years of age, but younger than fifteen years of age, to ride without a safety belt. *Id.* § 545.413(b)(2).

[FN5]. See *Atwater III*, 532 U.S. at 323-24.

[FN6]. See *Atwater II*, 195 F.3d at 248 (Wiener, J., dissenting). In *Atwater* the arresting officer, Burt Turek, seemed to have a “vendetta” against the driver. *Id.* This illustrates the potential abuse in allowing police officers to arrest for fine-only offenses. See *infra* Part V.

[FN7]. See *Atwater III*, 532 U.S. at 324.

[FN8]. See *id.* at 370 (O'Connor, J., dissenting) (recognizing that *Atwater* immediately accepted responsibility for the fine-only offense).

[FN9]. See *id.*

[FN10]. See *id.*

[FN11]. See *id.* Officer Turek charged Ms. *Atwater* with multiple violations, including failure to secure her children in their seat belts, driving without a license, and failing to provide proof of insurance. *Id.* The City of Lago Vista dropped these charges, however, ultimately arresting her for the fine-only offense of failure to secure a seat belt. *Id.* She pled no contest to the misdemeanor offense, see *supra* note 4, and paid the maximum penalty of \$50. *Id.*

[FN12]. See *id.* at 326. The Supreme Court granted certiorari to consider this issue. *Id.* at 326. In a five to four decision, the majority held in favor of every defendant, including the arresting officer, City of Lago Vista, and the Chief of Police. *Id.* at 354-55. The Court issued a broad sweeping *per se* rule, which authorizes police officers to arrest for minor, fine-only offenses when the officer has mere probable cause. *Id.* at 354. In the Fifth Circuit's en banc decision, Judge Garza argued an alternative, more persuasive viewpoint, in opposition to a

broad sweeping probable cause rule. See [Atwater II](#), 195 F.3d 242, 246-51 (5th Cir. 1999) (Garza, J., dissenting). He reasoned, moreover, that “probable cause will never immunize a constitutional violation.” [Id.](#) at 247 (Garza, J., dissenting). For a complete discussion of the weaknesses in the Supreme Court’s decision, see *infra* Part IV.

[FN13]. [Atwater III](#), 532 U.S. at 323-25.

[FN14]. [Id.](#) at 325.

[FN15]. [Id.](#) at 355.

[FN16]. [Id.](#) at 354. The majority stressed Officer Turek’s authorization under the Texas Transportation Code for conducting the custodial arrest of Ms. Atwater for her fine-only offense. [Id.](#) See also [Tex. Transp. Code Ann. § 543.001](#) (Vernon 2000). The Code provides that “any peace officer may arrest without warrant a person found committing a violation of this subtitle.” [Id.](#) § 543.001. The Code is referring to Subtitle C, which includes the Rules of the Road, and more importantly, § 545.413 for seat belt violations. See *id.* Nonetheless, the Fifth Circuit’s original panel decision, see *infra* Part III.A, in contrast to the Supreme Court’s interpretation of § 543.001, carefully examined and construed the statute’s use of the word “may.” See [Atwater I](#), 165 F.3d 380, 385 (5th Cir. 1999). To avoid construing the language of the statute in an unconstitutional fashion, the panel held that allowing police officers to arrest in all circumstances, under the statutory language, clearly violates the Constitution of the United States. [Id.](#) at 385-86.

[FN17]. [Atwater III](#), 532 U.S. at 372 (O’Connor, J., dissenting).

[FN18]. The states later adopted the Fourteenth Amendment, providing Fourth Amendment protection against abusive state action. [Whiting v. Traylor](#), 85 F.3d 581, 583 (11th Cir. 1996). Thus, state citizens may file Fourth Amendment actions against state actors, such as police officers and cities, through the power of the Fourteenth Amendment. See, e.g., 42 U.S.C § 1983 (Supp. 2000). Section 1983 provides the plaintiff with a civil cause of action against any state actor who violates the law or takes advantage of his duty as a state actor. See [Trafton v. Devlin](#), 43 F. Supp. 2d 56, 59 (D. Me. 1999). Section 1983 provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights... secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983 (Supp. 2000).

