Criminal Procedure: *Atwater v. City of Lago Vista*: The Due Process Dilemma of Fourth Amendment Seizures for Traffic Violations

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Introduction

Imagine that you are driving home from a long day at work on a Thursday evening. Driving a few miles over the speed limit (we all do it) so that you will not be late to a dinner date and forgetting to buckle your seatbelt, you do not see the police car on the side of the road until it is too late. He has already clocked your speed, turned on the flashing lights, and has begun to pull onto the road behind you. Like a good citizen, you slow down and immediately pull onto the side of the road. You get your vehicle registration and insurance card out of the glove compartment to help the officer and, hopefully, help yourself by making the process smoother and quicker.

The officer approaches the car, you roll down your window, and he asks for your license, registration, and proof of insurance. You give all of these documents to the officer with no complaint, expecting only to receive a citation and to be promptly on your way. Instead, much to your surprise, the officer tells you that you are under arrest. You ask if there is a problem, and he merely states that you have broken the law and are under arrest. Then the officer searches the passenger compartment of your car, and you are handcuffed, searched, and locked in the back of the police car.

The officer takes you to the county jail where you are stripped of your possessions (and dignity by this point) and held in a cell with a few shady-looking characters. Another officer informs you that a magistrate will not review your case until tomorrow morning, so you are told that you should make yourself comfortable. In the meantime, the police tow your car, and you are expected at work tomorrow morning, not to mention your obligations tonight. Think that this is an implausible scenario? Well, it isn't. In the recent case of *Atwater v. City of Lago Vista,*¹ the U.S. Supreme Court

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¹ Special thanks to Professor Robert E.L. Richardson for his invaluable contributions to this note.
held that an arrest for a minor traffic violation does not violate the Fourth Amendment.\(^3\)

Although Arwater was a logical extension of the gradual contraction of Fourth Amendment protections in recent decades,\(^3\) many scholars and ordinary citizens became concerned when the Supreme Court ruled that police could arrest someone for a mere seatbelt violation.\(^4\) The Fourth Amendment purportedly protects individuals from "unreasonable searches and seizures;"\(^5\) however, Arwater made it clear that law enforcement officers may arrest individuals for misdemeanors. Making an arrest for an offense for which the maximum punishment is a small fine is arguably unreasonable.\(^6\) The "basic principle of Fourth Amendment law" is that a search and seizure inside a home without a warrant is presumptively unreasonable.\(^7\) Moreover, the law requires that a warrant will not issue without a finding of probable cause by a neutral and detached magistrate.\(^8\)

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2. Id. at 323.

3. James A. Adams, Search and Seizure as Seen by Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?, 12 ST. LOUIS U. PUB. L. REV. 413, 475 (1993) (stating that Supreme Court decisions have led to much confusion in Fourth Amendment jurisprudence and ultimately less protection of individual rights); Daniel T. Gillespie, Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops, 31 LOY. U. CHI. L.J. 1, 3 (1999) (tracing evolving tensions between state and individual interests in Fourth Amendment jurisprudence); Martin L. O'Connor, Vehicle Searches — The Automobile Exception: The Constitutional Ride from Carroll v. United States to Wyoming v. Houghton, 16 Touro L. REV. 393, 393 (2000) (stating that there has been "substantial criticism of the Fourth Amendment jurisprudence of the U.S. Supreme Court"); 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, 700 (1998) (suggesting that a jurisprudence based on due process rather than privacy is more suited to examine what a police officer can do as opposed to what the officer can search); Chris K. Visser, Comment, 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, 1686 (1999) (stating that "citizens are now afforded less Fourth Amendment protections while driving").


5. U.S. CONST. amend. IV (emphasis added).


Over the years, however, many exceptions to this rule evolved, allowing warrantless searches and seizures outside the sacrosanct confines of the home. The common thread is that the United States Supreme Court has recognized exceptions to the warrant requirement when exigent circumstances exist, such as safety concerns or potential loss of evidence. As discussed below, one of the most recognized exceptions pertains to automobiles.

When the Supreme Court recognized the automobile exception, it held that individuals have a lesser expectation of privacy associated with vehicles than with their homes. Because the Supreme Court did not want to further confuse law enforcement officers with the many exceptions allowing warrantless searches and seizures, the Atwater Court declined to develop another test specifically for minor offenses, like traffic violations. Therefore, this note will argue that states must use legislative means to limit arrests for minor offenses.

Part II of this note explores judicial decisions affecting search and seizure rights under the Fourth Amendment and traces the contraction of these rights in automobile cases leading up to Atwater. Part III discusses the particular facts, the central issue and holding, and the reasoning of both the majority and the dissent in Atwater. Part IV.A analyzes Atwater and discusses the dissent's argument for a reasonableness test supported by "specific and articulable facts," which the majority ultimately rejected because it is not easily administrable. Part IV.B presents three approaches to resolve the problems of administration and to protect citizens' privacy and due process rights. The first approach differentiates between crimes that could result in arrest and those that ordinarily would not by employing the traditional

9. The Supreme Court has recognized the following exceptions to the warrant requirement: (1) standard operating procedures for police operations, see Florida v. White, 526 U.S. 559 (1999); South Dakota v. Opperman, 428 U.S. 364 (1976); (2) consent by the owner, see Florida v. Jimeno, 500 U.S. 248 (1991); United States v. Watson, 423 U.S. 411 (1976); (3) the protective sweep, see Maryland v. Buie, 494 U.S. 325 (1990); (4) the "plain view" doctrine, see Horton v. California, 496 U.S. 128 (1990); Texas v. Brown, 460 U.S. 730 (1983); (5) the "open field" doctrine, see Oliver v. United States, 466 U.S. 170 (1984); (6) search incident to arrest, see New York v. Belton, 453 U.S. 454 (1981); (7) an officer in "hot pursuit," see Warden v. Hayden, 387 U.S. 294 (1967); and (8) in the event of emergencies, see Draper v. United States, 358 U.S. 307 (1959).

10. See supra note 9.


12. Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1475 (1985) ("By its continued adherence to the warrant requirement in theory, though not in fact, the Court has sown massive confusion among the police and lower courts.").

classifications of mala in se and mala prohibita. The second option relies on state and municipal legislative bodies to distinguish in their statutes and ordinances between criminal offenses, civil offenses, and administrative violations. The third option is less time-intensive and consists of legislatures revising the language in select statutes to provide that police officers shall not arrest individuals for minor offenses such as traffic violations. Part V delves into the potential negative implications that the Supreme Court's holding in Atwater could have unless states take legislative action. Part V also explores the current status of Oklahoma law relating to arrests for minor traffic violations.

