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NOTE

PREVENTING "SENSELESS" ARRESTS: SEARCHING FOR A CONSTITUTIONAL RESOLUTION OF ATWATER V. CITY OF LAGO VISTA

I. INTRODUCTION

In March 1997, Gail Atwater was driving in Lago Vista, Texas, with her two children. No one in the car was wearing a seatbelt. Officer Bart Turek stopped Atwater’s vehicle. The Officer then handcuffed Atwater, placed her in the squad car, and took her to the police station. At the station, Atwater had to remove her shoes, jewelry, eyeglasses, and empty her pockets. After having her “mug shot” taken, Atwater was placed in a jail cell where she remained for about an hour before she was taken in front of the magistrate and released on $310 bond.

When the case ultimately reached the Supreme Court, a majority of the Court observed:

[Gail Atwater] was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.

2. See id. at 323.
3. See id. at 324.
4. See id. at 324-25.
5. See id.
6. See id.
7. Id. at 346-47.
Despite the rebuke, the Court ruled against Gail Atwater, holding that her Fourth Amendment rights had not been violated by her arrest for failing to wear a seatbelt.

It is axiomatic that the Fourth Amendment protects individuals from unreasonable search and seizure, and that the freedom from such search and seizure is often recognized as a liberty interest of the greatest importance. While custodial arrest is the ultimate antithesis of this freedom, nevertheless, in April of 2001, the Supreme Court upheld the validity of the warrantless arrest of Gail Atwater for a minor traffic offense punishable by fine only. In doing so, the Supreme Court settled an important question, at least for the time being, holding that the Fourth Amendment does not protect against such an arrest. At the very least, this decision by the Court has not been a popular one.

This Note discusses whether substantive due process protections could invalidate future arrests for minor traffic offenses or other minor crimes punishable by fine only. Part II provides background

8. See id.
9. See id. at 323.
10. The Fourth Amendment states:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. CONST. amend. IV.
11. The Supreme Court has been careful not to “minimize the importance and fundamental nature of this right.” United States v. Salerno, 481 U.S. 739, 750 (1987).
12. See Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 TEMP. L. REV. 221, 264-65 (1989). Noteworthy in this article is Professor Salken’s conclusion that “Custodial arrest for a minor traffic offense is an infringement on individual freedom that is prohibited by the fourth amendment.” Id. at 275.
14. See id. at 354.
16. There are occasions when a warrantless arrest is proper. One example is when an individual presents a threat of harm to him or herself or others. See, e.g., MINN. STAT. § 169.91 (2000). Although the statute requires the issuance of a citation for certain traffic offenses, it explicitly authorizes arrest for an accident resulting in injury or death, negligent homicide, involving influence of intoxicating liquor or drugs, and failure to stop in event of accident. See id.
information on the several lower federal court decisions and the Supreme Court decision in Atwater v. City of Lago Vista. Part III introduces the concept of substantive due process. Part IV discusses initial hurdles to making a constitutional argument in the context of Atwater, other than the Fourth Amendment argument already rejected by the Supreme Court. Part V discusses the Atwater facts under the rubric of a substantive due process analysis. Part VI concludes the argument that warrantless arrests for minor traffic violations are unconstitutional.

II. BACKGROUND

A. The Decisions in Atwater v. City of Lago Vista

1. The United States District Court Case

After her arrest, Atwater filed a civil suit in the Texas state court alleging both federal and state law grounds for relief, including that her Fourth Amendment rights had been violated. The defendants properly removed the case to the United States District Court for the Western District of Texas.

17. See, e.g., Atwater v. City of Lago Vista, 195 F.3d 242 (5th Cir. 1999), aff’d 532 U.S. 318 (2001); Atwater v. City of Lago Vista, 165 F.3d 380 (5th Cir.), reh’g granted, 171 F.3d 258 (5th Cir.), and rev’d en banc, 195 F.3d 242 (5th Cir. 1999); Atwater v. City of Lago Vista, No. A-97 CA 679 (W.D. Tex. filed Feb. 13, 1999) (unpublished opinion on file with the author).

18. See Atwater, 532 U.S. at 318.

19. The relevant due process portions of the Fifth and Fourteenth Amendments are as follows: “[N]or be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

20. See Atwater, 195 F.3d at 244. Atwater eventually pled no contest to not wearing a seatbelt and allowing her children not to wear seatbelts. See Atwater, 165 F.3d at 383. Charges of driving without a license and proof of insurance were dismissed. See id. Atwater brought suit against the City of Lago Vista under 42 U.S.C. § 1983. See id. 42 U.S.C. § 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Her causes of action were, “(1) Deprivation of Constitutional Rights, (2) Excessive Use of Force, (3) False Imprisonment, (4) Inadequate Training, (5) Failure to Supervise, (6) Intentional Infliction of Emotional Distress, (7) Assault and Battery, (8) Grossly Negligent Hiring and Retention, (9) Conspiracy to Formulate and Enforce a Municipal Policy to Violate Constitutional Rights, and (10) Common Fund.” Atwater, 195 F.3d at 244, n1.

