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## Was Atwater v. Lago Vista Decided Correctly? The Fourth Amendment's Shadow and Simulacra of Police Brutality and the American Dream

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## Was *Atwater v. Lago Vista* Decided Correctly? The Fourth Amendment's Shadow and Simulacra of Police Brutality and the American Dream

Charles Lincoln

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**WAS *ATWATER V. LAGO VISTA* DECIDED CORRECTLY? THE FOURTH AMENDMENT'S SHADOW  
AND SIMULACRA OF POLICE BRUTALITY AND THE AMERICAN DREAM**

*Charles Lincoln*\*

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I would like to thank the staff of the Barry Law Review for their precision in editing and excellent revision suggestions. According to my handwritten notes, the idea for this article originated in Professor Meg Penrose's class on March 25, 2015, during a class discussion of the *Atwater* case. I would like to thank Professor Penrose for her illuminating and thought-provoking Criminal Procedure class in the spring of 2015. Professor Penrose urged the class to excel in our critique of cases while also encouraging us to imagine and conceptualize the Constitutional paradigms relating to U.S. constitutional criminal procedure from the original texts of the cases and the U.S. Bill of Rights. In short, Penrose allowed us to live the spirit of the poet Alfred Tennyson's poem *Ulysses* with "Free hearts, free foreheads." Indeed, at that time, we felt like heroic champions of the common law that "Moved earth and heaven." We truly were. Since that course, the last line of Tennyson's poem expresses the will to continue working on this article and not give up but instead, "To strive, to seek, to find, and not to yield." My conversations with Andrew Zuidema, LL.M. and Ph.D. student in Criminal Law and Criminal Procedure at the University of Groningen in the summer of 2022 brought a new perspective to this issue that reassured me that I needed to write this. I would also like to thank fellow law school classmates who discussed *Atwater* with me over the years: Hayden P. Bartley, Julia D. Bradley, Kayla E. Harrington, Erik R. Lisowski, James M. Nichols, Jonathan J. Walters, James T. Ryffel, Mitchell A. Monthie, and William P. Brandt. I would also like to express appreciation to Cameron B. Peltz for his support in developing this article. A special thanks to Professor William H. Byrnes for helping me continue my pursuit of studying law.

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## INTRODUCTION

*Atwater v. Lago Vista* is a stand-alone case in Fourth Amendment jurisprudence.<sup>1</sup> Often basic Fourth Amendment jurisprudence builds off other case law.<sup>2</sup> There is a clear buildup regarding the exclusionary rule from *Weeks v. United States* (1914) to *Silverthorne Lumber Co. v. United States* (1920) to the expansion of “the fruit of the poisonous tree” doctrine to *Mapp v. Ohio* (1961) incorporating U.S. Constitution the Fourth Amendment to the states.<sup>3</sup>

Likewise, there are cases building up from the incorporation into the states from *United States v. Leon* (1984) to *Arizona v. Evans* (1995), expanding Fourth Amendment case law and rights.<sup>4</sup> The cavalcade of these cases somewhat plays a ballet of expanding and contracting the rights in certain circumstances.<sup>5</sup> But the rights build off and limit each other in a cognizable method.<sup>6</sup>

*Atwater v. Lago Vista* is not based on such a cavalcade of cases.<sup>7</sup> It is a stand-alone case—at best citing 1600s case law, norms, and rules from before the founding of the United States.<sup>8</sup> Granted, the United States adopted much of the English jurisprudence in the founding of the United States.<sup>9</sup>

Although *Atwater* does not deal with the exclusionary rule, the case law of the exclusionary rule depicts how Fourth Amendment Supreme Court cases build on top of one

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<sup>1</sup> Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *Fordham L. Rev.* 329, 343 (2002).

<sup>2</sup> See GOV'T PUBL'G OFF., *FOURTH AMENDMENT: SEARCH & SEIZURE* (2002), <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf>.

<sup>3</sup> Maedot Teka, *The Fruit of the Poisonous Tree Doctrine*, LAWINFO (Feb. 26, 2021), <https://www.lawinfo.com/resources/criminal-defense/the-fruit-of-the-poisonous-tree-doctrine.html>.

<sup>4</sup> Heather A. Jackson, *Arizona v. Evans: Expanding Exclusionary Rule Exceptions and Contracting Fourth Amendment Protection*, 86 *J. CRIM. L. & CRIMINOLOGY* 1201, 1201 (1996).

<sup>5</sup> Jack E. Call, *United States Supreme Court and the Fourth Amendment: Evolution from Warrant to Post-Warren Perspectives*, 25 *CRIM. JUST. REV.* 93, 93 (2000).

<sup>6</sup> GOV'T PUBL'G OFF., *supra* note 2.

<sup>7</sup> Frase, *supra* note 1, at 342–43.

<sup>8</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 327–28 (2001).

<sup>9</sup> *Id.* (“We begin with the state of pre-founding English common law and find that, even after making some allowance for variations in the common-law usage of the term ‘breach of the peace,’ the ‘founding-era common-law rules’ were not nearly as clear as *Atwater* claims; on the contrary, the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers’ warrantless misdemeanor arrest power.”).

another.<sup>10</sup> *Atwater* does not.<sup>11</sup> It is a stand-alone case in the jurisprudence neither adhering nor not adhering to the principles of stare decisis.<sup>12</sup>

This article first summarizes the facts of the *Atwater v. Lago Vista* case and comments on the social and cultural implications of such facts. Then the article lays out the procedural posture of the *Atwater* case. Thereafter, this article examines the unique legal reasoning of the case—suggesting that the case was incorrectly decided. After discussing the *Atwater* case, the article explores how subsequent case law interpreted and cited the *Atwater* case. Finally, the article concludes with the implications of *Atwater*, its progeny, and what this case means for future case law.

## I. SUMMARY AND ANALYSIS OF THE FACTS IN ATWATER V. LAGO VISTA

The following is a summary and commentary on the facts leading up to the Supreme Court decision of *Atwater v. Lago Vista* (2001).

### A. Facts of the Case

As established by the fact-finding court, the case's facts occurred when Officer Turek stopped a mother named Gail Atwater and her two children—ages three, son, and five, daughter—upon their return from soccer practice.<sup>13</sup> According to the court, Atwater allowed one of the children to search for a toy and to stand in the car without a seat belt.<sup>14</sup> Thus, none of the passengers at the time wore seat belts.<sup>15</sup> Turek recognized Atwater—the substance of this recognition is never clarified as to why Turek recognized Atwater—and pulled her over.<sup>16</sup> According to the court record, bystanders noted that Atwater stayed in the car, but Turek pointed his finger at her aggressively.<sup>17</sup> The scene progressively became more heated.<sup>18</sup> Atwater requested that Turek lower his voice.<sup>19</sup> Turek responded by stating Atwater would go to jail.<sup>20</sup>

<sup>10</sup> The notion of exclusion is only briefly mentioned, “It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or (as here) personal § 1983 liability for the misapplication of a constitutional standard, on the other. *Atwater's* rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur.” *Id.* at 350.

<sup>11</sup> *Id.* at 336.

<sup>12</sup> Granted Justice Louise Brandies indicated that stare decisis does not always need to be followed, “Stare decisis is not . . . [a] universal, inexorable command. ‘The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.’ Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.” *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–06 (1932).

<sup>13</sup> *Atwater*, 532 U.S. at 323.