II. U.S. Supreme Court Decisions Leading to Atwater: The Contraction of Fourth Amendment Protections

A. Establishing the Automobile Exception

The United States Supreme Court's decisions involving automobiles have progressively contracted Fourth Amendment due process rights as applied to the states through the Fourteenth Amendment. Due process is defined as "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights." Furthermore, such decisions have also decreased expectations of privacy associated with automobiles. To determine privacy expectations, the Court usually analyzes those expectations that it deems reasonable and that society in general wants to protect. In balancing the interests of law enforcement against the individual's right to protection from unreasonable searches and seizures, the Court has increasingly sided with the interests of law enforcement. An examination of several Supreme Court decisions involving automobiles illustrates this proposition.

Beginning the long road toward lessened privacy expectations and due process rights, Carroll v. United States first established the automobile exception to the Fourth Amendment's search warrant requirement. In Carroll, the defendant and a passenger were traveling in their vehicle from

14. Malum in se is defined as "[a] crime or an act that is inherently immoral, such as murder, arson, or rape." Malum prohibitum is defined as "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." Mala is the plural form of malum. BLACK'S LAW DICTIONARY 971 (7th ed. 1999).
15. Id. at 516.
17. 267 U.S. 132 (1925).
18. Id. at 154.
the direction of Detroit, heading towards Grand Rapids, Michigan.\textsuperscript{19} Officers stopped the vehicle on a suspicion that the men were concealing illegal liquor.\textsuperscript{20} The officers were patrolling a section of highway that they normally patrolled to find such violations.\textsuperscript{21} After searching the car and finding gin and whiskey behind the upholstery of the seats, the officers arrested the defendant and the passenger.\textsuperscript{22}

In finding an exception to the Fourth Amendment's warrant requirement, the U.S. Supreme Court reasoned that the mobility of a vehicle, and thus, the inability to get a search warrant in time to prevent the destruction of evidence, mandated such an exception.\textsuperscript{23} However, the Court stated that the Fourth Amendment still required probable cause to stop a vehicle.\textsuperscript{24} The Court defined probable cause as a reasonable belief arising out of the circumstances in a particular situation.\textsuperscript{25} The Carroll Court listed a combination of factors that justified the search and seizure in question.\textsuperscript{26} One of these factors was that bootleggers had established Detroit as an active center for introducing illegal liquor into the country, and Detroit was relatively close in proximity to the location of this search.\textsuperscript{27} Another factor was that the defendant had tried to furnish illegal liquor to the officers on a previous occasion.\textsuperscript{28} Additionally, the defendant was traveling from the direction of Detroit in the same automobile that the officers had seen in their previous dealings with the defendant.\textsuperscript{29} Taking these factors into consideration, the Court held that probable cause existed and that the warrantless search and seizure were valid.\textsuperscript{30} Thus, the automobile exception to the Fourth Amendment's requirement for a search warrant was born, paving the way for the contraction of due process rights and a lesser expectation of privacy associated with automobiles.

\textsuperscript{19} \textit{Id.} at 160.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} This scenario, during the Prohibition Era, strongly resembles the modern "war on drugs." \textit{See} Illinois \textit{v.} Wardlow, 528 U.S. 119 (2000) (officers patrolling a high drug area pursued a fleeing person and arrested him after a pat-down revealed a weapon); \textit{see also} Whren \textit{v.} United States, 517 U.S. 806, 808 (1996) (police officers patrolling a high drug area stopped defendants for traffic violations and subsequently arrested them for narcotics possession); Gillespie, \textit{supra} note 3, at 3.
\textsuperscript{22} \textit{Carroll}, 267 U.S. at 132.
\textsuperscript{23} \textit{Id.} at 146; \textit{see also} United States \textit{v.} Chadwick, 433 U.S. 1, 12 (1977).
\textsuperscript{24} \textit{Carroll}, 267 U.S. at 149.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 161.
\textsuperscript{27} \textit{Id.} at 160.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
B. Expanding the Automobile Exception: Inherent Mobility

As in Carroll, the defendant in Chambers v. Maroney,31 contested the admissibility of evidence seized from a vehicle, arguing that it was the fruit of an unlawful warrantless search.32 In Chambers, officers stopped a vehicle near the scene of an armed robbery because the car and the men inside matched the description given by two individuals near the scene of a crime.33 The officers arrested the men and then drove the car to the police station.34 Later, the police searched the car at the station without a warrant and found two revolvers and other incriminating evidence.

The U.S. Supreme Court reasoned that exigent circumstances permitting a warrantless search still existed because the vehicle remained mobile.35 This case differed from Carroll in that the police searched the vehicle without a warrant while it was under police control.36 Because there was probable cause to arrest the men, the Court held that there was also probable cause to search the car without a warrant for guns and stolen money.37 The fact that the vehicle was under police control and at the police station eliminated the possibility of destruction of the evidence; however, the Court apparently decided that because the vehicle had wheels, it remained mobile.38 By expanding the concept from actual mobility to inherent mobility, Chambers further lessened the privacy expectation in relation to vehicles.39

Pennsylvania v. Labron40 involved a similar issue and upheld the warrantless search of parked cars in two consolidated cases. In the first case, police officers observed the defendant putting drugs into the trunk of a car.41 The officers then arrested the defendant and searched his car without a warrant.42 In the second case, police officers also had probable cause to search for drugs and did so without a warrant.43 Labron reaffirmed the
Court's holding in *Chambers*. The Court literally tossed the exigency requirement for a warrantless search of an automobile out the window.\(^{45}\)

C. The Expectation of Privacy in Vehicles Is Associated with a Property or Possessory Interest

*Rakas v. Illinois*\(^{46}\) is another automobile case; however, its holding suggests that it may not be limited to vehicles.\(^{47}\) In *Rakas*, as in *Chambers*, officers stopped a vehicle that matched the description of the getaway car in a recent armed robbery.\(^{48}\) The officers ordered the occupants out of the vehicle, and two of the officers searched the car.\(^{49}\) The occupants were not arrested at the time, but the police subsequently arrested the occupants upon discovery of a box of rifle shells and a sawed-off rifle under the seat.\(^{50}\) Claiming that the search violated their Fourth and Fourteenth Amendment rights, the defendants moved to suppress the seized evidence.\(^{51}\)

The U.S. Supreme Court held that the search did not violate the defendants' rights under the Fourth and Fourteenth Amendments because the defendants lacked standing to contest the legality of the search.\(^{52}\) The defendants did not own the automobile, the rifle, or shells.\(^{53}\) They had been merely passengers; the owner was the driver of the vehicle. The Court reasoned that the passengers had no legitimate expectation of privacy in the vehicle, or the evidence obtained therein, because they had no property or possessory interest in the vehicle, the rifle, or the shells.\(^{54}\) With this holding, the Court ensured that defendants would not more widely invoke the exclusionary rule\(^{55}\) in future cases.\(^{56}\) As the dissent in *Rakas* argued, the decision "invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle, or of the item, will have

\(^{45}\) O'Connor, *supra* note 3, at 426.
\(^{47}\) O'Connor, *supra* note 3, at 432 ("The automobile exception cases suggest that the Court may have turned against the warrant requirement in many areas outside of a home.").
\(^{48}\) *Rakas*, 439 U.S. at 130.
\(^{49}\) *Id.*
\(^{50}\) *Id.*
\(^{51}\) *Id.*
\(^{52}\) *Id.* at 150.
\(^{53}\) *Id.*
\(^{54}\) *Id.* at 148.
\(^{56}\) *Rakas*, 439 U.S. at 142.
standing to seek suppression." The Court's holding in Rakas establishes that automobile passengers, having no property or possessory interest in the vehicle or its contents, lack any legal expectation of privacy.

