

O'CONNOR, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 99–1408

GAIL ATWATER, ET AL., PETITIONERS *v.* CITY OF  
LAGO VISTA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

[April 24, 2001]

JUSTICE O'CONNOR, with whom JUSTICE STEVENS,  
JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Fourth Amendment guarantees the right to be free from “unreasonable searches and seizures.” The Court recognizes that the arrest of Gail Atwater was a “pointless indignity” that served no discernible state interest, *ante*, at 26, and yet holds that her arrest was constitutionally permissible. Because the Court’s position is inconsistent with the explicit guarantee of the Fourth Amendment, I dissent.

I

A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure. See *Payton v. New York*, 445 U. S. 573, 585 (1980). When a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable. See *ibid.* It is beyond cavil that “[t]he touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’” *Pennsylvania v. Mimms*, 434 U. S. 106, 108–109 (1977) (*per curiam*) (quoting *Terry v. Ohio*, 392 U. S. 1, 19 (1968)). See also, *e.g.*, *United States v. Ramirez*, 523 U. S. 65, 71 (1998); *Maryland v. Wilson*,

O'CONNOR, J., dissenting

519 U. S. 408, 411 (1997); *Ohio v. Robinette*, 519 U. S. 33, 39 (1996); *Florida v. Jimeno*, 500 U. S. 248, 250 (1991); *United States v. Chadwick*, 433 U. S. 1, 9 (1977).

We have “often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity.” *Tennessee v. Garner*, 471 U. S. 1, 13 (1985). But history is just one of the tools we use in conducting the reasonableness inquiry. See *id.*, at 13–19; see also *Wilson v. Arkansas*, 514 U. S. 927, 929 (1995); *Wyoming v. Houghton*, 526 U. S. 295, 307 (1999) (BREYER, J., concurring). And when history is inconclusive, as the majority amply demonstrates it is in this case, see *ante*, at 4–24, we will “evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, *supra*, at 300. See also, e.g., *Skinner v. Railway Labor Executives’ Assn.*, 489 U. S. 602, 619 (1989); *Tennessee v. Garner*, *supra*, at 8; *Delaware v. Prouse*, 440 U. S. 648, 654 (1979); *Pennsylvania v. Mimms*, *supra*, at 109. In other words, in determining reasonableness, “[e]ach case is to be decided on its own facts and circumstances.” *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 357 (1931).

The majority gives a brief nod to this bedrock principle of our Fourth Amendment jurisprudence, and even acknowledges that “Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.” *Ante*, at 26. But instead of remedying this imbalance, the majority allows itself to be swayed by the worry that “every discretionary judgment in the field [will] be converted into an occasion for constitutional review.” *Ibid.* It therefore mints a new rule that “[i]f an officer has probable cause to believe that an individual has committed

O'CONNOR, J., dissenting

even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Ante*, at 33. This rule is not only unsupported by our precedent, but runs contrary to the principles that lie at the core of the Fourth Amendment.

As the majority tacitly acknowledges, we have never considered the precise question presented here, namely, the constitutionality of a warrantless arrest for an offense punishable only by fine. Cf. *ibid.* Indeed, on the rare occasions that members of this Court have contemplated such an arrest, they have indicated disapproval. See, e.g., *Gustafson v. Florida*, 414 U. S. 260, 266–267 (1973) (Stewart, J., concurring) (“[A] persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made”); *United States v. Robinson*, 414 U. S. 218, 238, n. 2 (1973) (Powell, J., concurring) (the validity of a custodial arrest for a minor traffic offense is not “self-evident”).

To be sure, we have held that the existence of probable cause is a necessary condition for an arrest. See *Dunaway v. New York*, 442 U. S. 200, 213–214 (1979). And in the case of felonies punishable by a term of imprisonment, we have held that the existence of probable cause is also a sufficient condition for an arrest. See *United States v. Watson*, 423 U. S. 411, 416–417 (1976). In *Watson*, however, there was a clear and consistently applied common law rule permitting warrantless felony arrests. See *id.*, at 417–422. Accordingly, our inquiry ended there and we had no need to assess the reasonableness of such arrests by weighing individual liberty interests against state interests. Cf. *Wyoming v. Houghton*, *supra*, at 299–300; *Tennessee v. Garner*, *supra*, at 26 (O’CONNOR, J., dissenting) (criticizing majority for disregarding undisputed common law rule).