[FN19]. [Boyd v. United States](#), 116 U.S. 616, 624-25 (1886). The Fourth Amendment was a direct response to the powerful and overzealous government. See *id.* In [Boyd](#) the Court acknowledged how the Framers, including John Adams, vehemently criticized Great Britain and the arbitrary power of the government. [Id.](#) at 625 (“[T]he worst instrument of arbitrary power [and] the most destructive ... [includes placing] the liberty of every man in the hands of every petty officer.”). [Id.](#)

[FN20]. [Warden v. Hayden](#), 387 U.S. 294, 301 (1967); [Henry v. United States](#), 361 U.S. 98, 100-01 (1959).

[FN21]. U.S. Const. amend. IV.

[FN22]. [California v. Hodari](#), 499 U.S. 621, 625 (1991).

[FN23]. [Atwater III](#), 532 U.S. 318, 360 (2001) (O'Connor, J., dissenting).

[FN24]. [Brower v. County of Inyo](#), 489 U.S. 593, 599 (1989).

[FN25]. [Atwater I](#), 165 F.3d 380, 384 (5th Cir. 1999). The panel of the Fifth Circuit found that arresting Atwater for a first-time seat belt offense was an “extreme practice” that demanded a more thorough Fourth Amendment analysis, including the balancing of the citizen's privacy interests with any legitimate governmental interests in performing the arrest. [Id.](#) at 387. In [Whren v. United States](#), 517 U.S. 806, 818 (1996), the Court developed the rule in Atwater that the mere presence of probable cause magically justifies every search and seizure, no matter how extreme. In Whren the police officer had probable cause to make a traffic stop as the driver sped off and failed to signal after seeing the officer. [Whren](#), 517 U.S. at 808. More importantly, the driver had two bags of crack cocaine in clear sight at the time of the stop. [Id.](#) The police officer was, therefore, justified in conducting a full custodial arrest without a warrant due to the suspicious activity and serious crime being conducted in the car. [Id.](#) at 818-19. The Court found that probable cause authorized the officer's actions and negated any need for a balancing test between the driver's privacy interests and the legitimate governmental interests. [Id.](#) at 819. Unlike the citizen in Whren, Ms. Atwater committed a fine-only traffic offense. [Atwater I](#), 165 F.3d at 385. The Fifth Circuit's panel appropriately found Atwater's full custodial arrest for failure to wear a seat belt extreme and extraordinary. [Id.](#) at 387. The panel further evaluated whether any legitimate government interests were served in arresting Atwater for the violation. [Id.](#) at 385-88. The panel found the seizure objectively unreasonable. [Id.](#) at 385. Moreover, the only legitimate goal for the arrest was to enforce Texas's seat belt law, which only protects the driver. [Id.](#) As the court highlighted, Ms. Atwater never posed a threat to herself, Officer Turek, the City of Lago Vista, or the general public. [Id.](#) at 387. More importantly, a traffic citation would have promoted the government's goal of enforcing the traffic law just as well as the full custodial arrest. [Id.](#) at 388. Had the Supreme Court conducted the balancing test for reasonableness under the Fourth Amendment in Whren, it is probable the majority would have found that the state's interest in curbing drug use and dealing far outweighed the citizen's privacy interests in that arrest. Thus, the police officer's mere probable cause was justified in that case. See [Whren](#), 517 U.S. at 818. For a complete analysis of the balancing test for reasonableness under the Fourth Amendment and the Supreme Court's failure to properly address this test in Atwater, see *infra* Part IV.

[FN26]. [Graham v. Connor](#), 490 U.S. 386, 396 (1989). Courts must apply an objective reasonableness standard to each case and consider the “totality of the circumstances.” [Id.](#) (citing [Tennessee v. Garner](#), 471 U.S. 1, 8-9 (1985)); but see [Atwater III](#), 535 U.S. at 347 (arguing that a “responsible” Fourth Amendment analysis does not consider a case-by-case determination). The Court ignored the balancing test promoted by its own precedent and the Fifth Circuit's panel decision. See, e.g., [Atwater I](#), 165 F.3d at 385-88; see also [Atwater III](#), 535 U.S. at 361-62 (O'Connor, J., dissenting). Although the Court relied on Whren, see *supra* note 24, the dissent auspiciously argued that the majority took this case out of context to promote its broad sweeping rule of law for the arrests of fine-only offenses. See [id.](#) at 363 (O'Connor, J., dissenting). After all, there was probable cause permitting a traffic stop in Whren just as there was probable cause permitting a traffic stop in Atwater. [Id.](#) at 363-64. However, Atwater was not a drug dealer, never acted suspiciously, and had clear privacy concerns that Officer Turek clearly violated in performing his arrest. See [id.](#) at 364.

