



# FOURTH AMENDMENT FORUM

By Milton Hirsch and David O. Markus

## Atwater v. City of Lago Vista — 'The Perfect Case'

During oral argument in *Atwater v. City of Lago Vista*,<sup>1</sup> Justice Sandra Day O'Connor encouragingly told counsel for Atwater that he had "the perfect case."<sup>2</sup> The shocking facts in *Atwater* and the pointed comments of one of the High Court's swing votes led most to believe it was a safe bet that the Fourth Amendment was due for another win. No such luck.

In March 1997, Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. They weren't wearing seatbelts. In Texas, front-seat passengers must wear seatbelts if they are installed, and any small child riding in the front must be secured. Violation of either provision is "a misdemeanor punishable by a fine not less than \$25 or more than \$50."<sup>3</sup>

Bart Turek, a Lago Vista police officer, pulled Atwater over after seeing her and her children without seat belts. Turek had stopped Atwater before for what he thought was a seat belt violation, but then realized that he was mistaken and that Atwater's son was in fact belted in. This time, Turek "yell[ed] . . . [w]e've met before" and "you're going to jail."<sup>4</sup> Atwater asked Turek if she could take her "frightened, upset, and crying" children to a friend's house nearby, but Turek, who ironically had just castigated Atwater for not caring for her children, refused and said "[y]ou're not going anywhere."<sup>5</sup> Instead, he told her that he would take the children into custody as well. Luckily, Atwater's friend was informed of what was occurring, came to the scene, and took charge of the children.<sup>6</sup>

Turek then handcuffed Ms. Atwater with her hands behind her back, placed her in the police car, and drove to the police station (without securing Atwater in a seat belt!). At the station, she was

forced to remove her shoes, relinquish her possessions, and wait in a holding cell for about an hour. She then posted a \$310 bond. Yet, the maximum fine for her seat belt offense was just \$50, which she ultimately paid after pleading no contest.

Atwater filed suit in Texas state court under 42 U.S.C. §1983 against Turek, the City of Lago Vista, and Chief of Police Frank Miller, claiming that they had violated her Fourth Amendment rights. The defendants removed to federal district court, which granted the defendants' summary judgment motion, stating that

Atwater's Fourth Amendment claim was "meritless."<sup>7</sup> A panel of the Fifth Circuit reversed, concluding that "an arrest for a first-time seatbelt offense" was an unreasonable seizure under the Fourth Amendment. The *en banc* Fifth Circuit vacated the panel decision and affirmed the district court.

## We Know Reasonableness When We See It

The Supreme Court granted *certiorari* on the following issue: "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable by a fine."<sup>8</sup> In a decision that surprised many, five members of the High Court held that the Fourth Amendment makes no such prohibition. Perhaps even more surprising, Justice Souter wrote the opinion for the slim majority, joining the company of the Chief Justice and Justices Scalia, Thomas, and Kennedy. Justice O'Connor — who had described the case as perfect at oral argument — wrote the dissent; Justices Stevens, Ginsburg, and Breyer joined that opinion.

We can't define reasonableness, but we know it when we see it.

The Fifth Circuit panel that heard the *Atwater* case consisted of Judges Parker (who wrote the unanimous panel opinion), Stewart, and Garza.<sup>9</sup> With respect to its analysis of the Fourth Amendment issue, the panel opinion is a model of good common sense. It begins by categorizing the seat belt law as "paternalistic," meaning the sort of law "designed to protect a specific individual from his own conduct, conduct which poses no threat to the public at large. We contrast . . . paternalistic statutes with most traffic laws, the violation of which can have an immediate impact on other users of streets and roadways."<sup>10</sup>

The significance of this threshold distinction is obvious. The driver who is drunk or reckless poses a danger to other



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wayfarers. His arrest forecloses the danger. His release from custody revives the danger, or at least the prospect of danger. By contrast, the driver who fails to buckle up poses no danger to others, and his (or in this case, her) arrest will not make the streets safer for anyone.