<sup>14</sup> Sam Cantrell, *Fourth Amendment Seizure—Getting Cuffed and Stuffed for Not Wearing a Seatbelt. Atwater v. City of Lago Vista*, 121 S. Ct. 1536, 2 WYO. L. REV. 127, 127 (2002).

<sup>15</sup> *Atwater*, 532 U.S. at 323–24.

<sup>16</sup> *Id.* at 324.

<sup>17</sup> Cantrell, *supra* note 14, at 127–28.

<sup>18</sup> *Atwater*, 532 U.S. at 324.

<sup>19</sup> Cantrell, *supra* note 14, at 128.

<sup>20</sup> *Id.*

Thereafter, Turek requested identification and car insurance, at which point Atwater informed him that her purse and its contents were stolen and she had yet to replace them.<sup>21</sup> Evidently not believing Atwater, Turek handcuffed her and drove her to the police station to be booked.<sup>22</sup>

Thereafter, Michael Haas—Atwater’s husband—hired an attorney in Lago Vista, Charles Lincoln; and with his attorney, Michael Haas sued for violating Gail Atwater’s protections against unreasonable searches and seizures under the Fourth Amendment.<sup>23</sup>

Reflecting on the events that transpired, it seems the record is not entirely clear as to what occurred between Atwater and Turek.<sup>24</sup> It is likely that such facts will never be firmly established by any party or witness.<sup>25</sup> Moreover, such cases are inherently difficult to prove.<sup>26</sup> Unfortunately, many cases frequently occur with unclear facts.<sup>27</sup> According to the decision in the Fifth Circuit Court of Appeals, it seems evident that Turek and Atwater had interactions in the past, and such interactions affected their relationship because “Turek screamed either that they had met before or had this conversation before.”<sup>28</sup> Moreover, it is unlikely that a police officer would act so violently without a prior history based on the fifth circuit’s opinion because

Turek stated that he recently stopped Atwater for not having her children in seat belts, but such was not the case. Turek had in fact stopped her several months before for allowing her son to ride on the front seat arm rest, but the seat belt was securely fastened. No citation was issued.<sup>29</sup>

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<sup>21</sup> *Atwater*, 532 U.S. at 324.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 325; Dave Harmon, *Claims of Police Abuses Polarize Lago Vista; Town’s Residents – Choosing Sides After Five Suits Allege Brutality, Bullying*, AUSTIN AM. STATESMAN, Sept. 24, 1997, at A1.

<sup>24</sup> *Atwater*, 532 U.S. at 324.

<sup>25</sup> *See id.*

<sup>26</sup> Stanley Jackson, *Caught Slippin’: Signs That a Criminal Case is Weak*, LAWS. INC. (Feb. 26, 2022), <https://www.lawyersincorporated.com/caught-slippin-signs-that-a-criminal-case-is-weak/>.

<sup>27</sup> Such ambiguity occurs not just with complex cases but simple cases as well. Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 703–04 (2017) (“If Congress passes a host of unclear laws, those laws will be defined by the facts of cases brought by prosecutors and decided by the courts. This is just what has occurred with statutes such as wire or mail fraud: Congress passed an incredibly broad—and, some would argue, vague—statute, allowing federal prosecutors and the courts to fill in its scope.”). This may be in part due to the three part constitutional framework of the Constitution of 1787. *See* Charles Lincoln, *A Structural Etiology of the U.S. Constitution*, 43 NOTRE DAME J. LEGIS. 122, 122 (2016).

<sup>28</sup> *Atwater v. City of Lago Vista*, 165 F.3d 380, 382 (5th Cir. 2001), *reh’g en banc granted, opinion vacated*, 171 F.3d 258 (5th Cir. 1999), *opinion reinstated in part on reh’g*, 195 F.3d 242 (5th Cir. 1999), *and aff’d*, 532 U.S. 318 (2001).

<sup>29</sup> *Id.*

This, by no means, justifies his actions.<sup>30</sup> Perhaps the last two and a half decades of police brutality show that, in some cases, police can act without provocation of a reasonable sort or with disproportionate provocation.<sup>31</sup>

Reviewing news articles from the Austin American-Statesman around the same time period shows that there was a pattern of police violence and brutality.<sup>32</sup> Moreover, it seems that the jurisdiction of Lago Vista—as it is geographically separated from the main Austin metropolitan area—did not have a large contingent of lawyers.<sup>33</sup> The Austin American-Statesman article indicates that one attorney handled the police brutality claims in Lago Vista.<sup>34</sup> Moreover, the article describes the interaction with law enforcement as reminiscent of the “Wild West.”<sup>35</sup>

### ***B. Simulacrum of Facts in the Case***

Indeed, it seems that emotions and feelings led to much of what developed in this case.<sup>36</sup> Much of what occurred prior to the appellate court’s ruling is difficult to distinguish based on the record.<sup>37</sup> There seems to be contradictory evidence and claims on both sides and from what was reported in the local news.<sup>38</sup> Therefore, there are at least three perspectives: the Atwaters, the City of Lago Vista Police Department, and the media. In the case, the City of Lago Vista describes Atwater as an irate and potentially neglectful mother.<sup>39</sup> However, the filings seem to describe Atwater’s point of view as a crusader against police brutality and injustice.<sup>40</sup> On the other hand, the news describes Atwater as a run-of-the-mill traditional American that never was

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<sup>30</sup> At least one can interpret such is the notion of the justice system based on the Fifth Circuit’s opinion: “Or in those instances where similar abuses took place, perhaps the victims either were without the resources to call the officer’s hand or chose to avoid further involvement with a justice system so lacking in common sense and reasonableness.” *Id.* at 384.

<sup>31</sup> John Wihbey & Leighton Walter Kille, *Excessive or Reasonable Force by Police? Research on Law Enforcement and Racial Conflict*, JOURNALIST’S RES. (July 28, 2016), <https://journalistsresource.org/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics/>.

<sup>32</sup> Harmon, *supra* note 23.

<sup>33</sup> *See also* Atwater, 165 F.3d at 382 (“Gail Atwater and her family are long-term residents of Lago Vista, Texas, a suburb of Austin.”).

<sup>34</sup> Harmon, *supra* note 23.

<sup>35</sup> *Id.*

<sup>36</sup> Jason M. Katz, *Atwater v. City of Lago Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment*, 36 AKRON L. REV. 491, 504 n.45 (2003).

<sup>37</sup> *Id.*; *see* Brief for Appellees at 3, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 98-50302), 1998 WL 34085838, at \*3.

<sup>38</sup> Amanda Onion, *Supreme Court to Hear Soccer Mom Case*, ABC NEWS (Dec. 3, 2000), <https://abcnews.go.com/US/story?id=94803&page=1>.

<sup>39</sup> *See* Brief for Respondents at 12, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1659099, at \*12-14.