[FN27]. 490 U.S. at 396.

[FN28]. See [Atwater III](#), 532 U.S. at 326, 361.

[FN29]. [Id.](#) at 360-61 (O'Connor, J., dissenting) (“[H]istory is just one of the tools we use in conducting the

reasonableness inquiry.”). The Supreme Court majority displayed an overly exhaustive common law perspective regarding minor offense arrests. *Id.* at 327-47. Thus, the Court worked very hard to counter all of the common law authority cited by Ms. Atwater holding that there was no clear answer or applicable case favoring Ms. Atwater's position. See *id.* at 346-48. Despite its ambiguous historical answer, the Court stood behind the common law's probable cause rule, see *supra* text accompanying note 25, failing to balance Ms. Atwater's privacy and liberty interests against the lack of any legitimate government interests in this case. See *id.* at 354; see also Part IV.

[FN30]. See *Atwater III*, 532 U.S. at 360 (O'Connor, J., dissenting).

[FN31]. *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

[FN32]. *Atwater III*, 532 U.S. at 362-63 (O'Connor, J., dissenting). The dissent accurately held that “giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable.” *Id.*

[FN33]. *Id.* at 326, 361.

[FN34]. See *id.* at 362-63 (O'Connor, J., dissenting).

[FN35]. *Id.* at 368. The dissent found Ms. Atwater's arrest unreasonable. *Id.* The City of Lago Vista lacked any legitimate governmental concern for arresting her, and Ms. Atwater never posed a threat to society. *Id.* at 368-69.

[FN36]. *Atwater I*, 165 F.3d 380, 382 (5th Cir. 1999).

[FN37]. *Id.*

[FN38]. *Id.* at 385-88.

[FN39]. *Id.* at 384; see also *supra* notes 24-25.

[FN40]. See *supra* note 4.

[FN41]. See *supra* notes 15-16 and accompanying text.

[FN42]. *Atwater I*, 165 F.3d at 385.

[FN43]. *Id.* at 385-88.

[FN44]. *Id.* at 389.

[FN45]. *Id.* at 387. The panel characterized the common law's probable cause rule as an “oversimplification of our Fourth Amendment jurisprudence.” *Id.*; see *supra* notes 25-26.

[FN46]. *Id.* at 386. Officer Turek used probable cause and statutory authorization to justify his actions. *Id.* The Supreme Court majority failed to consider the persuasive and logical reasoning of the panel decision. See generally *Atwater III*, 532 U.S. 318, 354 (2001) (holding that Officer Turek had authorization to arrest Ms. Atwater

through probable cause and the Texas Transportation Code). The panel found that a ruling in favor of the Officer Turek and the other government officials, based on mere probable cause, clearly undermined the Fourth Amendment and eradicated the need for reasonableness in performing a seizure or full custodial arrest. [Atwater I](#), 165 F.3d at 386; see [Wong Sun v. United States](#), 371 U.S. 471, 479 (1963) (finding that probable cause must be measured considering the facts of the case). In *Wong Sun*, the Supreme Court determined that probable cause was not the only factor to consider during an evaluation of a Fourth Amendment claim. *Id.* at 479. Moreover, the Court clarified that even where there is evidence of clear probable cause, the Court must still examine each and every fact of the specific case at issue. *Id.*

[FN47]. [Atwater I](#), 165 F.3d at 386 (citing [Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council](#), 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the [Supreme] Court will construe the statute to avoid such problems.”); [Crowell v. Benson](#), 285 U.S. 22 (1932) (examining a maritime statute which did not “preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted”)).

[FN48]. See [Atwater I](#), 165 F.3d at 386.

[FN49]. See *id.* at 389. The panel found that some traffic violations are dangerous and justify the use of a custodial arrest. *Id.* However, the panel evaluated all the facts and circumstances of this case and held that their decision was limited to the facts. *Id.* Moreover, while a different set of facts may have favored the defendants and supported the custodial arrest, the panel felt the facts in this case did not support Officer Turek's actions. See *id.* The panel supported the Texas Legislature's traffic laws, which allow police officers to arrest for some traffic offenses; however, in this case, the panel could not support the police officer's actions, despite the Legislature's statutes. *Id.* The panel held that “the governmental interest in arresting an individual for a seat belt violation is much less than in the case of other traffic violations.” *Id.* Furthermore, the panel underscored its dismay at Officer Turek's decision and actions in this case, holding that under the facts, his actions “were constitutionally unreasonable... [and] indefensible.” *Id.*

[FN50]. *Id.* at 388.