D. Abandoning Reasonableness: Probable Cause Is the Only Requirement for Arrest in the Absence of Extraordinary Intrusiveness

The Atwater majority relied heavily on Whren v. United States in justifying its holding. Whren addressed a probable-cause traffic stop by plain-clothes vice-squad officers in a "high drug area." In Whren, the Court found a warrantless traffic stop to be lawful because the operator of the vehicle stopped at a stop sign for an unreasonably long time, failed to signal, and was speeding. The Court reached this conclusion despite the fact that District of Columbia vice-squad officers in unmarked cars did not normally conduct traffic stops. Officers arrested the defendants when an officer saw bags of crack cocaine in one of the defendant's hands. Subsequently, the officers recovered other illegal drugs in a search of the defendants' car. The defendants moved to suppress the seized evidence on the basis that the police lacked probable cause for the stop and that the officers' grounds for approaching the vehicle to issue a traffic citation were pretextual.

The Court held that as long as officers have probable cause to stop the vehicle for the traffic violations, the officer's subjective intent is immaterial. Moreover, the Court rejected the "reasonable officer" test urged by the defendants. Because this particular case did not involve a search or seizure conducted in an extraordinary manner, the Court also declined to engage in a balancing analysis to determine the reasonableness of the initial

57. Id. at 168 (White, J., dissenting).
59. Id. at 808.
60. Id.
61. Id. at 819.
62. Id. at 809.
63. Id. "A pretextual stop is one in which police officers stop a motorist for constitutionally invalid reasons, but behave in an 'objectively reasonable' manner that prosecutors can later square with Fourth Amendment requirements." Visser, supra note 3, at 1685; see also Ohio v. Robinette, 519 U.S. 33, 38 (1996) (holding that an officer's subjective intentions are immaterial in a continued detention as long as the officer's actions are objectively justified); Visser, supra note 3, at 1710 (explaining that Whren facilitates arbitrary and discriminatory enforcement of traffic violations based on impermissible factors, in particular, skin color).
64. Whren, 517 U.S. at 813.
65. Id. at 815. Such a test would look to whether the particular officer's conduct was such that a reasonable officer in the same circumstances would have engaged in the conduct.
In holding that probable cause is all that is required for an arrest in the absence of extraordinary intrusiveness, the Whren Court laid the logical foundation for the Atwater decision.67

III. Statement of the Case: Atwater v. City of Lago Vista

A. Facts

In Atwater, a Texas police officer arrested a woman for failing to wear a seatbelt and failing to ensure that her two children were wearing seatbelts.68 The maximum fine for such an offense was fifty dollars,69 although a Texas statute authorized an arrest for this particular misdemeanor.70 Normally, however, an officer would only issue a citation to the person and not arrest her for failing to wear a seatbelt.71 When the police officer stopped her, Mrs. Atwater was driving in the small, residential neighborhood of Lago Vista, a suburb of Austin, at approximately fifteen miles per hour while her children looked along the ground for a lost toy.72

The officer who stopped Mrs. Atwater was, by all accounts, exceptionally rude.73 He had encountered Mrs. Atwater a few months prior and had stopped her then because her son was riding on the armrest of the vehicle.74 The son was wearing a seatbelt, however, so the officer merely gave Mrs. Atwater a warning at that time.75 On this encounter, the officer scared Mrs. Atwater's young children so badly with his comments, harsh tone, and treatment of their mother that the youngest required counseling afterwards.76

66. Id. at 818.

67. Id. at 819.


69. TEX. TRANSP. CODE ANN. § 545.413(d) (Vernon 1999).

70. Id. § 543.001.

71. See Atwater, 165 F.3d at 385.

72. Brief of Petitioners at 2, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408), available at http://supreme.lp.findlaw.com/supreme_court/briefs/99-1408/991408mo1/brief.pdf. When the officer stopped Mrs. Atwater, he also cited her for not carrying a driver's license and possessing no proof of insurance. Mrs. Atwater explained to the officer that she could not produce these documents because her purse had been stolen, but the officer replied that he had heard that excuse many times before. Id. Those two charges were later dismissed. Atwater, 165 F.3d at 383.

73. Atwater, 165 F.3d at 382.

74. Id.

75. Id.

76. Id. at 383.
Luckily, before the officer hauled Mrs. Atwater and her children to jail, a neighbor observed what was taking place and took the children.\textsuperscript{77} The officer then handcuffed Mrs. Atwater, put her in the squad car, and drove her to the police station.\textsuperscript{78} At the station, police forced Mrs. Atwater to remove her shoes, jewelry, glasses, and everything in her pockets.\textsuperscript{79} After taking her mug shot, officers placed her in a holding cell for approximately one hour before a magistrate released her on bond.\textsuperscript{80} Ultimately, she paid a fifty-dollar fine, the maximum penalty for her seat-belt violation.\textsuperscript{81}

\textbf{B. Procedural History}

Mrs. Atwater sued the city of Lago Vista, the Police Chief, and the officer who arrested her in state court.\textsuperscript{82} She alleged that the police violated her Fourth Amendment rights by conducting an unreasonable seizure and by using excessive force and punishment.\textsuperscript{83} She also claimed due process violations under the Fifth and Fourteenth Amendments.\textsuperscript{84} Mrs. Atwater also submitted state law claims for false imprisonment and intentional infliction of emotional distress.\textsuperscript{85} The city removed the case to the United States District Court for the Western District of Texas, where the judge granted summary judgment for the defendants.\textsuperscript{86}

On appeal, a three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the summary judgment,\textsuperscript{87} holding that although the Texas statute authorized arrest, it did so only when an arrest would be reasonable under the circumstances.\textsuperscript{88} Subsequently, the court, sitting en banc, granted a rehearing\textsuperscript{89} and ruled in favor of the city.\textsuperscript{90} The U.S. Supreme Court granted certiorari on the issue of whether the Fourth Amendment, as extended to the states through the due process clause of the

\begin{flushleft}
\textsuperscript{77} Id. at 382.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 382-83.
\textsuperscript{81} Brief of Petitioners at 5, Atwater (No. 99-1408).
\textsuperscript{82} Atwater, 165 F.3d at 383.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Atwater v. City of Lago Vista, 532 U.S. 318, 325 (2001).
\textsuperscript{87} Atwater, 165 F.3d at 389.
\textsuperscript{88} Id. at 386.
\textsuperscript{89} Atwater v. City of Lago Vista, 171 F.3d 258 (5th Cir. 1999).
\textsuperscript{90} Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999), aff'd, 532 U.S. 318 (2001).
\end{flushleft}
Fourteenth Amendment, forbids a warrantless arrest for a minor criminal offense.\(^9\)