21. See Atwater, 532 U.S. at 325.
To say that Judge Sparks, of the United States District Court for the Western District of Texas, found Atwater’s claims unsupportable, may be putting it mildly.\footnote{See Atwater, No. A-97 CA 679, at 55a (W.D. Tex. filed Feb. 13, 1999) (unpublished opinion on file with author).} A clear illustration of Judge Sparks’ feelings toward Atwater’s claims can be found in his closing remarks: “[t]his is a lawsuit that should have never been filed and was poorly litigated once it was. Suits such as this are [the] bane of the American legal system.”\footnote{Id. at 62a.}

The court found all of Atwater’s claims meritless, and granted summary judgment for the defendants.\footnote{See id. at 51a.} The court applied a qualified immunity test to Atwater’s constitutional claims.\footnote{See id. at 55a.} “Qualified immunity shields state officials from suit for damages provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.”\footnote{Id. at 56a.} Applying this two-part test, the court found that the plaintiff failed to demonstrate that the defendant violated any clearly established constitutional or statutory right.\footnote{See id. at 56a.} Therefore, it was not necessary to proceed to the second prong of the test, which would have asked whether the defendants’ conduct was objectively reasonable in light of the constitutional or statutory right. Nevertheless, in dicta, the court made it a point to say that the second prong of the test was also not met.\footnote{See id. at 56a.}

The court moved even more swiftly to dispose of Atwater’s state law claims.\footnote{See id. at 61a.} Under Texas law, a governmental unit is protected by sovereign immunity from suit arising from any tort unless the tort was spawned by operation of a motor vehicle or the use of tangible personal property.\footnote{See id.} Judge Sparks found it “laughable” to suggest that the exception to the sovereign immunity defense had been met in this case.\footnote{See id.}

2. The Fifth Circuit

A panel of the Court of Appeals for the Fifth Circuit reversed part of the district court’s ruling.\footnote{See Atwater v. City of Lago Vista, 165 F.3d 380 (5th Cir.), reh’g granted, 171 F.3d 258 (5th Cir.), and rev’d en banc, 195 F.3d 242 (5th Cir. 1999).} Although the district court found quite clearly that Atwater failed to state a claim under the Fourth
Amendment, the Fifth Circuit reversed, finding that Officer Turek’s actions were constitutionally unreasonable. The Fifth Circuit utilized the same test applied by the district court, namely a qualified immunity analysis, but reached a different result.

Under the first prong of the test, the appeals court found that there is a clearly established constitutional right to be free from unreasonable seizures. Second, the court opined that the existence of probable cause to arrest does not end the qualified immunity analysis in favor of the City of Lago Vista; the second part of the analysis still remained necessary.

Under the second part of the test, the panel found that the seizure was objectively unreasonable. The court first noted the significance of the fact that the law Atwater violated was paternalistic, in that Atwater could only harm herself, not others. A drunk or reckless driver poses a threat to all others on the streets, and such an arrest brings a measure of safety to society. Conversely, arresting a seatbelt violator will not make the streets any safer for others. The court reasoned that officers should be forced to make distinctions between times where it is appropriate and inappropriate to arrest, although arrest may be authorized by the statute in both instances. As the court noted, it is logical to distinguish between minor and serious offenses when analyzing the reasonableness of an arrest under the Fourth Amendment.

The panel then conducted a balancing test to determine whether this arrest was reasonable, weighing, as one factor, the state’s interest in the arrest, which could only have been the enforcement of the seatbelt law. Most would say that such an interest is minimal. The court found that,

33. See id. at 383.
34. See id.
35. See id. at 384.
36. See id.
37. See id.
38. See id. at 388.
39. See id. at 385. Although the fact that Atwater failed to buckle her children, putting them at risk, would undercut this point, none of the courts which heard this case discussed this aspect of the incident. Rather, they only discussed the fact that Gail Atwater failed to buckle herself.
41. See id. at 47.
42. Texas law authorizes, but does not require, the arrest of an individual violating the seatbelt law. See Tex. Transp. Code Ann. § 543.001 (1999).
43. See Atwater, 165 F.3d at 386.
44. See id.
45. See id. at 387.
46. One comment plausibly suggests that even the Texas legislature did not intend for anyone to be arrested for failing to comply with the seatbelt law. See Tamra J. Carsten, Comment,
"[t]he only reason to arrest Atwater instead of issuing her a citation under these circumstances was to harass and impose a level of punishment beyond the limitations of the statute. We cannot countenance such abuse from an officer of the law."  