<sup>40</sup> *See* *Atwater v. City of Lago Vista*, 532 U.S. 318, 349 (2001).



a “Leave it to Beaver[esque]”<sup>41</sup> 1990s “soccer mom.”<sup>42</sup> Indeed, it seems that Atwater had been driving her children from soccer practice at the time of the incident with Turek.<sup>43</sup> Perhaps, the media tried to frame the question of the American soccer mom against the “Wild West” irate police officer as a quest for the source of the American Dream at the contours of using police forces to retain hierarchies<sup>44</sup> and what occurs when those artificial hierarchies are inverted.<sup>45</sup>

The inversion appears similar to the self-parody of officers outlined in Hunter S. Thompson’s novel *Fear and Loathing in Las Vegas: A Savage Journey to the Heart of the American Dream* (1971), where officers no longer present a threat to crime but an inoculated simulacra of policing as it appears in media, cinema, and television.<sup>46</sup> Analogously, that is to say, police officers no longer assume the role traditionally attained, but as interpreted through movies whereby the symbolism of policing and constitutional protections does not actually connect with the U.S. Constitution, per se, but rather a post-modern representation in media of what the Constitution and policing appear to be culturally.<sup>47</sup>

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<sup>41</sup> Leave It to Beaver, the critically acclaimed normal suburban family television show, represented the Americana that arguably never existed and still resonates in American society as an ideal version of the American Dream. See James Poniewozik, All-TIME 100 TV Shows, TIME, <https://time.com/collection/all-time-100-tv-shows/> (last visited Dec. 16, 2009); Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89, 89 n.2 (2011) (“Leave It to Beaver is a 1950s and 1960s family-oriented American television show that attained an iconic status in the United States, with the Cleaver family exemplifying the idealized suburban traditional family of the mid-twentieth century.”).

<sup>42</sup> Laurie Asseo, *Supreme Court Hears Soccer Mom Case*, ABC NEWS (Dec. 4, 2000), <https://abcnews.go.com/US/story?id=94802&page=1>.

<sup>43</sup> *Id.*

<sup>44</sup> The attempt to use police power to maintain such hierarchies could be interpreted in James Madison’s Federalist No. 10 titled “The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection” where Madison argues “the most common and durable source of factions has been the various and unequal distribution of property,” and goes on to argue that “those who hold and those who are without property have ever formed distinct interests in society.” Madison suggests that those “lesser classes” might be prone to make decisions that are not in the public good’s interest, such as regarding questions of debt where “a question to which the creditors are parties on one side, and the debtors on the other.” In sum, Madison suggests a type of balance, where “justice ought to hold the balance between them” in that “neither with a sole regard to justice and the public good” should outweigh the other. Madison appears to indicate that such a balance means that those with property should have their interests prevail over other minor interests. The distinction between “balance” and having the property-owning class shows Madison’s use of hoary language. This is contentious language where Madison masks that the true intention is only to have those with power prevail. In other words, there is not a true balance of interests that appears present on a first read. Compare THE FEDERALIST NO. 10 (James Madison), with Charles Lincoln, *A Brief Historical Sketch of an Anthropological Analysis of the Development of International and Comparative Law*, 19 FLA. COASTAL L. REV. 221 (2019) (discussing the anthropological analyses of law).

<sup>45</sup> Philip Terzian, *Police and Soccer Moms*, WASH. TIMES (Dec. 17, 2000), <https://www.washingtontimes.com/news/2000/dec/17/20001217-013526-1545r/>; Dan K. Thomasson, *Bad Ruling Endangers Liberties*, THE LEDGER (May 12, 2001), <https://www.theledger.com/story/news/2001/05/12/bad-ruling-endangers-liberties/26536504007/>.

<sup>46</sup> HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM* 58 (Random House 1971).

<sup>47</sup> See Toby Reed & R.J. Thompson, *The Six-Gun Simulacrum: New Metaphors for an Old Genre*, 20 FILM CRITICISM (SPECIAL ISSUE) 52, 63–64 (1996) (discussing how Coogan’s Bluff “consciously plays on the insertion of cowboy signs into modern police work.”); Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 OKLA. CITY U. L. REV. 323, 340–41 (2012); Lincoln, *supra* note 44.

Whether the media represented a simulacrum—a culturally adaptable manifestation—of what really occurred or reported on what actually occurred, again, perhaps does not matter.<sup>48</sup> Such simulations are like representations of what really happened—a simulacrum, according to Jean Baudrillard’s theory of simulacra and simulation.<sup>49</sup> A simulacrum refers to the idea that contemporary society has been divorced from the idea of what is real. According to Jean Baudrillard, a French social thinker from the later half of the 20th century and early 21st century, technology has allowed and created artificial copies and representations of the real. This copying and representation of the real have become so ubiquitous that what is real is blurred. According to Baudrillard, the “real” is blurred because the original reference is lost—or never existed. Because of this blurring of reality, contemporary society has lost touch with reality, and society lives within an illusion that humans live in the real world. Likewise, neither Atwater, the police of the City of Lago Vista, nor the media interpreted what occurred based on “reality.”<sup>50</sup> Instead, they interpreted the events through the cultural simulacra and representation of what really happened. That is to say, what occurred as represented in the facts and written media was likely a simulacrum of the truth.<sup>51</sup> But there arguably is no way around such a circumstance. Those who suffered indirectly or directly may never truly be explicated. Perhaps, all American court proceedings deal with agreed simulacra and simulacrums of what actually occurred.

Because of this reliance on the simulacra of “facts” as “reality” in cases, case law itself becomes a simulacrum. The boundaries of what is real and represented are unclear.

### ***C. Procedural Posture***

Ultimately, the appellate courts and the Supreme Court relied upon the actual facts as the trier of fact interpreted them.<sup>52</sup>

Atwater and her husband, Haas, filed a federal civil rights lawsuit in the United States District Court for the Western District of Texas against the City of Lago Vista, arguing that the arrest violated the Fourth Amendment.<sup>53</sup> The United States District Court dismissed the lawsuit, and the United States Court of Appeals for the Fifth Circuit, sitting as a panel, initially reversed

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<sup>48</sup> For the definition of simulacrum, *see generally* JEAN BAUDRILLARD, *Simulacra and Simulations*, in JEAN BAUDRILLARD: SELECTED WRITINGS 166, 166 (Mark Poster ed., Paul Foss et al. trans.) (1994) (extending the common meaning of simulacrum to describe a copy of a copy severed from, and erasing, its original referent); *Locating the Suburb*, 117 HARV. L. REV. 2003, 2022 (2004).

<sup>49</sup> BAUDRILLARD, *supra* note 48. In some cases, there is not only a simulacra of law, but there is a mythology of law. *See* Charles Lincoln, *The Myth of “Separate Enterprises” in International Taxation: Approaches to Attribution of Profits to Permanent Establishments*, 22 TRINITY L. REV. 30 (2017), for the mythological discussion of another area of law, namely tax law. *See also* Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87 (2017); CHARLES LINCOLN, *THE DIALECTICAL PATH OF LAW* (Rowman & Littlefield ed. 2021).

<sup>50</sup> Elizabeth C. Tucker, *Has the Supreme Court Taken a Wrong Turn? An Analysis of the Supreme Court’s Decision in Atwater v. City of Lago Vista*, 107 DICK. L. REV. 675, 693–94 (2003).

<sup>51</sup> *See generally* BAUDRILLARD, *supra* note 48.

<sup>52</sup> Frase, *supra* note 1, at 336.