C. Holding/Majority Reasoning

The U.S. Supreme Court's five-to-four majority opinion in \textit{Atwater} held that the Fourth Amendment does not forbid a warrantless arrest for a minor traffic violation.\(^9\) The Court stated that as long as the officer has probable cause to believe that an individual has committed even a minor criminal offense, the Fourth Amendment is satisfied, and the officer may arrest the individual.\(^9\) Justice Souter, writing for the majority, cited \textit{United States v. Watson},\(^4\) \textit{Carroll v. United States},\(^5\) and \textit{Bad Elk v. United States},\(^6\) among others, to support the proposition that at common law a police officer could make a warrantless arrest for a misdemeanor committed in his presence.\(^7\) Although the Court reasoned that the common law at the time of the framing of the Constitution, as well as English and American statutes, authorized peace officers to make warrantless arrests without a breach of the peace for many different minor offenses,\(^8\) the Court also recognized contrary authority.\(^9\) Ultimately, the Court noted that "statements about the common law of warrantless misdemeanor arrest simply are not uniform."\(^10\) The Court then referred to various state statutes,\(^1\) such as the one in Texas, that permit warrantless misdemeanor arrests without requiring a breach of the peace.\(^2\) The Court declined to tailor a rule to address the facts of the instant case and rejected Mrs. Atwater's formulation of a new test because of the confusion the Court anticipated it would cause police officers.\(^3\) The Court reasoned that the need for clear and simple standards

92. \textit{Atwater}, 532 U.S. at 326.
93. \textit{Id.} at 354.
95. 267 U.S. 132, 156-57 (1925).
96. 177 U.S. 529, 534 (1900).
97. \textit{Atwater}, 532 U.S. at 340-41.
99. \textit{Atwater}, 532 U.S. at 329. English common law only permitted warrantless arrest of those committing or threatening to commit a breach of the peace. Schroeder, \textit{supra} note 98, at 789.
100. \textit{Atwater}, 532 U.S. at 329.
101. The Court lists statutes representing all fifty states and the District of Columbia in an appendix to its opinion. \textit{Id.} at 355-60.
102. \textit{Id.} at 359.
103. \textit{Id.} at 345-54. \textit{But see} Bradley, \textit{supra} note 12, at 1475 (stating that the Court "has}
and the need for an officer to act on a moment’s notice both justify the probable-cause-only standard.\textsuperscript{104} Mrs. Atwater suggested that the Court should balance the needs of society and the privacy interests of individuals to determine the reasonableness of an arrest for a minor offense.\textsuperscript{105} Although the Court conceded that a rule based on the facts of this case would likely result in Mrs. Atwater’s favor, the Court declined to adopt a balancing approach and opted instead for a bright-line rule: misdemeanor arrests that are based upon probable cause do not violate the Fourth Amendment.\textsuperscript{106} The Court also declined Mrs. Atwater’s argument in favor of distinguishing between offenses that could result in jail time and those that could only result in a fine.\textsuperscript{107} The Court reasoned that an officer might not be able to differentiate between jailable and nonjailable offenses when deciding whether to arrest an individual, nor should he be required to do so.\textsuperscript{108}

Mrs. Atwater also sought to refine the limitation between jailable and nonjailable offenses by allowing warrantless arrests only when "necessary for enforcement of the traffic laws or when an offense would otherwise continue and pose a danger to others on the road."\textsuperscript{109} The Court dismissed this idea because of the difficulty of administration, the prospect of evidentiary exclusion, and concern for officers’ civil liability for misapplication of the standard.\textsuperscript{110} The Court mentioned that there was no reason to believe that arrests for minor offenses posed a widespread problem.\textsuperscript{111} The Court, citing Whren, proclaimed that when there is no extraordinary

\textsuperscript{104} Atwater, 532 U.S. at 347. The Court also cited New York v. Belton, 453 U.S. 454, 458 (1981), as standing for the proposition that courts should express Fourth Amendment rules “in terms that are readily applicable by the police” and not “qualified by all sorts of ifs, ands, and buts.” Atwater, 532 U.S. at 347. The Court later cited Berkemer v. McCarty, 468 U.S. 420, 431 n.13 (1984), noting that officers “have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person.” Atwater, 532 U.S. at 348.

\textsuperscript{105} Atwater, 532 U.S. at 345-46.

\textsuperscript{106} Id. at 354; see also Hayes v. Florida, 470 U.S. 811, 816 (1985) (asserting the "traditional rule that arrests may be made only on probable cause"); Dunaway v. New York, 442 U.S. 200, 208 (1979) (asserting that probable cause, without a balancing test, is the minimum necessary for an arrest with a few exceptions).

\textsuperscript{107} Atwater, 532 U.S. at 348.

\textsuperscript{108} Id.

\textsuperscript{109} Id. at 349.

\textsuperscript{110} Id.

\textsuperscript{111} Id. at 351-52.
intrusiveness involved in the search and when probable cause to arrest exists, there is no need to balance the interests of the individual against those of the government.¹¹² Whereas in Whren the officers did not arrest the defendant until they saw contraband, the Court apparently viewed this distinction as immaterial. The glaring difference between Whren and Atwater is that in Whren the officers arrested the individual after he had committed a felony, and in Atwater, the officer arrested Mrs. Atwater for a mere traffic violation. Thus, Atwater continues down the road established in Carroll of steadily contracting Fourth Amendment protections of individuals, resulting in almost no expectation of privacy in relation to automobiles.