Given this analysis, the self-evident logic of which would commend itself to the mind of an alert nine-year-old, it was unreasonable – for Fourth Amendment (and all other) purposes – to subject Atwater to a full-custody arrest for the simple reason that no law-enforcement or societal goal was furthered by that full-custody arrest. The majesty and dignity of the Texas seat belt law would have been fully vindicated by giving Atwater a citation, demanding that she buckle up herself and her children, and sending her on her way. “[T]o determine the objective reasonableness of Officer Turek’s actions we must understand the nature of the offense involved and who the law is designed to protect because that helps us weigh the governmental interest in arresting a violator versus the individual’s privacy interest under the Fourth Amendment.”<sup>11</sup> It is, of course, no answer to say that the Texas seat belt statute authorizes (but does not require) arrest; if the conduct authorized by the statute constitutes an unreasonable search or seizure, the statute runs afoul of the Fourth Amendment.<sup>12</sup>

In the course of Judge Parker’s comprehensive opinion, he remarked in passing that at common law, law enforcement officers were not authorized to arrest for misdemeanors not constituting a breach of the peace.<sup>13</sup> By no means was this observation offered as the *ratio decidendi* of the opinion. It was dictum or context, no more. Despite the passing reference, the Founders’ intent became the feature of the Atwater litigation.

Turek and company, having been told in good plain terms by Judge Parker that it is unreasonable to treat a soccer mom like a serial killer, sought and obtained rehearing *en banc*. Atwater’s lawyers felt obliged, understandably so, to defend Judge Parker’s opinion in all its particulars. Thus the question whether the common law proscribed warrantless arrests for peaceable misdemeanors, and, if so, whether that common law rule informed the interpretation of the Fourth Amendment, was part and parcel of what the *en banc* court would consider.

The majority opinion for the *en banc* court<sup>14</sup> is a model of tight-lipped Texan terseness. Setting aside the factual and procedural history of the case and certain

other prefatory remarks, the entire textual analysis consists of this paragraph:

After reviewing the record, we conclude that Officer Turek had probable cause to arrest Atwater and that he did not conduct the arrest in such an “extraordinary manner.” Neither party disputes that Officer Turek had probable cause to arrest Atwater. Atwater admits that she was not wearing her seat belt and that she had not belted in her children. Operating a motor vehicle without wearing a seat belt violates Texas law, and Officer Turek had discretion to arrest Atwater without a warrant. . . . Moreover, there is no evidence in the record that Officer Turek conducted the arrest in an “extraordinary manner, unusually harmful” to Atwater’s privacy interests. . . . Atwater admits that she did not suffer any physical harm during or as a result of the arrest. We therefore conclude that, because it was based on probable cause and because it was not conduct in the above-described “extraordinary manner,” Officer Turek’s arrest of Atwater was reasonable under the Fourth Amendment.<sup>15</sup>

Note that the *en banc* opinion does not go so far as to say that the conduct visited upon Gail Atwater was reasonable in any ordinary sense of the word; it was reasonable “under the Fourth Amendment” although it was clearly unreasonable as reasonable people understand reasonableness. For the *en banc* court, Fourth Amendment reasonableness is a term of art describing all searches and seizures which are (1) probable cause based, and (2) involve ordinary, but not extraordinary, abuse of the seized or searched citizen.

#### What *Atwater* Is Not About

In a footnote, the *en banc* opinion makes short work of the “common law as limitation on the Fourth Amendment” argument. Atwater “did not raise this argument before the district court or the panel that initially considered this case. Instead, the panel considered this argument *sua sponte*, and even though it ruled in Atwater’s favor, it declined to do so based on the common law rule.” That being the case, Atwater “has waived her right to pursue this issue here.”<sup>16</sup> Thus the one thing about which the panel opinion and the *en banc* opinion are in agreement is

what *Atwater* is *not* about: It is not about the common law rule governing the arrest of misdemeanants, and it is not about the applicability of that rule to Fourth Amendment standards. The panel found Officer Turek’s conduct to be unreasonable as a matter of first principles. The *en banc* court found it to be reasonable because it was founded upon probable cause and involved only ordinary, rather than extraordinary, bullying of Ms. Atwater.