<sup>53</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 325 (2001).

the summary judgment granted by the district court.<sup>54</sup> However, upon rehearing en banc, the Fifth Circuit vacated the panel's decision and affirmed the district court.<sup>55</sup> Thereafter, the Supreme Court granted certiorari.<sup>56</sup>

## II. UNIQUE HISTORICAL LEGAL REASONING IN *ATWATER V. LAGO VISTA*

What strikes the eye is the court's failure to follow the Fourth Amendment jurisprudence because such jurisprudence is universally applicable.<sup>57</sup> The opinion and dissents in *Atwater* do not build off the case law leading up to the case but rather engage in a unique historical analysis.<sup>58</sup> The decision in this case did not follow the normal development of case law.<sup>59</sup> The study of such jurisprudence in law school shows clear development from the incorporation of the Fourth Amendment through the Fourteenth Amendment to the states in *Mapp v. Ohio* (1961) chronologically and logically, building upon prior case law until 2001.<sup>60</sup> Indeed, Fourth Amendment search and seizure case law frequently reference prior jurisprudence.<sup>61</sup> However, the decision in *Atwater v. Lago Vista*, authored by Justice Souter, provides a tour de force of historical analysis of English common law going back to the Tudor period of English common law under King Henry VIII around the time of his separation from the Catholic Church.<sup>62</sup>

Indeed, from the perspective of legal history, this case is a unique examination of America's legal origins from medieval England up through the 18th century.<sup>63</sup> The Court's exposition is frequently unparalleled in detail and precisions.<sup>64</sup> For example, the majority opinion provides:

Nor were the nightwalker statutes the only legislative sources of warrantless arrest authority absent real or threatened violence, as the parties and their *amici* here seem to have assumed. On the contrary, following the Edwardian legislation and throughout the period leading up to the framing, Parliament repeatedly extended warrantless arrest power to cover misdemeanor-level offenses not involving any breach of the peace. One 16th-century statute, for instance, authorized peace

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<sup>54</sup> *Atwater v. City of Lago Vista*, 165 F.3d 380, 389 (5th Cir. 1999), *reh'g en banc granted, opinion vacated*, 171 F.3d 258 (5th Cir. 1999), *opinion reinstated in part on reh'g*, 195 F.3d 242 (5th Cir. 1999), *and aff'd*, 532 U.S. 318 (2001).

<sup>55</sup> *Id.*

<sup>56</sup> *Atwater*, 532 U.S. at 326.

<sup>57</sup> *See generally id.* at 327–28.

<sup>58</sup> *See id.* at 327–28, 333–35.

<sup>59</sup> *See id.*; *see also* Katz, *supra* note 36, at 506.

<sup>60</sup> Katz, *supra* note 36, at 496 n.20.

<sup>61</sup> *See generally Atwater*, 532 U.S. at 361.

<sup>62</sup> The Court conducted a thorough and detailed historical analysis referring to centuries old law. Such analysis is astonishingly detailed and exacting but also rarely seen in Supreme Court case law. *See, e.g., Atwater*, 532 U.S. at 334–35 (quoting 33 Hen. VIII, ch. 9, §§ 11–16, 5 Statutes at Large 84–85 (1541)) (“[o]ne 16th-century statute, for instance, authorized peace officers to arrest persons playing ‘unlawful game[s]’ like bowling, tennis, dice, and cards, and for good measure extended the authority beyond players to include persons ‘haunting’ the ‘houses, places and alleys where such games shall be suspected to be holden, exercised, used or occupied.’”).

<sup>63</sup> *See id.*

<sup>64</sup> Meg Penrose, *Enough Said: A Proposal for Shortening Supreme Court Opinions*, 18 SCRIBES J. LEG. WRITING 49, 59 (2018).

officers to arrest persons playing “unlawful games” like bowling, tennis, dice, and cards, and for good measure extended the authority beyond players to include persons “haunting” the “houses, places and alleys where such games shall be suspected to be holden, exercised, used or occupied.” A 17th-century act empowered “any person . . . whatsoever to seize and detain any . . . hawkker, pedlar, petty chapman, or other trading person” found selling without a license. And 18th-century statutes authorized the warrantless arrest of “rogues, vagabonds, beggars, and other idle and disorderly persons” (defined broadly to include jugglers, palm-readers, and unlicensed play-actors), “horrid” persons who “profanely swear or curse,” individuals obstructing “publick streets, lanes or open passages” with “pipes, butts, barrels, casks or other vessels” or an “empty cart, car, dray or other carriage,” and, most significantly of all given the circumstances of the case before us, negligent carriage drivers.<sup>65</sup>

However, unlike most Fourth Amendment analyses in the latter half of the 20th century, this case did not build off *Mapp v. Ohio* (1961) and its case law progeny.<sup>66</sup> Indeed, there is no discussion of incorporation to the states of the Bill of Rights’ Fourth Amendment through the Due Process Clause and the Fourteenth Amendment.<sup>67</sup> Such analysis of incorporation has been a hallmark of Fourth Amendment analysis regarding unreasonable searches and seizures.<sup>68</sup>

### III. SUPREME COURT JURISPRUDENCE CITING *ATWATER V. LAGO VISTA*

According to a Westlaw search conducted on December 23, 2022, the Supreme Court of the United States has cited *Atwater* 17 times in either a majority or dissenting opinion.<sup>69</sup> Granted, some of these citations deal with different issues.<sup>70</sup> For example, in *Wynne v. Maryland* (2015), a case dealing with state and local tax issues relating to double taxation, the dissenting opinion by Justice Thomas writes, “we have looked to founding-era state laws to guide our understanding of the Constitution’s meaning.”<sup>71</sup> Although not directly relevant to Fourth Amendment jurisprudence, such obiter dictum in another case dealing with substantively different laws—namely state and local tax law and the Dormant Commerce Clause—indicates how

<sup>65</sup> *Atwater*, 532 U.S. at 334–35 (citations omitted).

<sup>66</sup> See generally *id.*

<sup>67</sup> See *id.* at 326.

<sup>68</sup> See *People v. Goldston*, 682 N.W.2d 479, 482 (Mich. 2004).

<sup>69</sup> See, e.g., *Lange v. California*, 141 S. Ct. 2011, 2024 n.7, 2029–31, 2035–36, 2038 (2021) (Roberts, J., concurring); *Missouri v. McNeely*, 569 U.S. 141, 150 (2013); *Nieves v. Bartlett*, 139 S.Ct. 1715, 1725, 1727 (2019); *Rodriguez v. United States*, 575 U.S. 348, 367 (2015); *Arkansas v. Sullivan*, 532 U.S. 769, 771, 773 (2001); *Brown v. Polk Cnty.*, 141 S. Ct. 1304, 1306 (2021); *Torres v. Madrid*, 141 S. Ct. 989, 996 (2021); *District of Columbia v. Wesley*, 138 S. Ct. 577, 586 (2018); *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 580 (2015) (Thomas, J., dissenting); *Utah v. Strieff*, 579 U.S. 232, 253 (2016); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 392 (2009); *Brendlin v. California*, 551 U.S. 249, 263 n.7 (2007); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *Thornton v. United States*, 541 U.S. 615, 632 (2004); *Virginia v. Moore*, 553 U.S. 164, 170–71, 173, 175–76, 180 (2008); *Arizona v. Gant*, 556 U.S. 332, 343–44 (2009); *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 329–30, 337–39, 345–46 (2012).

<sup>70</sup> See *Torres*, 141 S. Ct. at 996 (regarding historical record and well-settled legal rule); but see *Pringle*, 540 U.S. at 369–70 (stating 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>71</sup> *Wynne*, 575 U.S. 542 at 580 (first citing *District of Columbia v. Heller*, 554 U.S. 570, 600–602 (2008) (Second Amendment); and then citing *Atwater*, 532 U.S. at 337–340 (Fourth Amendment)).

*Atwater* relied on founding-era state law in its opinion.<sup>72</sup> Based on the context of Justice Thomas’s citation, it seems he bolsters his opinion with precedents that rely on the majority’s analysis dealing with a high value on state law.<sup>73</sup>

Of the decisions the Supreme Court has published since *Atwater* in 2001, four of them are cases that substantively cite and discuss *Atwater*.<sup>74</sup> Those cases in chronological order are:

- *Virginia v. Moore*, 553 U.S. 164 (2008).
- *Arizona v. Gant*, 556 U.S. 332 (2009).
- *Florence v. Board of Chosen Freeholders*, 566 U.S. 318 (2012).
- *Missouri v. McNeely*, 569 U.S. 141 (2013).