D. The Dissent

Justice O'Connor's dissent is important because it addresses the public's concerns about being arrested for a minor offense. Indeed, an arrest for a traffic violation affronts the sensibilities of the average citizen. Justice O'Connor's dissent began by asserting that it is unreasonable to arrest someone when the maximum punishment is a small fine.¹¹³ She also stated that, in this case, history provides no consistent basis for ruling on the issue.¹¹⁴ She asserted that probable cause alone is insufficient and that a Fourth Amendment balancing test is necessary.¹¹⁵ O'Connor stated that, in the act of balancing, one must look at the penalty for the offense to determine the government interest.¹¹⁶ She quoted Terry v. Ohio¹¹⁷ in formulating a recommendation that an officer should issue a citation in cases of fine-only offenses unless "specific and articulable facts . . . taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest."¹¹⁸ Justice O'Connor also referred to the significant liberty and privacy intrusions that an arrest entails.¹¹⁹ Stating that the standard of probable

¹¹² Id. at 352-53.
¹¹³ Id. at 360 (O'Connor, J., dissenting); see also Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (stating that "a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"); Schroeder, supra note 98, at 800 (proclaiming that when a person is arrested for a misdemeanor, the arrest is likely the most severe consequence).
¹¹⁴ Atwater, 532 U.S. at 362 (O'Connor, J., dissenting).
¹¹⁵ Id. at 363 (O'Connor, J., dissenting).
¹¹⁶ Id. at 365 (O'Connor, J., dissenting).
¹¹⁷ 392 U.S. 1, 21 (1968).
¹¹⁸ Atwater, 532 U.S. at 366 (O'Connor, J., dissenting) (second alteration in original).
¹¹⁹ Id. at 363 (O'Connor, J., dissenting).
cause itself is not one of precision, she downplayed the majority's reasons for and insistence on a bright-line rule focused on probable cause. Many ordinary citizens might agree with Justice O'Connor, in that the advantage of the clarity of a bright-line rule does not justify infringing citizens' Fourth Amendment rights.

Addressing the concerns that officers would be subject to civil liability for unconstitutional arrests and thus face a strong disincentive to make even a valid arrest, Justice O'Connor reminded the Court that qualified immunity is an adequate solution to both issues. Warning of the potential for abuse by police officers having unfettered discretion to arrest for fine-only offenses, Justice O'Connor concluded that because an officer's subjective motivations for making traffic stops are beyond the Court's purview, the Court has the duty to ensure that officers' actions upon a traffic stop are within the constitutional bounds of the Fourth Amendment.

IV. Analysis and Implications

A. The Failure of the Reasonableness Argument

1. Disagreement in the Precedent

Although the majority ultimately concluded that it was unnecessary to determine the reasonableness of the arrest, it conceded that the argument does have merit. The majority admitted that, purely based on the facts of the case, Atwater's arguments were plausible. But, as has been the case in the past, the majority erred on the side of the bright-line rule in favor of law enforcement. Although the U.S. Supreme Court has used a reasonableness test in many instances where society's expectations of privacy are less or the search and seizure is extraordinarily intrusive, the Court declined to adopt the reasonableness test in Atwater. The majority's ruling establishes the need for states to adopt legislation to protect their citizens' Fourth Amendment interests.

Both the majority and the dissent noted that the common law at the time of the framing of the Constitution provided no clear guidance as to whether minor offenses required a breach of the peace for an officer to arrest an

120. Id. at 366 (O'Connor, J., dissenting).
121. Id. at 367 (O'Connor, J., dissenting).
122. Id. at 372 (O'Connor, J., dissenting); see also 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, 230 (1989) (warning that a discretionary power to arrest creates a great danger of officers using arrest as a pretext to conduct a search).
individual. The majority also cited eighteenth century and modern statutes that did not require a breach of the peace before permitting an arrest. Indeed, both sides cited a multitude of cases, statutes, commentaries, and treatises to support their respective positions, ultimately tending to prove only great disparity of opinion in the area. Because precedent does not clearly support one position over the other, the dissent asserted that a balancing test would appropriately "evaluate the search or seizure under traditional standards of reasonableness" by balancing the respective interests involved.

The Supreme Court initially adopted the traditional exceptions to the warrant requirement because exigent circumstances existed in which it was impractical for an officer to obtain a warrant. Additionally, the cases that allow a warrantless search or seizure are those in which an impartial magistrate would issue a warrant based on probable cause. Terry illustrates that the "central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." To determine the reasonableness of the intrusion, the Court must balance "the need to search [or seize] against the invasion which the search [or seizure] entails."

123. Atwater, 532 U.S. at 328; id. at 363 (O'Connor, J., dissenting).
124. The majority cited early English statutes authorizing peace officers to arrest people playing unlawful games, to arrest beggars and other idle and disorderly persons, and to arrest negligent carriage drivers. Id. at 333. Preconstitutional American statutes allowed arrest for drunkenness, profane swearing, Sabbath-breaking, and fortune-telling. Id. at 337. See also the appendix to the opinion of the Court. Id. at 355-60.
125. In her brief, Atwater referred to the fact that the rejection of the use of general warrants and writs of assistance led to the adoption of the Fourth Amendment. Brief of Petitioners at 8-12, Atwater (No. 99-1408).
126. Atwater, 532 U.S. at 361 (O'Connor, J., dissenting) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)); see also Salken, supra note 122, at 263 (stating that a seizure can be unreasonable, notwithstanding probable cause, if "it is too intrusive or unjustified by the circumstances," and a court must balance the individual's interests against the government's interests to determine the reasonableness of a course of action).
127. Terry v. Ohio, 392 U.S. 1, 20 (1968) ("[I]n most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.").
128. Id. at 21.
129. Id. at 19; see also United States v. Place, 462 U.S. 696, 703 (1983) ("The exception to the probable-cause requirement for limited seizures . . . in Terry and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure. . . .").
130. Terry, 392 U.S. at 21 (alterations in original) (quoting Camara v. Municipal Court, 387 U.S. 523, 537 (1967)).
The majority opinion admitted that balancing the interests of the arresting officer against Mrs. Atwater did not overcome the significant invasion of her Fourth Amendment rights. However, the Court stated that if it were to develop a rule directly applicable to the facts in the instant case, Atwater would have prevailed. In Atwater, a magistrate would not likely have issued an arrest warrant for an individual who was not a flight risk, posed no serious threat to others, and had only committed a minor misdemeanor.

2. The Two-Part Test Defined

The dissent asserted that a two-part test, defined by Terry, would appropriately evaluate an arrest for a fine-only offense, as in Atwater. Although the officers belief that Atwater had violated the law justified the initial stop, the crime was a minor one for which it was arguably unreasonable to arrest Atwater. The officer had to make two separate decisions. First, the officer had to decide whether to stop Atwater. Probable cause to stop Mrs. Atwater existed. Next, the officer had to decide whether to issue a citation or to arrest. The dissent would require the police officer to be "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion." The officer in Atwater had no specific and articulable facts that justified arresting Atwater instead of issuing her a citation.