[FN51]. *Id.* at 389. The panel limited its decision to the facts of the case. *Id.* The panel distinguished *Atwater's* case from other recent situations in Texas where individuals were arrested following initial seatbelt violations. *Id.* at 388 (citing [Madison v. State](#), 922 S.W.2d 610, 612 (Tex. App.-- Texarkana 1996, writ ref'd) and [Valencia v. State](#), 820 S.W.2d 397, 399 (Tex. App.--Houston [14th Dist.] 1991, writ ref'd)). The referenced cases involved initial stops for seat belt violations; nevertheless, both situations lead to seizures of large amounts of cocaine and subsequent arrests. [Madison](#), 922 S.W.2d at 612; [Valencia](#), 820 S.W.2d at 398. Therefore, while the police officer had probable cause to stop the vehicles for initial seat belt violations, the actual custodial arrests were for major drug possession offenses and not fine-only traffic offenses. See [Atwater I](#), 165 F.3d at 388. This was a major distinction and motivating factor in the panel's decision. *Id.* The Supreme Court chose to ignore cases like *Madison* and *Valencia*, despite their relevance to *Atwater's* claim.

[FN52]. [Atwater II](#), 195 F.3d 242, 242 (5th Cir. 1999).

[FN53]. *Id.* at 244-46.

[FN54]. *Id.* at 244. En banc, the Fifth Circuit elected not to deviate from the broad, general rule for Fourth

Amendment analysis. See *supra* notes 25-26.

[FN55]. See *Atwater I*, 165 F.3d at 384.

[FN56]. *Atwater II*, 195 F.3d at 244-45 (failing to deviate from the common law probable cause rule unless the seizure is “conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests.” (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996))).

[FN57]. *Atwater III*, 532 U.S. 318, 326 (2001).

[FN58]. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 *Wm. & Mary L. Rev.* 197, 197-201 (1993). Maclin emphasizes the Constitution does not tolerate or support a strict police state. *Id.* at 197-202. The Fourth Amendment provides fundamental protection against overpowering government officials and reflects the Constitution's prohibition of “police excesses.” *Id.* at 197. Nevertheless, the Supreme Court failed to apply the Constitution's protection against police excesses and the potential abuse of police power in allowing arrests for fine-only offenses.

[FN59]. See Appellant's Rehearing Brief at 9, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408) (citing the following articles, which represent the mass disapproval of the Court's opinion around the country: Sandy Banks, *Why a Mom's Fate Should Worry Us All*, *L.A. Times*, Apr. 27, 2001, at 1E (“Civil libertarians worry that the ruling will expand police powers, making them judge and jury, free to haul folks off to jail for the most benign violations.”); Mark Cloud, *Extreme Searches*, *Chi. Trib.*, May 4, 2001, at 25N (“Now, thanks to Souter, we no longer have to worry that other petty offenders--those scoundrels who commit non-jailable minor offenses--will escape arrest; justice really is blind.”); Steve Forbes, *Junk Judgment*, *Forbes*, May 28, 2001, at 40 (“The officer used disproportionate force and acted in an unreasonable manner, considering the nature of the offense.”); James O. Goldsborough, *Belting Justice for a Seat Belt Violation*, *The San Diego Union-Trib.*, Apr. 30, 2001, at B7 (“O'Connor's powerful dissent... will outlive the wretched majority opinion” which was “both blind and dangerous.”); James K. Kilpatrick, *Punishing Logic in Soccer Mom's Case*, *The News And Observer* (Raleigh, NC), May 7, 2001, at A11 (“Justice Souter had to dig down to the 13th Century to justify his miserable opinion in the case of the Soccer Mom.... Souter's overblown essay on the common law of England becomes part of the supreme law of our own land.”); Peter Moskos, *U.S. Supreme Court Ruling Sowed Confusion, Injustice*, *The Baltimore Sun*, May 3, 2001, at 13A (“Allowing police to jail people for once non-jailable offenses is absurd because it helps neither the public nor the police.”); Ed Quillen, *Tell Us Again, Which Side Won the Cold War?*, *The Denver Post*, Apr. 29, 2001, at E6 (“American police aren't there to protect you life, liberty or property--they're a threat to all three, and nothing appears likely to stop this from getting even worse.”); Rob Zaleski, *Supreme Court Ruling Is Boggling*, *Capital Times* (Madison, WI), May 14, 2001, at Lifestyle p.1 (“Two highly respected former Madison law enforcement officials ... were stunned and horrified by the U.S. Supreme Court's latest ultra-conservative--as in pro-police state--ruling.”); *A Decision Lacking Reason*, *Investor's Business Daily*, Apr. 26, 2001, at 22 (“[C]onservative thinking could use a bit of revision when it comes to Fourth Amendment issues.”); *A Bad Decision by Supreme Court*, *The State Journal-Register* (Springfield, IL), May 10, 2001, at 10 (foreshadowing the impact of the Court's holding to our Fourth Amendment rights).