The following sections of this article will discuss how these cases applied the principles in *Atwater*. And, then, whether these cases reflect well on the analysis in *Atwater*.

#### **A. *Virginia v. Moore*, 553 U.S. 164 (2008).**

The general issue, in this case, was whether the Fourth Amendment prohibits the introduction of evidence that has been procured subject to a warrantless arrest for a crime in which the maximum penalty would not result in jail time.<sup>75</sup> Specifically, is it reasonable under the Fourth Amendment for law enforcement to make a warrantless arrest for driving with a suspended license—even though Virginia state law did not permit such an arrest?<sup>76</sup>

The Supreme Court held unanimously that such an arrest was allowed.<sup>77</sup> Thus, the evidence law enforcement gained from the arrest was admissible.<sup>78</sup> Justice Scalia, writing for the unanimous opinion of the Court, noted that one of the key points of analysis the Court used in coming to its decision was that the Fourth Amendment does not incorporate state statutory law.<sup>79</sup> Therefore, no constitutional ground existed for the defendant to exclude the evidence acquired in such an arrest from the trial.<sup>80</sup>

In Scalia’s analysis, he cites *Atwater* as follows:

When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness “by assessing, on the one

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<sup>72</sup> *Id.* at 580 (Thomas, J., dissenting); see Charles Edward Andrew Lincoln IV, *A New Deal for Europe? The Commerce Clause as the Solution to Tax Discrimination and Double Taxation in the European Union*, 11 J. BUS. ENTREPRENEURSHIP & L. 115 (2018).

<sup>73</sup> *Wynne*, 575 U.S. 542 at 580–81 (Thomas, J., dissenting).

<sup>74</sup> *Moore*, 553 U.S. at 170–71, 173, 175–76, 180; *Gant*, 556 U.S. at 343–44; *Florence*, 566 U.S. at 329–30, 337–39, 345–46; *McNeely*, 569 U.S. at 150.

<sup>75</sup> *Moore*, 553 U.S. at 167–68.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 178, 180 (Ginsburg, J., concurring).

<sup>78</sup> *Id.* at 178.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

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.”<sup>81</sup>

Citing *Atwater*, Scalia makes the point that the legal history of statutes and common law from the founding era of the United States does not always provide an answer to legal questions.<sup>82</sup> Specifically, there is no clear answer as to what is reasonable for a search and seizure under the Fourth Amendment.<sup>83</sup> When the answer to what is reasonable is unclear, the Supreme Court looks to the traditions and traditional standards of what is considered reasonable.<sup>84</sup> The Court then compares the traditions of reasonableness with the rights an individual has to privacy as balanced with the “promotion of legitimate government interests.”<sup>85</sup>

Discussing *Atwater* in further depth, Scalia goes on to say:

Even if we thought that state law changed the nature of the Commonwealth's interests for purposes of the Fourth Amendment, we would adhere to the probable-cause standard. In determining what is reasonable under the Fourth Amendment, we have given great weight to the “essential interest in readily administrable rules.” In *Atwater*, we acknowledged that nuanced judgments about the need for warrantless arrest were desirable, but we nonetheless declined to limit to felonies and disturbances of the peace the Fourth Amendment rule allowing arrest based on probable cause to believe a law has been broken in the presence of the arresting officer.<sup>86</sup>

Here, Scalia indicates that a critical part of the Supreme Court’s constitutional analysis in *Atwater* is the administrability of rules that the Court analyzes.<sup>87</sup> Thus, a key question in the realm of warrantless arrests is whether the rule the Court shares is indeed administrable.<sup>88</sup> Scalia then goes on to compare the situation in *Moore* with the situation in *Atwater*.<sup>89</sup>

Finally, in the concurrence, Justice Ginsburg discusses *Atwater* as well.<sup>90</sup> Ginsburg indicates that while Virginia could have made driving with a suspended license an arrestable offense, the state did not.<sup>91</sup> Likewise, Texas could have made driving without a seat belt an arrestable offense.<sup>92</sup>

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<sup>81</sup> *Moore*, 553 U.S. at 171 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *see also* *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 (2001).

<sup>82</sup> *Moore*, 553 U.S. at 170–71.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 171.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 174–75 (citing *Atwater*, 532 U.S. at 347).

<sup>87</sup> *Moore*, 553 U.S. at 175.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 180 (Ginsburg, J., concurring).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; *Atwater v. City of Lago Vista*, 532 U.S. 318, 324 (2001).

Overall, the *Moore* case is the closest in chronological proximity to *Atwater*, which substantively discusses the *Atwater* case.<sup>93</sup> It shows a successive adherence to the notion of *stare decisis* in the sense that the Court continues to uphold the principles in the *Atwater* case.<sup>94</sup>

Discussing the ramifications of the *Moore* case, Professor William A. Schroeder wrote in 2013 that “[i]n any event, any legislation will have less force after *Virginia v. Moore*, where the Court made it clear that a state law constraint was not the equivalent of a constitutional constraint.”<sup>95</sup> This indicates that *Moore* and *Atwater* could have implications that affect the efficacy of state law.<sup>96</sup> It is unclear whether it bolsters or improves state law. Earlier in the article, Professor Schroeder wrote, “For example, in Texas, following the *Atwater* decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.”<sup>97</sup> Likewise, states could continue to limit the power of their police in light of such decisions.<sup>98</sup>

Indeed, returning to the issue of *Moore*, “*Moore*, of course, takes this inquiry one step further: Does the Fourth Amendment’s modern probable cause safe harbor apply even when a state expressly withdraws its officers’ arrest authority?”<sup>99</sup> But reliance on the historical record is not the best tool in many cases because “as Justice Souter himself conceded in *Atwater*, the historical record is mixed at best regarding the proposition that English constables at the time of the framing had the power at common law to arrest misdemeanants in the absence of a statute granting that power.”<sup>100</sup> It seems clear, even in the academic literature and in subsequent cases, that the method of analysis in *Atwater* relied on unclear historical foundations.<sup>101</sup> Thus, it appears that although *Moore* is in line with the decision of *Atwater*, the case again brought up the insecure foundations of the *Atwater* case.<sup>102</sup> This uncertain and wobbly foundation for the historical method of analysis in the *Atwater* case suggests it was incorrectly decided.<sup>103</sup>

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<sup>93</sup> See *supra* note 70 and accompanying text.

<sup>94</sup> Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O’Connor’s Dissent in Atwater v. City of Lago Vista*, 79 MISS. L.J. 115, 134 (2009).

<sup>95</sup> William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations: Strip Searches in Detention Facilities—Atwater Strikes Again*, 46 AKRON L. REV. 331, 347 (2013).

<sup>96</sup> Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 166 (2020).

<sup>97</sup> Schroeder, *supra* note 95, at 347.

<sup>98</sup> *Id.* at 347–48.

<sup>99</sup> Morris B. Hoffman, *The Court Says No to “Incorporation Rebound” Virginia v. Moore*, 61 BAYLOR L. REV. 818, 855 (2009).

<sup>100</sup> *Id.* at 855–56 (2009).

<sup>101</sup> *Id.* (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 330 (2001)).