#### What Did the Framers Intend?

Unlike the Fifth Circuit, the Supreme Court, in its analysis, was “guided by ‘the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.’”<sup>17</sup> In fact, Justice Souter, who is not known for an affinity to originalism, wrote that if a practice was accepted when the Fourth Amendment was adopted, the party advocating for change “bears a ‘heavy burden’ of justifying a departure from the historical understanding.”<sup>18</sup> Atwater argued that the common law forbade peace officers to make warrantless misdemeanor arrests except in cases of “breach of peace.” Breach of the peace, according to Atwater, meant only those nonfelony offenses “involving or tending towards violence.”<sup>19</sup> And Atwater had some pretty heavy hitters to back her up.

First, the Supreme Court itself noted in *Carroll v. United States* (quoting Lord Halsbury)<sup>20</sup> that:

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

In addition to Lord Halsbury, Sir William Blackstone, Sir Edward East, James Fitzjames Stephen and Glanville Williams were cited in support of the notion that the common law confined warrantless misdemeanor arrests to actual breaches of the peace. The Court, however, pointed out that other commentators disagreed with this view.

Whether the notion that the common law barred warrantless arrest for peaceable misdemeanors was universally espoused by contemporary jurists and treatise writers, or only generally espoused by contemporary jurists and treatise writ-

ers, seemed to be of great moment to Justice Souter. This preoccupation is puzzling because history rarely gives us definite answers on modern questions – and it did not do so here.<sup>21</sup>

### Too Much Discretion

Justice Souter's opinion cites to ample authority for the proposition that the common law proceeded upon the common sensical proposition underlying Judge Parker's panel opinion in *Atwater*:<sup>22</sup> A misdemeanor was not subject to warrantless arrest unless the misdemeanor or its attendant circumstances posed a danger to others. Although Justice Souter purports to cite countervailing authority, the examples he offers fit comfortably within the general rule. Early American and contemporary English practices authorized warrantless arrest for misdemeanors such as Sabbath-breaking, vagrancy, public drunkenness, and the like. For First Amendment and other reasons, such offenses no longer make up part of our criminal code. But in earlier times, they were viewed as destructive of the fabric of society.

The driver who neglects to wear his seat belt hazards only his own life. But the Sabbath-breaker, by his evil example, hazards the immortal souls of impressionable onlookers. No home and hearth is safe while vagrants run amok. And as for the public drunkard, staggering under the influence was no doubt a menace to colonial traffic much like driving under the influence is today. Jailable v. non-jailable, peaceable v. non-peaceable?

Gail Atwater and her children did not come before the United States Supreme Court for a dissertation on the common law. They came for an adjudication of their rights. Even if, as Justice Souter insisted with such scrupulous exactitude, the common law sources are in equipoise as to an officer's arrest power in the case of a peaceable misdemeanor, Gail Atwater is still entitled to know if she was subjected to a Fourth Amendment violation. Was her full-custody arrest unreasonable?

Certainly it was offensive, even outrageous; Justice Souter teeters on the edge of conceding that fact.

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have

buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.<sup>23</sup>

This language notwithstanding, the Court rejected any constitutional distinction between jailable and non-jailable offenses for purposes of an officer's arrest power; and fell back upon the rule that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."<sup>24</sup>

Atwater's counsel advanced the position that, for Fourth Amendment purposes, the warrantless arrest of a misdemeanor whose offense is jailable may be reasonable, but the arrest of a misdemeanor whose offense is non-jailable (*i.e.* punished by fine) is not. This, of course, is a variation on the common law distinction between misdemeanors that cause a breach of the peace and those that do not; and not very far removed from Judge Parker's distinction between "paternalistic" criminal statutes and those that protect society at large.

Justice Souter rejected this distinction because "an officer on the street might not be able to" draw it.