Here, however, we have no such luxury. The Court’s thorough exegesis makes it abundantly clear that war-

O'CONNOR, J., dissenting

warrantless misdemeanor arrests were not the subject of a clear and consistently applied rule at common law. See, e.g., *ante*, at 11 (finding “disagreement, not unanimity, among both the common-law jurists and the text-writers”); *ante*, at 14 (acknowledging that certain early English statutes serve only to “riddle Atwater’s supposed common-law rule with enough exceptions to unsettle any contention [that there was a clear common-law rule barring warrantless arrests for misdemeanors that were not breaches of the peace]”). We therefore must engage in the balancing test required by the Fourth Amendment. See *Wyoming v. Houghton*, *supra*, at 299–300. While probable cause is surely a necessary condition for warrantless arrests for fine-only offenses, see *Dunaway v. New York*, *supra*, at 213–214, any realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition. See *infra*, at 6–8.

Our decision in *Whren v. United States*, 517 U. S. 806 (1996), is not to the contrary. The specific question presented there was whether, in evaluating the Fourth Amendment reasonableness of a traffic stop, the subjective intent of the police officer is a relevant consideration. *Id.*, at 808, 814. We held that it is not, and stated that “[t]he making of a traffic stop . . . is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.” *Id.*, at 818.

We of course did not have occasion in *Whren* to consider the constitutional preconditions for warrantless arrests for fine-only offenses. Nor should our words be taken beyond their context. There are significant qualitative differences between a traffic stop and a full custodial arrest. While both are seizures that fall within the ambit of the Fourth Amendment, the latter entails a much greater intrusion on an individual’s liberty and privacy interests. As we

O'CONNOR, J., dissenting

have said, “[a] motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way.” *Berkemer v. McCarty*, 468 U. S. 420, 437 (1984). Thus, when there is probable cause to believe that a person has violated a minor traffic law, there can be little question that the state interest in law enforcement will justify the relatively limited intrusion of a traffic stop. It is by no means certain, however, that where the offense is punishable only by fine, “probable cause to believe the law has been broken [will] ‘outbalanc[e]’ private interest in avoiding” a full custodial arrest. *Whren v. United States*, *supra*, at 818. Justifying a full arrest by the same quantum of evidence that justifies a traffic stop— even though the offender cannot ultimately be imprisoned for her conduct— defies any sense of proportionality and is in serious tension with the Fourth Amendment’s proscription of unreasonable seizures.

A custodial arrest exacts an obvious toll on an individual’s liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. *United States v. Robinson*, *supra*. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. See *New York v. Belton*, 453 U. S. 454 (1981). The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. See *County of Riverside v. McLaughlin*, 500 U. S. 44 (1991). Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous. Rosazza & Cook, Jail Intake:

O'CONNOR, J., dissenting

Managing A Critical Function— Part One: Resources, 13 *American Jails* 35 (Mar./Apr. 1999). And once the period of custody is over, the fact of the arrest is a permanent part of the public record. Cf. *Paul v. Davis*, 424 U. S. 693 (1976).