Tennessee v. Garner illustrates a much more drastic example of the two-part test. In Garner, the Court held that a state statute authorizing deadly force to effectuate an arrest was unconstitutional in the case of an escaping, unarmed felon. Garner is another example of the need to distinguish the justification for the seizure from the justification for the type of seizure that

131. Atwater, 352 U.S. at 347; see also Schroeder, supra note 98, at 804 (stating that when the legislature classifies an offense as a misdemeanor, it shows that the interest in arrest for this offense is minor).
132. Atwater, 352 U.S. at 347.
133. Atwater v. City of Lago Vista, 195 F.3d 242, 244 (5th Cir. 1999), aff'd, 532 U.S. 318 (2001).
134. Terry, 392 U.S. at 19-20 ("And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one, whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").
136. Id. at 366 (O'Connor, J., dissenting) (quoting Terry, 392 U.S. at 21) (alteration in original).
138. Id. at 3.
ultimately results. Although probable cause existed to seize the suspect, the Court stated that the next part of the analysis must determine the reasonableness of the manner in which the police conducted the seizure. 139

The Supreme Court applied this same analysis in Schmerber v. California, 140 holding that drawing one’s blood without consent at a hospital is permissible. 141 In Schmerber, probable cause existed for a warrantless search because the individual was clearly drunk and exigent circumstances existed because the evidence would dissipate over a matter of hours. The Court, however, went on to determine that the Fourth Amendment intrusion was reasonable. 142 Conversely, in Winston v. Lee, 143 probable cause alone did not justify a search. 144 The Court deemed that a surgical procedure to remove a bullet to prove the defendant had attempted armed robbery was extraordinarily intrusive. 145

In Atwater, the police lawfully seized Mrs. Atwater for her violation of the seatbelt laws. However, the seizure was unreasonable when the government’s interests are balanced against Mrs. Atwater’s interests. The existence of probable cause justified the initial stop, but the officer needed to take the next step and reasonably determine whether he should issue a citation or make an arrest. The dissent argues that with a small-fine offense, other exigent circumstances must exist to justify an intrusive arrest. 146 If "specific and articulable facts" 147 supporting an arrest do not exist, then the officer must only issue a citation.

3. Balancing the Interests: Are These Rights Worth Protecting?

Importantly, society must protect individuals from arrest for minor offenses in those areas it deems reasonable and worthy of protection. In

139. Id. at 7-8. "Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on . . . how it is carried out." Id. at 8. The constitutionality of the seizure is determined by balancing an individual’s Fourth Amendment interests against the government’s interests. Id. (citing United States v. Place, 462 U.S. 696, 703 (1983)). The Court also cited a number of cases standing for the proposition that courts must employ a totality-of-the-circumstances approach in each case of search or seizure. Id. at 8-9; see also Graham v. Connor, 490 U.S. 386, 395-96 (1989) (holding that courts must evaluate the reasonableness of the seizure in each case, using the severity of the crime as one factor to determine if police used excessive force during the seizure).


141. Id. at 777.

142. Id.


144. Id. at 760.

145. Id.


many cases, the Court has based decisions, at least in part, on whether society deems certain governmental intrusions valid in areas in which society expects privacy. For example, in California v. Greenwood,148 the Court held that a person does not expect privacy in garbage set out on the curb because society is not interested in protecting the privacy of garbage.149 Again, in Oliver v. United States,150 the Court stated that the Fourth Amendment does not protect subjective expectations of privacy, but only those that society wants to protect.151 In another case, the Court noted that a juvenile's right to privacy at school is not as highly protected as that of an adult, holding that a search of a girl's purse under reasonable suspicion of finding cigarettes was constitutional.152 Theoretically, courts must evaluate the reasonableness of searches and seizures "'in light of contemporary norms and conditions."153 However, in most of the cases in which the Court has addressed an individual's expectation of privacy, the Court has decided that there is no societal expectation of privacy.

Along with the former approach, the Court has almost always employed a balancing test to determine the reasonableness of searches and seizures when society deems that less privacy is expected. The Court has consistently held that an automobile is one place where individuals expect less privacy.154 Other such places are schools, airports, open fields, prisons, and the borders of a country.155 In each of these instances, the Court has engaged in a balancing test to determine the reasonableness of either a search or seizure.156 In Atwater, Mrs. Atwater was in her automobile.

149. Id.
151. Id.
154. See, e.g., United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (discussing the fact that riding in a vehicle necessarily lowers privacy expectations because a car is not normally used as a residence, it does not serve as a repository for personal items, people travel in vehicles in plain view of others, and vehicles are highly regulated by the government).
155. See T.L.O., 469 U.S. at 350 (upholding a warrantless search by a school's principal when he had a reasonable suspicion of finding contraband in a juvenile's purse); Hudson v. Palmer, 468 U.S. 517, 538 (1984) (O'Connor, J., concurring) (asserting that "all searches and seizures of the contents of an inmate's cell are reasonable"); Oliver, 466 U.S. at 184 (defining the "open fields" doctrine); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (holding that privacy expectations at the border of the country are significantly less); United States v. Lopez, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971) (holding that overriding security concerns limit privacy expectations in airports).
156. See supra note 155.
Therefore, one may argue that the Court should have employed the traditional reasonableness test. The Court should have balanced Mrs. Atwater's rights to privacy against law enforcement's need to arrest her for a minor offense and subsequently search her and her vehicle.

4. Is the Arrest Extraordinarily Intrusive?

Mrs. Atwater argued that an arrest for a minor traffic violation is extraordinarily intrusive\(^{157}\) because police do not arrest most people for an offense for which the penalty is less severe than the arrest itself.\(^{158}\) Additionally, a public arrest is embarrassing, and the effects may linger in that even if one is acquitted of a minor offense, the record of the arrest will most likely be available to the public.\(^{159}\)

Beyond the physical restraint and embarrassment involved in being handcuffed and taken to jail, an arrestee must also face the dangers of the holding cell where he could be exposed to dangerous felons.\(^{160}\) Someone arrested for a seatbelt violation on a Saturday or Sunday may have to spend the weekend in jail waiting to see a magistrate the following Monday.\(^{161}\) In response to this argument, the majority stated that such cases of abuse had not flooded courts showing this to be a widespread problem.\(^{162}\) They alluded to the fact that the instant case represented an isolated incident in which the police officer's judgment was extremely poor, although his actions were constitutional.\(^{163}\) The Court, however, overlooks the fact that litigation is costly. Mrs. Atwater's husband happened to be an emergency room physician, so they arguably had more money than most families and could afford to sue. The Court's lack of awareness of the problem does not equate to the nonexistence of the problem. Most people in Mrs. Atwater's situation would be upset about their treatment, but would not seek a remedy in court.

Although the Court did not address it, persons arrested while in the company of children could experience additional problems. We are left to wonder what would have happened to Mrs. Atwater's small children had a neighbor not rescued them from riding along to the police station with their...

\(^{158}\) See United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring); United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring) (stating that an argument can be made that the restrictions on arrest should be greater than those on searches because an arrest "is a serious personal intrusion").
\(^{159}\) Schroeder, supra note 98, at 797.
\(^{160}\) Id. ("Any arrest has a profound and long-lasting effect on the arrestee.").
\(^{162}\) Atwater, 532 U.S. at 353.
\(^{163}\) See id. at 355.
mother. One can only assume that the officers, upon receiving the children, would have called the Department of Health and Human Services or an equivalent organization to take the children into temporary custody. The arrestee would experience additional problems if he were not a resident of the community or state where arrested. If it were difficult for friends or family of such an individual immediately to pick up the children, they would, in effect, be incarcerated along with their parent, although not actually held in a jail cell.