[P]enalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of an arrest. Is this the first offense or is the suspect a repeat offender? Is the weight of the marijuana a gram above or a gram below the fine-only line? Where conduct could implicate more than one criminal prohibition, which one will the district attorney ultimately decide to charge? And so on.<sup>25</sup>

This line of argument is far from persuasive. Police officers make these kinds of judgment calls, and even more consequential judgment calls, every day of the week. Although we seldom consider the point, the fact is that the narrow discretion exercised by a Supreme Court Justice compares to the all-but-unfettered discretion exercised by every traffic cop "as moonlight unto sunlight, and as water

unto wine."<sup>26</sup> Justice Souter's litany of questions can easily be rebutted in kind: Doesn't the law require police officers to make judgment calls all the time? Certainly they must distinguish between arrestable and similar but non-arrestable conduct frequently. And as long as those decisions are made in good faith — something notably absent from the conduct visited upon Gail Atwater by Bart Turek — is there really any reason to fear a raft of §1983 lawsuits against cops and municipalities?

Officer Turek's actions cut the heart right out of the Fourth Amendment.<sup>27</sup> Nothing he did served any legitimate state interest. Certainly, the goals articulated by Lago Vista — "the enforcement of child safety laws and encouraging [Atwater] to appear for trial" — were not met any better by arresting Atwater than by issuing her a citation. In fact, arresting Atwater was counterproductive to her children's welfare, they are now in counseling because of the event. And arrest surely wasn't needed to ensure that Ms. Atwater, a 16-year resident of Lago Vista, who was driving 15 miles per hour in broad daylight in a residential street with no other traffic, would appear in court. The Court's statement, therefore, that Atwater's claims clearly outweighed anything the city could raise should have ended the Fourth Amendment inquiry.

### One of the Worst

A judge in the Southern District of Florida, during interviews of potential law clerks, typically asks what is the worst case in Supreme Court history. A few come to mind, and now *Atwater* can be added to that list.<sup>28</sup> Although we usually like to end articles with a positive from the case, it is hard to find one here. After *Atwater*, when an officer has probable cause to believe that a fine-only misdemeanor offense has occurred, the officer may stop the car, arrest the driver, search the driver, search the entire passenger compartment of the car including any purse or package inside, impound the car and inventory all its contents. *Atwater* gives the police unfettered discretion to do all of these things after a seat-belt infraction without articulating a single reason to justify their actions.

### NOTES

1. 121 S.Ct. 1536 (2001).
2. Oral Argument for United States v. Atwater, 2000 WL 1801617, at p. 14.
3. *Atwater*, 121 S.Ct. at 1541.
4. *Id.*

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himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it, it necessarily must be inferred from surrounding facts and circumstances. *Id.*, citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 558 (1984).

It is surprising that the *Henley* case required a journey to the Ninth Circuit. It should have been resolved in the trial court. Certainly jurors would rely on a

bribery attempt in forming their opinions about whether Darryl Henley was a member of the conspiracy. Although the co-defendants were not involved in the bribery attempt, they were likely to be perceived as guilty by association.

The jury, in deciding the question of the guilt of the co-defendants, is certainly required under conspiracy law to determine if Darryl Henley (1) was involved in a drug scheme and (2) committed acts in furtherance of the con-

spiracy. After the bribe attempt, there could not have been any doubt in juror Quihuis mind that Darryl Henley was guilty of the crimes charged. This certainly lightened the prosecution's burden of proof. If only one juror is corrupted or commits misconduct the verdict is tainted. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9<sup>th</sup> Cir. 1977). The co-defendants were deprived of their rights to have a verdict by 12, not 11, impartial or untainted jurors. ⚡

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5. *Id.* at 1541-42.

6. *Id.* at 1565. (O'Connor, J. dissenting).

7. *Id.* at 1542.

8. *Id.* at 1541.

9. Interestingly, Judge Reynaldo Garza, a name often heard bandied about for the next Supreme Court vacancy, dissented from the en banc opinion, stating that there was no particular reason for taking Atwater into custody.

10. *Atwater v. City of Lago Vista*, 165 F.3d 380, 385 (5<sup>th</sup> Cir. 1999).

11. *Id.*

12. *Id.* at 386.

13. *Id.*

14. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5<sup>th</sup> Cir. 1999).