The damage here, obviously isn't confined to the crudely infringed constitutional rights of Gail Atwater. The precedent set by this terribly misguided decision threatens the Fourth Amendment rights of every American. If an abusive cop, exercising what Souter conceded was “poor judgment,” can handcuff and jail a young mother in front of her small children for a misdemeanor traffic offense, what further outrages by other police can we expect?

A Bad Decision by Supreme Court, *The State Journal-Register* (Springfield, IL), May 10, 2001, at 10.

[FN60]. *Atwater III*, 532 U.S. at 365-66.

[FN61]. See *id.* at 361 (O'Connor, J., dissenting).

[FN62]. *Id.* at 369 (O'Connor, J., dissenting).

[FN63]. See *id.* at 350.

[FN64]. *Id.* at 367 (O'Connor, J., dissenting).

[FN65]. See *id.* at 373.

[FN66]. See Appellant's Rehearing Brief at 9-10, *Atwater* (No. 99-1408) (citing *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (finding the confinement of Japanese Americans to be justified during WWII)). In *Korematsu* the Supreme Court clearly utilized its administrative convenience in considering the case, due to problems with locating and isolating disloyal members in the United States at the time of the war. *Id.*

[FN67]. See *Morgan v. City of DeSoto*, 900 F.2d 811, 814 (5th Cir. 1990). In *Morgan* high school students were congregating on a parking lot and creating an enormous littering problem. *Id.* The City of DeSoto decided to enforce a law, making it a crime to assemble on various parking lots around the town after dark. *Id.* One night, DeSoto police officers enforced the new criminal trespass law and arrested a large group of high school students assembled at one of the parking lots. *Id.* The Fifth Circuit found little justification for the police officers' actions, despite the posted signs, warnings, and statutory authorization. *Id.* Like the Supreme Court's dissent in *Atwater*, the Fifth Circuit in *Morgan* held that "regardless of whether the officers had probable cause to arrest... [there is] no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail... as if they were threats to society." *Id.*

[FN68]. *Tennessee v. Garner*, 471 U.S. 1, 13 (1985).

[FN69]. *Atwater III*, 532 U.S. at 327-47. The majority disagreed with *Atwater's* argument that minor offense arrests were only justified at common law for breach of the peace offenses. *Id.* at 339-41.

[FN70]. See *id.* at 345-49.

[FN71]. See *id.*

[FN72]. *Id.* at 361 (O'Connor, J., dissenting).

[FN73]. *Id.* (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

[FN74]. *Id.* (citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 375 (1931) and recognizing the Supreme Court's prior, more appropriate Fourth Amendment analysis).

[FN75]. *Id.*

[FN76]. *Id.* at 347.

[FN77]. *Id.* at 354.

[FN78]. See *id.* at 362 (O'Connor, J., dissenting).

[FN79]. *Id.* at 366.

[FN80]. See *Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

[FN81]. See *Atwater III*, 532 U.S. at 354-55.

[FN82]. *Id.* at 369 (O'Connor, J., dissenting); see also *Atwater I*, 165 F.3d 380, 382 (5th Cir. 1999). The Fifth Circuit's panel found that state governments should permit arrests for fine-only offenses only when the proper procedure for obtaining a warrant, based upon probable cause, occurs. *Id.* at 387. In *Atwater I* the panel agreed that had Officer Turek gone to the magistrate and sought a warrant, *Atwater* never would have been arrested. *Id.* This provides a further argument that *Atwater's* arrest was clearly unreasonable and unjustified.