We have said that “the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State’s interest in arresting individuals suspected of committing that offense.” *Welsh v. Wisconsin*, 466 U. S. 740, 754, n. 14 (1984). If the State has decided that a fine, and not imprisonment, is the appropriate punishment for an offense, the State’s interest in taking a person suspected of committing that offense into custody is surely limited, at best. This is not to say that the State will never have such an interest. A full custodial arrest may on occasion vindicate legitimate state interests, even if the crime is punishable only by fine. Arrest is the surest way to abate criminal conduct. It may also allow the police to verify the offender’s identity and, if the offender poses a flight risk, to ensure her appearance at trial. But when such considerations are not present, a citation or summons may serve the State’s remaining law enforcement interests every bit as effectively as an arrest. Cf. Lodging for *Amici Curiae* State of Texas et al. (Texas Department of Public Safety, Student Handout, Traffic Law Enforcement 1 (1999)) (“Citations. . . . Definition— a means of getting violators to court without physical arrest. A citation should be used when it will serve this purpose except when by issuing a citation and releasing the violator, the safety of the public and/or the violator might be imperiled as in the case of D. W. I.”).

Because a full custodial arrest is such a severe intrusion on an individual’s liberty, its reasonableness hinges on “the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U. S., at 300. In light of the availability of citations to

O'CONNOR, J., dissenting

promote a State's interests when a fine-only offense has been committed, I cannot concur in a rule which deems a full custodial arrest to be reasonable in every circumstance. 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. Instead, I would require that when 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. *Terry v. Ohio*, 392 U. S., at 21.

The majority insists that a bright-line rule focused on probable cause is necessary to vindicate the State's interest in easily administrable law enforcement rules. See *ante*, at 27–30. Probable cause itself, however, is not a model of precision. "The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a [crime] has been committed—must be measured by the facts of the particular case." *Wong Sun v. United States*, 371 U. S. 471, 479 (1963) (citation omitted). The rule I propose—which merely requires a legitimate reason for the decision to escalate the seizure into a full custodial arrest—thus does not undermine an otherwise "clear and simple" rule. Cf. *ante*, at 26.

While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections. What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment. Over the

O'CONNOR, J., dissenting

past 30 years, it appears that the *Terry* rule has been workable and easily applied by officers on the street.

At bottom, the majority offers two related reasons why a bright-line rule is necessary: the fear that officers who arrest for fine-only offenses will be subject to “personal [42 U. S. C.] §1983 liability for the misapplication of a constitutional standard,” *ante*, at 29, and the resulting “systematic disincentive to arrest . . . where . . . arresting would serve an important societal interest,” *ante*, at 30. These concerns are certainly valid, but they are more than adequately resolved by the doctrine of qualified immunity.

Qualified immunity was created to shield government officials from civil liability for the performance of discretionary functions so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982). This doctrine is “the best attainable accommodation of competing values,” namely, the obligation to enforce constitutional guarantees and the need to protect officials who are required to exercise their discretion. *Id.*, at 814.

In *Anderson v. Creighton*, 483 U. S. 635 (1987), we made clear that the standard of reasonableness for a search or seizure under the Fourth Amendment is distinct from the standard of reasonableness for qualified immunity purposes. *Id.*, at 641. If a law enforcement officer “reasonably but mistakenly conclude[s]” that the constitutional predicate for a search or seizure is present, he “should not be held personally liable.” *Ibid.*

This doctrine thus allays any concerns about liability or disincentives to arrest. If, for example, an officer reasonably thinks that a suspect poses a flight risk or might be a danger to the community if released, cf. *ante*, at 30, he may arrest without fear of the legal consequences. Similarly, if an officer reasonably concludes that a suspect may possess more than four ounces of marijuana and thus

O'CONNOR, J., dissenting

might be guilty of a felony, cf. *ante*, at 27–28, and n. 19, 30, the officer will be insulated from liability for arresting the suspect even if the initial assessment turns out to be factually incorrect. As we have said, “officials will not be liable for mere mistakes in judgment.” *Butz v. Economou*, 438 U. S. 478, 507 (1978). Of course, even the specter of liability can entail substantial social costs, such as inhibiting public officials in the discharge of their duties. See, e.g., *Harlow v. Fitzgerald*, *supra*, at 814. We may not ignore the central command of the Fourth Amendment, however, to avoid these costs.