<sup>102</sup> *Id.* at 853–54.

<sup>103</sup> Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law” – “Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 133 (2010).

***B. Arizona v. Gant, 556 U.S. 332 (2009).***

The issue in *Gant* was whether the Fourth Amendment exception—namely, the search of a vehicle incident to arrest—is allowed after the arrestee has been secured.<sup>104</sup> Specifically, can police arrest an individual and search their vehicle without a warrant?<sup>105</sup>

The Court held that law enforcement could not conduct a search incident to arrest unless there was a threat to safety or an imminent threat of evidence not being preserved.<sup>106</sup>

In the majority opinion, Justice Stevens stated that police must have a reasonable belief that evidence could be destroyed or that there is a question of safety.<sup>107</sup>

Stevens wrote, citing *Atwater*:

In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.<sup>108</sup>

Here, Stevens means to write that if the circumstances lead law enforcement to reasonably believe that a vehicle search could lead to evidence of a crime, then such a search may occur.<sup>109</sup>

In his concurring opinion, Justice Scalia wrote:

[W]e should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is ipso facto “reasonable” only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.<sup>110</sup>

A decision such as *Gant* helps protect the rights of those individuals who are arrested because “[a]dopting the automobile exception as the alternative to *Gant* simultaneously protects privacy interests while enabling law enforcement total access to vehicles, without the need for further litigation.”<sup>111</sup>

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<sup>104</sup> *Arizona v. Gant*, 556 U.S. 332, 343–44 (2009).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (first citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 324 (2001); and then citing *Knowles v. Iowa*, 525 U.S. 113, 118 (1998)).

<sup>109</sup> *Id.*

<sup>110</sup> *Gant*, 556 U.S. at 353.

<sup>111</sup> Devon M. Stiles, *Constitutional Law—Faded Lines: Another Attempt to Delineate Reasonableness in Automobile Searches Incident to Arrest; Arizona v. Gant*, 129 S. Ct. 1710 (2009), 10 WYO. L. REV. 319, 337 (2010).



However, it is important to note that “the police may choose to effectuate a full custodial arrest of the driver of a vehicle simply for having committed one of a myriad of traffic offenses, no matter how minor, regardless of the arresting officer's true motivation for arresting.”<sup>112</sup> In other words, the efficacy of the *Gant* case could be minimized because law enforcement could use the *Atwater* case to make the arrest—and then search the vehicle.<sup>113</sup> Such a double-entendre of numerous exceptions to exceptions could render rulings such as the *Gant* case less effective.<sup>114</sup>

***C. Florence v. Board of Chosen Freeholders, 566 U.S. 318 (2012).***

In this case, the Court had to analyze whether law enforcement may strip-search an individual who has been arrested for a crime—even before the individual is admitted to jail—and even if there is no reason to suspect the individual has any incriminating evidence.<sup>115</sup>

Specifically, was it constitutional to be strip-searched after being arrested for a fine when there was no reason to suspect the individual arrested had any contraband and was not yet in jail?<sup>116</sup>

Florence, the plaintiff, argued that “persons arrested for minor offenses cannot be subjected to invasive [Fourth Amendment-unreasonable searches] searches unless prison officials have [Fourteenth Amendment-Due Process Clause] reason to suspect concealment of weapons, drugs, or other contraband.”<sup>117</sup> The federal district court agreed with Florence.<sup>118</sup> The Third Circuit Court of Appeals disagreed.<sup>119</sup> The Third Circuit argued that jails' interest in safety and security outweighed the privacy interests of detainees—even those accused of minor crimes.<sup>120</sup>

The Court cited and relied in part on *Atwater* and wrote:

Persons arrested for minor offenses may be among the detainees processed at these facilities. This is, in part, a consequence of the exercise of state authority that was the subject of *Atwater v. Lago Vista*. *Atwater* addressed the perhaps more fundamental question of who may be deprived of liberty and taken to jail in the first place.<sup>121</sup>

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<sup>112</sup> Nadia B. Soree, *Whose Fourth Amendment and Does it Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753, 778 (2013).

<sup>113</sup> *Id.*

<sup>114</sup> Seth W. Stoughton, *Modern Police Practices: Arizona v. Gant's Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1746 (2011).

<sup>115</sup> *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 324 (2012).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 318.

<sup>118</sup> *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 513 (D.N.J. 2009).

<sup>119</sup> *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 308, 311 (3d Cir. 2010).

<sup>120</sup> *Id.* at 308.

<sup>121</sup> *Florence*, 566 U.S. at 329 (citation omitted).

This indicates that the implication of *Atwater* is that searches after an arrest may occur—even if there is a minor arrest.<sup>122</sup> The Court continues to discuss the facts of the *Atwater* case in some detail.<sup>123</sup> Returning to the principle of the administrability of rules and laws, the Court wrote, “One of the central principles in *Atwater* applies with equal force here. Officers who interact with those suspected of violating the law have an ‘essential interest in readily administrable rules.’”<sup>124</sup> Therefore, the notion of administrability of the rules carries on proceeding from *Atwater* to *Florence*.

The ramifications of *Florence* provide that “even for a minor offense, the Fourth Amendment does not forbid an invasive strip search.”<sup>125</sup> Speaking to the results of the case, the American Civil Liberties Union indicated that the decision “puts the privacy rights of millions of Americans at risk.”<sup>126</sup> More specifically, such searches could lead to arrestees becoming victims of sexual violence.<sup>127</sup>

#### ***D. Missouri v. McNeely, 569 U.S. 141 (2013).***

The issue before the Supreme Court in this case was whether a police officer may order a blood alcohol test without a judge’s warrant on the basis that the blood alcohol levels could dissipate—where the dissipation creates an exigency requiring immediate testing.<sup>128</sup> Specifically, does the basis that blood alcohol levels dissipate faster than most police can obtain a warrant create a *per se exigency* for administering such a test?<sup>129</sup>

The majority opinion of the Court held that a blood alcohol content test qualifies as a search and that such a search needs to be within the bounds of the Fourth Amendment.<sup>130</sup> This means that an officer must have a warrant for such a search—unless the person gives consent.<sup>131</sup>

The Court reasoned that analyzing whether a law enforcement officer is justified to act in such a way during an emergency that does not require a warrant is always viewed under the

<sup>122</sup> *Id.* at 330.

<sup>123</sup> *Id.* at 329–30.

<sup>124</sup> *Id.* at 338.

<sup>125</sup> Soree, *supra* note 112, at 778.

<sup>126</sup> *ACLU Says Supreme Court Decision Upholding Strip Searches Puts Privacy Rights of Millions of Americans at Risk*, ACLU (Apr. 2, 2012), <https://www.aclu.org/press-releases/aclu-says-supreme-court-decision-upholding-strip-searches-puts-privacy-rights?redirect=criminal-law-reform/aclu-says-supreme-court-decision-upholding-strip-searches-puts-privacy-rights>.

<sup>127</sup> Merrick D. Cosey, “Turn Around,” “Bend Over,” “Squat,” and “Cough”: *The Supreme Court Strips the Fourth Amendment “Naked” in Florence v. Board of Chosen Freeholders*, 40 S.U. L. REV. 515, 517 (2013).

<sup>128</sup> Lincoln Caplan, Editorial, *Is the Driver Drunk?*, N.Y. TIMES, Jan. 5, 2013 (§SR), at 10.

<sup>129</sup> *Missouri v. McNeely*, 569 U.S. 141, 145 (2013).