[FN83]. *Atwater III*, 532 U.S. at 369 (O'Connor, J., dissenting).

[FN84]. *Atwater I*, 165 F.3d at 384. The panel declared that arresting a citizen for a first-time traffic offense was an extreme and unnecessary practice. *Id.* at 387. Most importantly, it evaluated the case under the reasonableness test and determined whether the City of Lago Vista had any legitimate reasons for allowing Officer Turek to arrest for mere seat belt violations. *Id.* The seizure was held objectively unreasonable. *Id.* at 388. The panel could only find one potentially legitimate goal, which was the enforcement of the seat belt law. *Id.* at 387. However, this law only protects drivers. *Id.* at 385. As the court highlighted, *Atwater* did not pose a threat to herself, Officer Turek, or the public. *Id.* at 387-88. Overall, a traffic citation would have promoted the government's goal of enforcing the traffic law just as well as the full custodial arrest. *Id.* at 388.

[FN85]. *Atwater III*, 532 U.S. at 370 (O'Connor, J., dissenting).

[FN86]. *Id.*

[FN87]. *Id.*

[FN88]. *Id.* at 369. Although Officer Turek stopped *Atwater* for a previous seat belt violation involving her son, the record reflects he was mistaken. *Id.* Moreover, *Atwater's* son utilized the middle seat's lap belt, which Officer Turek could not see from the road. *Id.* Thus, Officer Turek arrested *Atwater* for a first-time, fine-only offense. See *id.*

[FN89]. *Id.* at 347, 354; see also *supra* notes 25-26, 46.

[FN90]. See *Atwater II*, 195 F.3d 242, 249 (5th Cir. 1999) (Weiner, J., dissenting); see also *Atwater I*, 165 F.3d 380, 386 (5th Cir. 1999) ("Officer Turek cannot hide behind the Texas seat belt law to legitimate his actions.").

[FN91]. *Atwater II*, 195 F.3d at 249; see *Atwater III*, 532 U.S. at 365-66 (O'Connor, J., dissenting). Justice O'Connor magnifies:

[W]hen there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the additional intrusion" of a full custodial arrest.

Id. at 366 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

[FN92]. See [Atwater II](#), 195 F.3d at 251 (Weiner, J., dissenting).

[FN93]. *Id.* at 250.

[FN94]. See, e.g., [Hudson v. Palmer](#), 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) (finding that an arrest terminates all of the citizen's privacy interests); [DeShaney v. Winnebago County Dep't of Social Servs.](#), 489 U.S. 189, 196 (1989) (finding that liberty includes established rights and freedoms that the constitution protects from unnecessary governmental interference or restraint).

[FN95]. [Atwater III](#), 532 U.S. at 369. Despite Officer Turek and the City of Lago Vista's great concern for traffic safety in this matter, Officer Turek ironically neglected to fasten Atwater's seat belt during the ride to the police station. *Id.* Instead of worrying about minor traffic offenses, the City of Lago Vista should have been more concerned about police abuse and Gail Atwater's deprivation of liberty.

[FN96]. *Id.*

[FN97]. See William A. Schroeder, [Warrantless Misdemeanor Arrests and the Fourth Amendment](#), 58 Mo. L. Rev. 771, 797 (1993). "Any arrest has a profound and long-lasting effect on the arrestee. Even if an arrest is a minor offense, and charges against the arrestee are ultimately dropped or the arrestee is acquitted, the records of the arrestee probably will be retained and disseminated." *Id.* (emphasis added). An arrest creates suspicion among members of society, even if no conviction follows. *Id.* The "cloud of suspicion" often results in "lost employment opportunities and future law enforcement scrutiny." *Id.* at 798. More importantly, there is some suggestion that the Constitution bars custodial arrests for minor offenses. *Id.*

[FN98]. [Atwater III](#), 532 U.S. at 368 (O'Connor, J., dissenting). Officer Turek arrested Atwater as her children watched, terrified and confused. *Id.* Aside from probable cause for a minor fine-only offense, he lacked proper justification for the arrest. *Id.* As the dissent accurately emphasized, "The record in this case makes it abundantly clear that Ms. Atwater's arrest was constitutionally unreasonable." *Id.*

[FN99]. [Atwater II](#), 195 F.3d 242, 251 (5th Cir. 1999) (Weiner, J., dissenting).