## II

The record in this case makes it abundantly clear that Ms. Atwater’s arrest was constitutionally unreasonable. Atwater readily admits— as she did when Officer Turek pulled her over— that she violated Texas’ seatbelt law. Brief for Petitioners 2–3; Record 381, 384. While Turek was justified in stopping Atwater, see *Whren v. United States*, 517 U. S., at 819, neither law nor reason supports his decision to arrest her instead of simply giving her a citation. The officer’s actions cannot sensibly be viewed as a permissible means of balancing Atwater’s Fourth Amendment interests with the State’s own legitimate interests.

There is no question that Officer Turek’s actions severely infringed Atwater’s liberty and privacy. Turek was loud and accusatory from the moment he approached Atwater’s car. Atwater’s young children were terrified and hysterical. Yet when Atwater asked Turek to lower his voice because he was scaring the children, he responded by jabbing his finger in Atwater’s face and saying, “You’re going to jail.” Record 382, 384. Having made the decision to arrest, Turek did not inform Atwater of her right to remain silent. *Id.*, at 390, 704. He instead asked for her license and insurance information. *Id.*, at 382. But cf.

O'CONNOR, J., dissenting

*Miranda v. Arizona*, 384 U. S. 436 (1966).

Atwater asked if she could at least take her children to a friend's house down the street before going to the police station. Record 384. But Turek— who had just castigated Atwater for not caring for her children— refused and said he would take the children into custody as well. *Id.*, at 384, 427, 704–705. Only the intervention of neighborhood children who had witnessed the scene and summoned one of Atwater's friends saved the children from being hauled to jail with their mother. *Id.*, at 382, 385–386.

With the children gone, Officer Turek handcuffed Ms. Atwater with her hands behind her back, placed her in the police car, and drove her to the police station. *Id.*, at 386–387. Ironically, Turek did not secure Atwater in a seat belt for the drive. *Id.*, at 386. At the station, Atwater was forced to remove her shoes, relinquish her possessions, and wait in a holding cell for about an hour. *Id.*, at 387, 706. A judge finally informed Atwater of her rights and the charges against her, and released her when she posted bond. *Id.*, at 387–388, 706. Atwater returned to the scene of the arrest, only to find that her car had been towed. *Id.*, at 389.

Ms. Atwater ultimately pleaded no contest to violating the seatbelt law and was fined \$50. *Id.*, at 403. Even though that fine was the maximum penalty for her crime, Tex. Tran. Code Ann. §545.413(d) (1999), and even though Officer Turek has never articulated any justification for his actions, the city contends that arresting Atwater was constitutionally reasonable because it advanced two legitimate interests: “the enforcement of child safety laws and encouraging [Atwater] to appear for trial.” Brief for Respondents 15.

It is difficult to see how arresting Atwater served either of these goals any more effectively than the issuance of a citation. With respect to the goal of law enforcement generally, Atwater did not pose a great danger to the

O'CONNOR, J., dissenting

community. She had been driving very slowly— approximately 15 miles per hour— in broad daylight on a residential street that had no other traffic. Record 380. Nor was she a repeat offender; until that day, she had received one traffic citation in her life— a ticket, more than 10 years earlier, for failure to signal a lane change. *Id.*, at 378. Although Officer Turek had stopped Atwater approximately three months earlier because he thought that Atwater's son was not wearing a seatbelt, *id.*, at 420, Turek had been mistaken, *id.*, at 379, 703. Moreover, Atwater immediately accepted responsibility and apologized for her conduct. *Id.*, at 381, 384, 420. Thus, there was every indication that Atwater would have buckled herself and her children in had she been cited and allowed to leave.

With respect to the related goal of child welfare, the decision to arrest Atwater was nothing short of counterproductive. Atwater's children witnessed Officer Turek yell at their mother and threaten to take them all into custody. Ultimately, they were forced to leave her behind with Turek, knowing that she was being taken to jail. Understandably, the 3-year-old boy was “very, very, very traumatized.” *Id.*, at 393. After the incident, he had to see a child psychologist regularly, who reported that the boy “felt very guilty that he couldn't stop this horrible thing . . . he was powerless to help his mother or sister.” *Id.*, at 396. Both of Atwater's children are now terrified at the sight of any police car. *Id.*, at 393, 395. According to Atwater, the arrest “just never leaves us. It's a conversation we have every other day, once a week, and it's— it raises its head constantly in our lives.” *Id.*, at 395.