<sup>130</sup> *Id.* at 142 (“When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. Circumstances may make obtaining a warrant impractical such that the alcohol’s dissipation will support an exigency, but that is a reason to decide each case on its facts . . .”).

<sup>131</sup> Granted this raises the question whether an intoxicated person could actually give consent if the alcohol levels prove to be within a certain measure.

totality of the circumstances.<sup>132</sup> However, one of the key points in the Supreme Court’s analysis is the question of reasonableness.<sup>133</sup>

Speaking to the notions of reasonableness, the Court wrote in connection with the *Atwater* case the following:

We apply this “finely tuned approach” to Fourth Amendment reasonableness in this context because the police action at issue lacks “the traditional justification that ... a warrant ... provides.” Absent that established justification, “the fact-specific nature of the reasonableness inquiry,” demands that we evaluate each case of alleged exigency based “on its own facts and circumstances.”<sup>134</sup>

This brings up *Atwater* in “non-normal” police situations.<sup>135</sup> When police are confronted with a situation, exceptions to the Fourth Amendment’s warrant requirement may arise.<sup>136</sup> This, in a way, implicates the whole system of legal reasoning in the *Atwater* case.<sup>137</sup> If an individual driving without a seat belt is an exigent circumstance,<sup>138</sup> then what is not?

#### IV. IMPLICATIONS OF *ATWATER V. LAGO VISTA*

At stake in the *Atwater* case was much more than the validity of a Texas seat belt law.<sup>139</sup> All scientific and engineering reports indicate that seatbelts are absolutely necessary, and having such a law promotes public safety.<sup>140</sup> The decision to wear or not wear a seatbelt rests on every person entering a car. Whether one puts on a seat belt because society encourages them to wear a seat belt or not is unclear.<sup>141</sup> Moreover, most individuals in the United States have encountered police stops for speeding or other routine matters<sup>142</sup>—and it is likely fair to suggest that most hope they will get off with a warning rather than an altercation bordering, if not fully encompassing, police brutality.<sup>143</sup> But there is no doubt seatbelts are of utmost importance to public safety.

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<sup>132</sup> *McNeely*, 569 U.S. at 149.

<sup>133</sup> *Id.* at 150–51.

<sup>134</sup> *Id.* at 150 (first quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 n.16 (2001); and then quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 148–49.

<sup>137</sup> *Id.* at 150; *see also* *Atwater v. City of Lago Vista*, 532 U.S. 318, 247 (2001).

<sup>138</sup> Carlos Miller, *WATCH: Cop Enters Home Without Warrant to Pursue Man Over Seat Belt Violation*, PINAC NEWS (July 5, 2020), <https://pinacnews.com/index.php/2020/07/05/watch-cop-enters-home-without-warrant-to-pursue-man-over-seat-belt-violation/>.

<sup>139</sup> Tucker, *supra* note 50, at 694.

<sup>140</sup> *Seat Belts*, NHTSA, <https://www.nhtsa.gov/risky-driving/seat-belts> (last visited Mar. 17, 2023).

<sup>141</sup> Consider the character Trinity’s quote about societal influence from the fourth installment of *The Matrix*, “I remember wanting a family, but was that because that’s what women are supposed to want? How do you know if you want something yourself or if your upbringing programmed you to want it?” Neo, her interlocutor, responds, “I pay my analyst a lot of money to answer such questions for me.” *THE MATRIX RESURRECTIONS* (Warner Bros. Pictures 2021).

<sup>142</sup> *Findings*, THE STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings/> (last visited Mar. 17, 2023).

<sup>143</sup> Sam Levin, *US Police Have Killed Nearly 600 People in Traffic Stops Since 2017, Data Shows*, THE GUARDIAN (Apr. 21, 2022, 9:13 AM), <https://www.theguardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data>.

Perhaps parallel to how the media outlined Ms. Atwater as a traditional 1950s mother taking care of her children living in a picturesque small town akin to “Leave it to Beaver,”<sup>144</sup> there existed other problems that did not outwardly manifest themselves.<sup>145</sup> Consider the limiting view and falseness of the mythical trope of *Leave It to Beaver* as outlined by Louise Melling in the Yale Law Journal Forum in 2021:

For many years, the American family trope resembled a kind of *Leave It to Beaver* mythical archetype, featuring a white male head of household, his white stay-at-home wife, and their two children. This trope was false and exclusionary in many respects. To begin, the family was white. Single parents, working mothers, and intergenerational families—all of which are more likely to be or consist of people of color—are missing from the picture. One parent can afford to stay at home, and the family lives in a detached house that they own. The family roles are gendered and the couple heterosexual. While we all now know this trope stands for few families and perhaps even fewer aspirations, it persists to this day, with the assumption still being that women are the primary caregivers; that if a woman wearing a wedding ring buys two coffees, one is for her husband, not her wife; that chosen families include two adults; and that women are wanting—perhaps even monsters—if they do not embrace motherhood.<sup>146</sup>

Although the gender roles examined in the Yale Law Journal are not explicitly at issue in the *Atwater* case, such a discussion may shed light on future analysis of case law and the actuality of the depiction of the American Dream. This may be especially true in the discussion of facts in Supreme Court cases but also in how the media represents facts of cases or the simulacra of cases regarding the American Dream.

The best representation and duality of this duality between the “perfect world” of suburban America and the American Dream is found in David Lynch’s movie *Blue Velvet* (1986) and his television series *Twin Peaks* (1991-1992, 2017).<sup>147</sup> *Blue Velvet* is about the underpinnings of perfect America as often portrayed in 1950s television.<sup>148</sup> *Blue Velvet* could be considered an inversion of *Leave it to Beaver*. *Twin Peaks* also picks up a theme about showing the veil of “perfect” American small towns—initially depicted in much the same fashion much in the same fashion as 1950s America.<sup>149</sup>

<sup>144</sup> Onion, *supra* note 38.

<sup>145</sup> Louise Melling, *Religious Exemptions and the Family*, 131 YALE L.J. F. 275, 275–76 (2021); see Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249, 273–74 (2020).

<sup>146</sup> Melling, *supra* note 145, at 275–76.

<sup>147</sup> See Richard Corliss, *Czar of Bizarre*, TIME (Oct. 1, 1990),

<https://content.time.com/time/subscriber/article/0,33009,971255,00.html>, for a general profile of David Lynch.

<sup>148</sup> Writing in The New York Times on the small town nature of David Lynch’s work, John O’Connor writes, “‘*Twin Peaks*’ is not a sendup of the form. Mr. Lynch clearly savors the standard ingredients . . . [b]ut then the director adds his own peculiar touches, small passing details that suddenly, and often hilariously, thrust the commonplace out of kilter.” John J. O’Connor, ‘*Twin Peaks*,’ *A Skewed Vision of a Small Town*, N.Y. TIMES (§C), Apr. 6, 1990, at 88.

<sup>149</sup> Andrew Pollack, *Export News: ‘Twin Peaks’ Mania Peaks in Japan*, N.Y. TIMES (§2), Aug. 2, 1992, at 209.