[FN100]. See *id.* at 254 (Dennis, J., dissenting).

[FN101]. See [Atwater III](#), 532 U.S. at 351; see also *supra* notes 25-26.

[FN102]. *Id.* at 350.

[FN103]. *Id.* The majority emphasized that "Atwater's rule... would not only place police in an almost impossible spot but would guarantee increased litigation." *Id.*

[FN104]. *Id.* at 351.

[FN105]. *Id.* at 367 (O'Connor, J., dissenting) (citing [Harlow v. Fitzgerald](#), 457 U.S. 800, 818 (1982)).

[FN106]. *Id.*

[FN107]. *Id.*

[FN108]. *Id.* at 366.

[FN109]. *Id.* at 367.

[FN110]. See *Morgan v. City of DeSoto*, 900 F.2d 811, 814 (5th Cir. 1990).

[FN111]. *Id.*

[FN112]. *Id.*

[FN113]. *State v. Jones*, 727 N.E.2d 886, 892 (Ohio 2000).

[FN114]. *Id.* Like the Supreme Court, see *Atwater III*, 532 U.S. at 327-47, the Ohio Supreme Court examined whether the arrest for a minor offense would have been proper at common law or when the Fourth Amendment was enacted. *Id.* The Ohio Supreme Court determined that a balancing test was necessary, as the common law did not reveal any clear practice for allowing or forbidding the arrest. *Jones*, 727 N.E.2d at 892-93. The court then conducted the traditional balancing test for its case, analyzing the facts and circumstances surrounding the arrest for a minor jaywalking offense. *Id.* at 893-95.

[FN115]. *Id.* at 895. The Utah Supreme Court has also applied the traditional balancing test for determining whether a minor arrest violates the Fourth Amendment. *State v. Harmon*, 910 P.2d 1196, 1201-04 (Utah 1995). Here, a police officer received a tip from an informant that the defendant was dealing drugs out of her home. *Id.* at 1198. The officer tried to search the defendant's house without a warrant, but the defendant refused his request. *Id.* The officer then followed the defendant from her home and called in her license plate information. *Id.* Because the defendant was driving with a suspended license, the officer decided to stop her for the minor offense. *Id.* The officer pulled her over and arrested her for driving with a suspended license. *Id.* The officer's true intention was to search the home for narcotics, and after he asked her one more time to the search the home without a warrant, she refused. *Id.* Upon the woman's refusal, the police officer decided to arrest her for the minor offense. *Id.* The Utah Supreme Court faced a Fourth Amendment issue similar to *Atwater* and *Jones*. See *id.* at 1199. Accordingly, the court conducted the traditional balancing test for reasonableness under the Fourth Amendment. *Id.* at 1201-04.

[FN116]. *Atwater III*, 532 U.S. at 362 (O'Connor, J., dissenting). The arrest for a fine-only offense, although a rare issue in prior Supreme Court case law, is not "self-evident." *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring)). The Court has criticized this type of arrest before through dicta. *Id.* (citing *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring)).

[FN117]. 414 U.S. at 266-67 (1973).

[FN118]. *Id.*

[FN119]. See *Arizona v. Hicks*, 480 U.S. 321, 325-27 (1987); *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). In *Hicks* the Court required probable cause under the "plain view" doctrine and elected not to extend the doctrine to nonpublic places, such as the home, where searches and seizures are presumptively unreasonable without a warrant or probable cause. 480 U.S. at 326-27. The police had "reasonable suspicion" that certain items found in the defendant's home were stolen. *Id.* at 326. The Court found that this "reasonable suspicion" did not rise to the level of probable cause, and therefore the search was an unreasonable Fourth Amendment violation. See *id.* at 329. In *United States District Court*, the Supreme Court found that the Government's use of surveillance equipment must conform to the customary Fourth Amendment requirement of judicial ap-

proval prior to initiation of a search or surveillance. 407 U.S. at 321.

[FN120]. *Atwater III*, 532 U.S. at 373. (O'Connor, J., dissenting).

[FN121]. *Id.* at 368.

[FN122]. See *id.* at 369-71.