5. The Bright-Line Rule Prevails

Because the Supreme Court has declined to engage in a balancing test, the bright-line rule that it is constitutional for officers to arrest individuals for minor infractions is the law. In order to prevent their citizens from being arrested for seatbelt violations, states must now rely on their legislatures to remedy the situation. The majority noted that "[i]t is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle."

This note submits three different approaches.

B. Suggested Solutions to the Administrability Problem

1. The Malum in Se/Malum Prohibited Distinction

The first possible solution would be for courts to distinguish between mala in se and mala prohibita traffic offenses. Mala in se offenses are offenses that involve an element of moral culpability or that were crimes under common law. They are "true crimes." These offenses consist of two parts: a mental element, the mens rea; and an act, the actus reas. One example is the crime of burglary. Burglary involves the acts of breaking and entering, but the acts alone are not enough. To be guilty of the crime of burglary, the accused must also have the requisite mental intent to commit a crime in the dwelling.

Mala prohibita offenses are offenses that violate laws created merely to regulate life in society. Mala prohibita offenses do not include moral turpitude or any mental element. These offenses are merely wrong

164. Id. at 352.
165. See supra note 14.
166. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 7.10 (3d ed. 1982).
168. See supra note 14.
169. PERKINS & BOYCE, supra note 166, § 7.5; see also Richardson, supra note 167,
because the law prohibits them. For instance, traveling one mile over the speed limit is a malum prohibitum offense because it does not matter that you did not know that you were violating the law or that your speedometer was not functioning properly. Mala prohibita offenses, such as speeding and not wearing a seatbelt, should only require a citation, while mala in se offenses, such as reckless driving and driving under the influence (DUI), would result in a custodial arrest. 170

Arguments against using this classification system do exist. For example, although dividing crimes on this basis would be an easy task for a lawyer, it might not be as clear-cut for a police officer. Officers could receive training in this area; however, policy makers could argue that the time and money involved is unjustified. Therefore, a second solution would be to rely on legislative bodies to pass laws listing which crimes could lead to an arrest. In such a situation, officers would not have to interpret legal terms or balance the reasonableness of a course of action. Merely by learning which offenses the law classifies as true crimes versus administrative or civil offenses, the officers would know the crimes for which they could arrest.

2. Recodification of State Statutes

A good illustration of what states can do to protect their citizens from arrest for minor offenses exists in the product of the Oklahoma Legislative Recodification Committee from 1990 to 1992. 171 Using the Model Penal Code as a guide, the Committee first determined that Oklahoma should codify all crimes in title 21 of the Oklahoma Statutes. 172 The Committee located and analyzed every crime in the Oklahoma Statutes and created four different classifications for offenses: (1) felonies, (2) misdemeanors, (3) civil infractions, and (4) administrative violations. 173 The proposal then placed all crimes and misdemeanors into title 21. 174 The proposals kept all civil infractions and administrative violations in their respective titles but did not

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170. For examples of the use of this classification, see District of Columbia v. Colts, 282 U.S. 63 (1930), where the Court held that driving recklessly is a malum in se offense, and United States v. Ramos, 815 F. Supp. 1304 (D. Ariz. 1993), where Arizona did not allow arrest for most traffic violations because they are mala prohibitum offenses, while the state did allow arrest for negligent homicide, driving under the influence, and failure to stop at an accident.
172. Id. at ii.
173. Id.
174. Id. at ii-iii.
consider them crimes and did not allow for arrest. The Committee defined administrative violations as violations of an "administrative rule, policy or procedure [that] needs an enforcement provision and a sufficient administrative structure exists to process it effectively." It defined civil infractions as infractions of some "rule, policy or procedure" or a harm that "is civil in nature, needs an enforcement provision and cannot adequately be processed in all areas of the state by an administrative agency." Thus, the Committee lumped both civil infractions and administrative violations into the category of civil offenses, punishable only by fine.

The next part of the Recodification Committee's analysis determined which offenses Oklahoma law should classify as criminal or civil in nature. The proposed guidelines were quite similar to the mala prohibita and mala in se classifications. If the rule, policy, or provision existed for the general welfare of society or affected the public at large, the proposal would classify it as a civil offense. All civil offenses fell within the category of mala prohibita offenses. If the offense was a crime at the common law, indicated a dangerous personality, or was "sufficiently reprehensible within itself," the proposal classified it as a crime. Thus, all crimes in title 21 were mala in se offenses. The Committee also decriminalized or repealed some "crimes," such as adultery, because they were unknown or rarely charged. Also, the proposal moved offenses with a separate mental element that were not determined to belong in title 21 to other titles, and the proposal deleted the separate mental elements.

Although the work of the Oklahoma Recodification Committee took almost three years, the benefits of such work would greatly benefit every state. The proposal itself consisted of 254 pages, very few pages when compared to the entire length of all of the Oklahoma Statutes. Furthermore, the advantages of reviewing state statutes are numerous. Such review performs regular house-keeping functions by eliminating unnecessary statutes or parts of those statutes. Not only is legislation clearer to those whose job it is to carry out the law, but the legislation is more easily understood by the average citizen. Every citizen of every state should be

175. Id. at iii.
176. Id.
177. Id.
178. Id.
179. Id. at iii-iv.
180. Id. at iv.
181. Id. at i.
182. Id. at iv.
able to determine easily what offenses state law characterizes as criminal and the penalties attached to those crimes.

The system proposed by the Oklahoma Recodification Committee makes finding the information much easier. By simply looking at one title of the state statutes, the citizens of a state, including police officers, could determine every crime and know when an arrest is applicable in that state. Such a system would greatly benefit police officers and also those citizens who have no real remedy in a case such as Atwater. Additionally, restricting the offenses for which officers can arrest enhances the productivity of the police force. Because officers spend much valuable time taking arrestees to the station for booking, limiting arrests in the case of very minor offenses enhances productivity. Citizens would know that they will still face punishment for violations of minor offenses, but the average law-abiding citizen need not fear that police will arrest and confine him to a holding cell with all of the humiliation that entails. Recodifying state statutes would save police departments and citizens unnecessary embarrassment and would also conserve state money in the long run.183

The Lago Vista Police Department incurred much negative publicity because of the mistakes of one officer.184 Although the U.S. Supreme Court deemed his actions constitutional, it also indicated that they were unnecessary. Average citizens may now see police officers in a different light. They might perceive officers not as protectors of the peace and the public, but as individuals to avoid. Thus, citizens may now be more loathe to stop when they see lights flashing in their rear view mirror than prior to Atwater.