The same era of the 1950s that seemed to deny the ugly truths about America—or at least distract from them—produced the McCarthy era.<sup>150</sup> Likewise, as CBS’s Edward R. Murrow reported in his program “See It Now” of Senator Joseph McCarthy’s record as an anti-communist stating, “[w]e can deny our heritage and our history, but we cannot escape responsibility for the result. There is no way for a citizen of a republic to abdicate his responsibilities.”<sup>151</sup> This sentiment of denying the heritage appears in the legal reasoning of the *Atwater* case at the Supreme Court.<sup>152</sup> The past century of incorporating the Bill of Rights through the Fourteenth Amendment was hardly mentioned in *Atwater*.<sup>153</sup> What was analyzed was the history prior to the founding of the American Republic.<sup>154</sup> Indeed, “[a]lmost three-quarters of the 37-page majority opinion is devoted to historical arguments.”<sup>155</sup> Morgan Cloud, writing on the importance of historical analysis in the *Atwater* decision, wrote:

It is a measure of originalism's impact on constitutional litigation that *Atwater* relied primarily upon history and that Justice Souter devoted the better part of his majority opinion to historical analysis. Justice Souter was not by any sensible measure an originalist judge, yet this opinion consisted largely of a lengthy and detailed historical analysis responding to and rejecting *Atwater*'s arguments. Although Souter was no originalist, his opinion exhibited many of the characteristics of that method. He concluded that although *Atwater*'s “historical argument is by no means insubstantial, it ultimately fails.”<sup>156</sup>

In the legal frontiers of American jurisprudence, Edward Murrow’s talk about McCarthy could also apply: “[a]s a nation we have come into our full inheritance at a tender age. We proclaim ourselves, as indeed we are, the defenders of freedom, wherever it continues to exist in the world, but we cannot defend freedom abroad by deserting it at home.”<sup>157</sup> That is to say, rhetorically, the legal precedent of the United States is indeed young,<sup>158</sup> but it is unclear what legal precedents we should use to analyze the law. Arguably the formulation of *stare decisis* would likely adhere—whereby the Court should have used the most recent case law to interpret reasonable searches and seizures.<sup>159</sup> If the Supreme Court had used such case law, it likely would have come to the opposite result.<sup>160</sup> There is no indication in the facts as they are presented to the

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<sup>150</sup> Or was synonymous with the McCarthy era. Jason P. Isralowitz, *The Reporter As Citizen: Newspaper Ethics and Constitutional Values*, 141 U. PA. L. REV. 221, 244 (1992).

<sup>151</sup> *Id.* at 278 n.271 (citing *See It Now* (CBS television broadcast Mar. 9, 1954)).

<sup>152</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 341, 345 (2001).

<sup>153</sup> *Id.* at 362 (O’Connor, J., dissenting).

<sup>154</sup> Morgan Cloud, *A Conclusion in Search of a History to Support It*, 43 TEX. TECH L. REV. 29, 40 (2010).

<sup>155</sup> *Id.* at 49 n.51.

<sup>156</sup> *Id.* at 40.

<sup>157</sup> David Shedden, *Today in Media History: Edward R. Murrow Investigated Joe McCarthy on ‘See It Now’*, POYNTER (Mar. 9, 2015), <https://www.poynter.org/newsletters/2015/today-in-media-history-edward-r-murrow-examined-joe-mccarthys-methods-on-see-it-now/>.

<sup>158</sup> Branka Vuleta, *Stare Decisis: Definition, History, and How it Works*, LEGALJOBS (Nov. 16, 2022), <https://legaljobs.io/blog/stare-decisis/>. See Lincoln IV, *supra* note 49; LINCOLN, *supra* note 49, for a more in depth discussion of *stare decisis*.

<sup>159</sup> *With Roe Overturned, Legal Precedent Moves to Centerstage*, A.B.A. (June 24, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage/>.

<sup>160</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001) (O’Connor, J., dissenting).

court and the media that there was any reason for a search and seizure.<sup>161</sup> Moreover, there seems to be an abundant representation that the civil rights of Ms. Atwater and her family were violated.<sup>162</sup>

In such a case where the Supreme Court ignored the precedent originating from *Mapp v. Ohio* (1961) up to the moment of the 2000-2001 term, the rhetorical flourish of Murrow on CBS perhaps reaches its most articulate crescendo and simulacra in discussing the actions of Senator Joseph McCarthy:

The actions of the junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad, and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear; he merely exploited it — and rather successfully. Cassius was right. “The fault, dear Brutus, is not in our stars, but in ourselves.”<sup>163</sup>

Perhaps “Senator from Wisconsin” could be replaced by the “analysis of the Supreme Court.” But the real answer would not be the Supreme Court; rather, as Murrow indicates, the fault is not with the Supreme Court, and indeed the Supreme Court was fully justified in its decision.<sup>164</sup>

Likewise, in the midst of the Vietnam War during the Battle of Bến Tre in 1968, an unnamed U.S. major told the journalist Peter Arnett that “it became necessary to destroy the town to save it.”<sup>165</sup> It was the Fourth Amendment. It is the Fourth Amendment because it was something that was being fought over—like that town in the Vietnam War.<sup>166</sup> The Supreme Court had a hard decision to make because the law was unclear—or non-existent on the subject.<sup>167</sup> Likewise, in the Vietnam War, the military had to make a decision about fighting to defeat Viet Kong.<sup>168</sup> The defeat of the enemy was the ostensible goal.<sup>169</sup> Likewise, maintaining police power to ensure safety was the ostensible goal in *Atwater*.<sup>170</sup> But, in order to ensure law enforcement provides security, the foundational principles ensuring privacy and safety were destroyed.<sup>171</sup> Those principles are analogous to the town in the Vietnam War. Subsequent examination of case law decisions from the Supreme Court shows how much the Fourth Amendment case law has eroded since the decision in *Atwater*.<sup>172</sup>

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<sup>161</sup> *Id.* at 368 (O'Connor, J., dissenting).

<sup>162</sup> *Id.*

<sup>163</sup> Shedden, *supra* note 157.

<sup>164</sup> *Id.*

<sup>165</sup> *Major Describes Move*, N.Y. TIMES, Feb. 8, 1968, at 14.

<sup>166</sup> *Id.*

<sup>167</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 362 (2001) (O'Connor, J., dissenting).

<sup>168</sup> *Major Describes Move*, *supra* note 165.

<sup>169</sup> *Id.*

<sup>170</sup> *Atwater*, 532 U.S. at 348–49.

<sup>171</sup> *Id.* at 372–73 (O'Connor, J., dissenting).

<sup>172</sup> Eric Roper, *High Court Continues to Erode 4th Amendment Protections*, THE LAW OFF. OF ERIC ROPER, P.A. (June 21, 2016), <https://www.ericroperlaw.com/high-court-continues-to-erode-4th-amendment-protections/>.

## CONCLUSION

The Supreme Court correctly decided the *Atwater v. Lago Vista* case because the Bill of Rights and common law within the United States did not produce a conclusive result regarding whether someone could be arrested for a crime where the maximum penalty was a minuscule monetary amount.<sup>173</sup>

This article brings up questions for further research that are not the purpose of this current article regarding justice and consistency. Nature seems to indicate that is consistency following the Platonic dialogue *Timaeus*.<sup>174</sup> But assuming that nature is not consistent but rather chaotic, would this mean the idea of justice is chaotic as well? Surely, the idea of ensuring justice comes from the idea that there is a potential for consistency in nature. Perhaps, the question for further research would be whether there is a middle ground between chaos and consistency or potentially another “ground” that is not a “middle ground” that neither nor really reaches the idea of justice simultaneously.

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<sup>173</sup> *Atwater*, 532 U.S. at 332.

<sup>174</sup> PLATO, *TIMEAUS AND CRITIAS* (Thomas Kjeller Johansen ed., Benajamin Jowett trans., Penguin Classics 2017) (360 BC).