[FN123]. *Id.* at 371.

[FN124]. See *id.* at 354 n.25; see also *Arkansas v. Sullivan*, 532 U.S. 769, 772-73 (2001) (Ginsburg, J., concurring); Appellant's Rehearing Brief at 2, *Atwater* (No. 99-1408) (articulating the epidemic "requirement is a novel and frightening addition to constitutional jurisprudence").

[FN125]. Appellant's Rehearing Brief at 3, *Atwater* (No. 99-1408) (citing California Criminal Justice Statistics Center, Tables 18 & 19, http://www.justice.hcdojnet.state.ca.us/cjsc_state/prof99/index.htm (last visited May 1, 2001)).

[FN126]. In *Arkansas v. Sullivan*, Justice Ginsburg urged the Court to reconsider its recent precedent if the decision ever leads to "an epidemic of unnecessary minor-offense arrests." 532 U.S. 769, 773 (Ginsburg, J., concurring). Justice Ginsburg observed that the Court has departed from *stare decisis* in the past "to bring its opinions into agreement with experience and with facts newly ascertained." *Id.* (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).

[FN127]. See *Atwater III*, 532 U.S. at 355-60 (including an appendix of minor offense statutes that may be subject to an arrest).

[FN128]. Law Should Remedy Effect of Court Ruling; Minor Traffic Violators Should Not Have to Fear Having Police Hauling Them off to Jail, *San Antonio Express News*, Apr. 27, 2001, at 6B (recognizing that "jails of Texas...[are] already...full without incarcerating motorists who run red lights and fail to wear seat belts"). "Even though *Atwater* lost her case before the U.S. Supreme Court, her argument is sound." *Id.*

[FN129]. See *supra* note 26.

[FN130]. *Atwater III*, 532 U.S. at 372 (O'Connor, J., dissenting) (recognizing the dangerous impact of the majority's opinion--it gives police officers too much power and unfettered discretion).

[FN131]. See Schroeder, *supra* note 97, at 781. Many jurisdictions allow police officers to instigate full custodial arrests if there is probable cause to believe the defendant committed a misdemeanor or felony in the officer's presence, or for misdemeanors not committed in the officer's presence if there is probable cause to believe that certain circumstances exist for a specified misdemeanor. *Id.* These jurisdictions permit warrantless arrests for misdemeanors involving domestic violence or violations of a protective order. *Id.* at 785-86. Few courts, including the Supreme Court, have substantively commented on "anything significant about the relationship between the Fourth Amendment and the common law rule"--a rule barring warrantless misdemeanor arrests. *Id.* at 787, 788. Most jurisdictions allow warrantless arrests for real crimes, rather than fine-only traffic offenses. See *id.* at 785-86.

[FN132]. 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, 223 (1989). Salken argues that states must restrict police discretion and monitor the authorization for arrests, especially for fine-only traffic offenses. *Id.* at 224.

[FN133]. [Atwater III](#), 532 U.S. at 372 (O'Connor, J., dissenting); see also [Maryland v. Wilson](#), 519 U.S. 408, 422 (1997) (stipulating that officers should be required to give justification for their actions when performing any type of seizure and arrest).

[FN134]. [Atwater III](#), 532 U.S. at 372 (O'Connor, J., dissenting).

[FN135]. See, e.g., [Atwater II](#), 195 F.3d 242, 247 (5th Cir. 1999) (Garza, J., dissenting). Justice Garza discussed an affidavit from a member of the Recruitment Unit of the Austin Police Department, who reviewed Officer Turek's file prior to Atwater's arrest. *Id.* The record reflected that Officer Turek lacked the necessary maturity for police work, failed two out of three psychological tests for the Austin Police Department, and neglected to provide several pieces of necessary information in his application. *Id.* Justice Garza placed great emphasis on this affidavit, and it should have been an eye-opener for the Supreme Court. If Officer Turek represents other police officers in the United States, then the Court's decision now allows these unfit state actors to continue with their unreasonable behavior, without any legal ramifications. See generally *id.* at 247-48.

[FN136]. [Atwater III](#), 532 U.S. at 372 (O'Connor, J., dissenting). Police officers now have an available “arsenal” that permits them to arrest, search, and seize without offering any justification besides mere statutory authority and probable cause. *Id.*

43 S. Tex. L. Rev. 957

END OF DOCUMENT