15. *Id.* at 245-6 (internal citations and footnotes omitted).

16. *Id.* at 245, n.3.

17. *Atwater*, 121 S. Ct. at 1543 (quoting *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995)).

18. *Id.* at 1552, n.14. This is an odd position for Justice Souter to be taking since just a few years ago he stated that there must be a balance between liberty and order, "having regard to what history teaches [which] are the traditions from which [the balance struck by society] developed as well as the traditions from which it broke. That tradition is a living thing." *See* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (quoting Justice Harlan). Justice O'Connor, writing in a dissent, stated that "history is just one of the tools we use in conducting the reasonableness inquiry." *See Atwater*, 121 S.Ct. at 1560 (O'Connor, J. dissenting). For a discussion of the originalism arguments, *see* Michael C. Dorf, *Washington Yankees in King Arthur's Court: The Supreme Court Journeys to Eighteenth Century England to Define the Rights of Twenty-First Century Americans*, May 2, 2001, *Find Law's Legal Commentary* <<http://writ.new.findlaw.com/dorf/20010502.html>>.

19. *Id.* at 1543. The Court noted that "breach of the peace" meant different things in different contexts. *See id.* at n. 2 (quoting numerous sources, including J. Turner, Kenny's *OUTLINES OF CRIMINAL LAW* §695, p. 537 (17<sup>th</sup> ed. 1958) ("Strangely enough what constitutes a 'breach of the peace' has not been authoritatively laid down.")).

20. 267 U.S. 132 (1925) (quoting 9 Halsbury, *LAW OF ENGLAND* § 612, p. 299 (1909)). The *Atwater* Court tried to distance itself from this quote, saying that it was taken out of context. *See Atwater*, 120 S.Ct. at 1544.

21. One cannot scan the rich tapestry of the common law from end to end and expect to find unanimity on any great question. To try to do so is to ignore caution offered from the highest source:

In order to know what [our law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. . . .

I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further. In doing so there are two errors equally to be avoided both by writer and reader. One is that of supposing, because an idea seems very familiar and natural to us, that it has always been so. . . . *The other mistake is the opposite one of asking too much of history.*

Oliver Wendell Holmes, *THE COMMON LAW* p.2 (Dover ed. 1991) (1881).

22. Not referenced in Justice Souter's opinion is *VORHEES ON ARREST*, a respected American authority, which offers the following summary of the applicable law:

An officer, may also arrest, without a warrant, one who in his presence commits a breach of the peace; and by authority of statute, city charter, or ordinance, he may arrest, without a warrant, one who, within his jurisdiction, commits a misdemeanor other than a breach of the peace, as, for example, one who is violating a city ordinance, without breaking the peace, although by the common law he would have no authority to do so.

There is a tendency on part of the courts to look with disfavor upon legislative enactments that authorize arrests without warrants for misdemeanors not amounting to breaches of the peace, as interfering with the constitutional liberties of the subject.

Harvey Cortlandt Vorhees, *THE LAW OF ARREST*, pp. 78-9 (1904) (footnotes omitted) (emphasis added).

23. *Atwater*, 121 S.Ct. at 1553.

24. *Id.* at 1554.

25. *Id.* at 1554-55.

26. Alfred Lord Tennyson, *Locksley Hall*.

27. Turek and company argued, and the Court agreed, that efficiency and bright line rules were concerns of the Fourth Amendment. But as we and others have repeatedly stated, the main goal of the Fourth Amendment is to curb police discretion. *See, e.g.,* Tracey Maclin, *What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine?* 3 U. PA. J. COMP. L. 398 (2001).

28. Even one of the Wall Street Journal editorial writers (who claims that this Supreme Court under Rehnquist and Scalia "rarely gets things wrong") has described *Atwater* as "the poorest decision handed down by the Rehnquist Court." *See* Varadarajan, Tunku, *THE WALL STREET JOURNAL, The Social Contract Buckles: The Supreme Court Wrongly Authorizes Cops to Act Like Jerks*, April 30, 2001. ⚡