Citing Atwater surely would have served the children's interests well. It would have taught Atwater to ensure that her children were buckled up in the future. It also would have taught the children an important lesson in accepting responsibility and obeying the law. Arresting

O'CONNOR, J., dissenting

Atwater, though, taught the children an entirely different lesson: that “the bad person could just as easily be the policeman as it could be the most horrible person they could imagine.” *Ibid.*

Respondents also contend that the arrest was necessary to ensure Atwater’s appearance in court. Atwater, however, was far from a flight risk. A 16-year resident of Lago Vista, population 2,486, Atwater was not likely to abscond. See Record 376; Texas State Data Center, 1997 Total Population Estimates for Texas Places 15 (Sept. 1998). Although she was unable to produce her driver’s license because it had been stolen, she gave Officer Turek her license number and address. Record 386. In addition, Officer Turek knew from their previous encounter that Atwater was a local resident.

The city’s justifications fall far short of rationalizing the extraordinary intrusion on Gail Atwater and her children. Measuring “the degree to which [Atwater’s custodial arrest was] needed for the promotion of legitimate governmental interests,” against “the degree to which it intrud[ed] upon [her] privacy,” *Wyoming v. Houghton*, 526 U. S., at 300, it can hardly be doubted that Turek’s actions were disproportionate to Atwater’s crime. The majority’s assessment that “Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case,” *ante*, at 26, is quite correct. In my view, the Fourth Amendment inquiry ends there.

### III

The Court’s error, however, does not merely affect the disposition of this case. The *per se* rule that the Court creates has potentially serious consequences for the everyday lives of Americans. A broad range of conduct falls into the category of fine-only misdemeanors. In Texas alone, for example, disobeying any sort of traffic warning

O'CONNOR, J., dissenting

sign is a misdemeanor punishable only by fine, see Tex. Tran. Code Ann. §472.022 (1999 and Supp. 2000–2001), as is failing to pay a highway toll, see §284.070, and driving with expired license plates, see §502.407. Nor are fine-only crimes limited to the traffic context. In several States, for example, littering is a criminal offense punishable only by fine. See, e.g., Cal. Penal Code Ann. §374.7 (West 1999); Ga. Code Ann. §16–7–43 (1996); Iowa Code §§321.369, 805.8(2)(af) (Supp. 2001).

To be sure, such laws are valid and wise exercises of the States' power to protect the public health and welfare. My concern lies not with the decision to enact or enforce these laws, but rather with the manner in which they may be enforced. Under today's holding, when a police officer has probable cause to believe that a fine-only misdemeanor offense has occurred, that officer may stop the suspect, issue a citation, and let the person continue on her way. Cf. *Whren v. United States*, 517 U. S., at 806. Or, if a traffic violation, the officer may stop the car, arrest the driver, see *ante*, at 33, search the driver, see *United States v. Robinson*, 414 U. S., at 235, search the entire passenger compartment of the car including any purse or package inside, see *New York v. Belton*, 453 U. S., at 460, and impound the car and inventory all of its contents, see *Colorado v. Bertine*, 479 U. S. 367, 374 (1987); *Florida v. Wells*, 495 U. S. 1, 4–5 (1990). Although the Fourth Amendment expressly requires that the latter course be a reasonable and proportional response to the circumstances of the offense, the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate.

Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of “an epidemic of unnecessary minor-offense arrests.” *Ante*, at 33, and n. 25. But the relatively small number of published cases dealing with such arrests

O'CONNOR, J., dissenting

proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. See *Whren v. United States, supra*, at 813. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions— which are properly within our reach— comport with the Fourth Amendment's guarantee of reasonableness.

\* \* \*

The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness. I respectfully dissent.