Additionally, if state statutes no longer classified many minor offenses as criminal, a violator would not have a right to an attorney, a right that costs the state significant amounts of money in the case of indigent defendants.185 The fact that the defendant would not have the right to an attorney would not cause major concern because the violation would not be a "crime" and not allow for any jail time.186

183. Richardson, supra note 167, at 15.
186. 22 OKLA. STAT. § 1355.6 (2001); Smith, 747 P.2d at 825.
Mrs. Atwater and her family spent much time and money on a case that they ultimately lost because the Supreme Court did not want to create a broad rule that would further complicate the area of search and seizure under the Fourth Amendment. In responding, states should reexamine and revise their statutes as the optimum solution to the problem. Such revision should clearly delineate the offenses for which officers may arrest and should protect societal expectations of privacy without the need to engage in an additional reasonableness test. The efforts of the Oklahoma Recodification Committee provide a roadmap for any such effort.

3. Modified Recodification

A third solution exists if a state determines that revision of the state statutes would entail too much time and/or money. A state could simply revise those statutes dealing with the few offenses that should not result in an arrest. This third approach would not take as much time or effort as recodifying all of the state's statutes; however, legislators would run the risk of leaving some statutes out of the revision process. Legislators could simply determine that certain minor offenses, like violation of the seatbelt laws, littering, over-parking, or speeding, should only result in a fine and not arrest. The states' legislative bodies should incorporate such language in statutes or ordinances. In fact, many states have approached the issue in this manner already.187

V. Impact: The Practical Effect

Atwater carries potentially serious implications, because once a lawful arrest occurs, an officer may conduct a search incident to the arrest.188 Atwater could lead officers to arrest more people for very minor violations so that they could conduct incident searches and not worry about the admissibility of evidence seized in these lawful searches. Another consideration is that for a minor violation, a potential arrestee usually has the expectation that the police will stop him temporarily and not arrest him. Even an officer probably does not know initially if he will merely temporarily stop or arrest an individual. Giving the officer the discretion to...


188. New York v. Belton, 453 U.S. 454 (1981); Salken, supra note 122, at 224 ("Restricting the power to arrest is the most rational and effective solution to preventing unjustified searches incident to arrest for traffic offenses . . . ").
decide which course of action to take may result in many more pretextual stops and arrests. If the individual belongs to a certain race or falls within a certain age group, the officer may decide to arrest the individual so that he can then search the driver and the passenger compartment of the vehicle for contraband or other evidence of wrongdoing. In addition to the potential search questions this dilemma raises, Atwater could lead police to arrest people for all types of minor offenses, including those not related to automobiles.

In Oklahoma, officers can currently arrest individuals for a misdemeanor traffic violation, although title 47 of the Oklahoma Statutes, dealing with motor vehicles, provides for a fine not to exceed twenty dollars for violation of the seatbelt law. As stated in the penalties section, title 47 considers violation of any of its provisions a misdemeanor unless otherwise classified as a felony. Courts may fine persons convicted of misdemeanors in title 47 up to $500 and may imprison violators for no more than ten days if the statute does not provide another penalty. After the Atwater case, Oklahoma Senator Frank Shurden (D-District 8) introduced Senate Bill 444, amending title 47 of the Oklahoma Statutes to ensure that police could not handcuff or incarcerate seatbelt violators. Governor Frank Keating vetoed the bill on June 5th, 2001, for other reasons.

189. Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 YALE L. & POL’Y REV. 381, 382 (2001) (citing Professor Wayne LaFave in stating that a search incident to arrest is the most common justification for conducting a warrantless search).


191. 47 OKLA. STAT. § 17-101 (2001); see also id. § 16-114 ("A police officer may, without a warrant, arrest a person for any moving traffic violation of which the arresting officer or another police officer in communication with the arresting officer has sensory or electronic perception including perception by radio, radar and reliable speed-measuring devices.").

192. Id. § 12-417(E) ("Fine and court costs for violating the provisions of this section shall not exceed Twenty Dollars ($20.00). ").

193. Id. § 17-101(A).

194. Id. § 17-101(B)(1).

195. The bill would provide the following language to amend the current statute, 47 OKLA. STAT. § 11-1112 (2000): "Provided, a law enforcement officer may not handcuff or incarcerate any person for a violation of this section." Enrolled S.B. 444, 48th Okla. Leg., 1st Sess., at 6-7 (Okla. 2001), available at LEXIS, 2001 Bill Text OK S.B. 444.

196. Oklahoma Legislature Homepage, Status of Measures, History, 2001 Regular
Many states have incorporated into their statutes language similar to that of Senate Bill 444 so that what occurred in Atwater does not happen in their states. Oklahoma's citizens would be well served if the legislature would adopt something similar to the work product of the Oklahoma Legislative Recodification Committee. Recodifying the state statutes so that all crimes reside in only one title would serve as an easily administrable solution for law enforcement. Such a solution would also prove a fair arbiter of justice for citizens by enforcing laws while continuing to respect individuals' rights. Recodification would ensure that only actual criminal offenses could result in an arrest. All civil offenses would merely authorize fines.

If this solution proves unfeasible for the State, then the legislature should pass specific bills, such as Senate Bill 444, that would protect Oklahoma citizens' Fourth Amendment rights by providing that an officer may not arrest for a minor offense. The third option involves returning to the traditional classification system that distinguishes between mala in se and mala prohibita offenses so that citizens committing mala prohibita offenses are not branded and treated as criminals.

The Supreme Court's holding in Atwater signifies an all-time low in due process rights and expectations of privacy for individuals in automobiles. The case reveals that a judicial solution no longer exists to combat the problem of unnecessary arrests for minor offenses. States must combat this problem by passing legislation that prohibits arrests for minor traffic violations.

Amy J. Nelson
APPENDIX A

No. SB 444
JUNE 5th, 2001
TIME SIGNED: 9:30 am

OFFICE OF,
THE GOVERNOR
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLA.

TO THE HONORABLE PRESIDENT PRO TEMPORE
AND MEMBERS OF THE OKLAHOMA SENATE
FIRST SESSION, FORTY-EIGHTH OKLAHOMA LEGISLATURE

ENROLLED SENATE BILL NO. 444

BY:

SHURDEN of the SENATE
and
LEIST of the HOUSE

This is to advise you that on this date, pursuant to the authority vested in me by Section 11 of Article VI of the Oklahoma Constitution to approve or object to legislation presented to me, I have VETOED Senate Bill 444 because this bill does not clearly indicate that all officers of the highway patrol are to complete the full Patrol Academy of the Department of Public Safety, a requirement that must exist in order to protect the safety of the public.

The bill also requires the Department to provide the same uniform and equipment to all officers of the Oklahoma Highway Patrol Division. However, the legislature has failed to provide adequate funding to implement this mandate.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA
FRANK KEATING