The Fifth Circuit, en banc, vacated the panel’s decision and granted a rehearing. In a terse majority opinion, the Fifth Circuit now upheld the district court decision. The Fifth Circuit found that, "because [the arrest] was based on probable cause and because it was not conducted in . . . [an] ‘extraordinary manner,’ Officer Turek’s arrest of Atwater was reasonable under the Fourth Amendment." The en banc majority reasoned that if an officer has probable cause to arrest, only in the most


47. Atwater, 165 F.3d at 388.

48. See Atwater v. City of Lago Vista, 171 F.3d 258 (5th Cir. 1999) (vacating the panel’s decision).

49. The majority’s opinion is seven paragraphs long (or short). See Atwater v. City of Lago Vista, 195 F.3d 242, 244-46 (5th Cir. 1999), aff’d, 532 U.S. 318 (2001). "The majority opinion for the en banc court is a model of tight-lipped Texan terseness." Hirsch & Markus, supra note 15, at 47 (footnote omitted).

50. See Atwater, 195 F.3d at 246.

51. Id. (quoting Whren v. United States, 517 U.S. 806, 818 (1996)) (emphasis added).

52. The significance of the fact that Officer Turek had probable cause to arrest, in that he witnessed Atwater commit a crime in his presence, is given different treatment in both Fifth Circuit opinions as well as the Supreme Court opinion. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Atwater v. City of Lago Vista, 195 F.3d 242, 245 (5th Cir. 1999), aff’d, 532 U.S. 318 (2001); Atwater v. City of Lago Vista, 165 F.3d 380, 384 (5th Cir.), reh’g granted, 171 F.3d 258 (5th Cir.), and rev’d en banc, 195 F.3d 242 (5th Cir. 1999). The interaction between the Fourth Amendment reasonableness test and the existence of probable cause, could probably constitute an entire note on its own. The issue of probable cause and warrantless arrest came before the Supreme Court after Atwater. See Arkansas v. Sullivan, 532 U.S. 769, (2001). In this case, an individual had been arrested for speeding, driving without a registration or insurance card, carrying a roofing hatchet, and improper window tainting. See id. at 770. The Court supported its Atwater conclusion and found that with probable cause, an officer’s discretion to arrest is unlimited. See id. at 773 (Ginsburg, J., concurring). At the same time, the concurring opinion of Justice Ginsburg, joined by the same Justices that made up the dissent in Atwater (Justices O’Connor, Stevens and Breyer) noted: "[I]f experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests,’ I hope the Court will reconsider its recent precedent." Id. (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 353 (2001)). Some would argue that the “epidemic” of “senseless” arrests has already begun. See Frank J. Murray, Minor Crimes Split Courts on Rights, WASH. TIMES, Mar. 17, 2002, at A3 ("Robert C. DeCarli, the Austin, Texas, lawyer who lost the Atwater case... filed statistics with the high court showing an estimated quarter-million [minor arrests] are made nationwide every year."). Also discussed in this article is People v. McKay, 41 P.3d 59 (Cal. 2002). In McKay, an individual was arrested for riding his bicycle on the wrong side of a residential street. See id. at 63. The court held, pursuant to Atwater v. City of Lago Vista, “there is nothing inherently unconstitutional about effecting a custodial arrest for a fine only offense.” Id. at 64. See also Linda Greenhouse, Divided Justices Back Full Arrests on Minor Charges, N.Y. TIMES, Apr. 25, 2001, at A1.

http://scholarlycommons.law.hofstra.edu/hlr/vol31/iss1/7
extraordinary of circumstances will such an arrest be found to violate the Fourth Amendment rights of an individual.\textsuperscript{53} The Supreme Court has defined "extraordinary" in the Fourth Amendment context as a seizure involving deadly force, unannounced entry into the home, entry into the home without a warrant, or physical penetration of the body.\textsuperscript{54} The court concluded no such "extraordinary" circumstances were present in Gail Atwater's case.\textsuperscript{55}

In dissent, Judge Wiener used both facts and legal argument to reach a contrary conclusion.\textsuperscript{56} His analysis of the facts led him to speculate whether Officer Turek was seeking to settle a personal grudge against Atwater.\textsuperscript{57} Prior to the March 1997 arrest of Gail Atwater, Officer Turek had pulled her over once before.\textsuperscript{58} On this occasion Officer Turek thought Atwater had failed to secure her child in a seatbelt, but was surprised to find that the child was, indeed, wearing a seatbelt.\textsuperscript{59} Turek let Atwater continue on her way, without issuing a citation or making an arrest.\textsuperscript{60}

Turning to Judge Wiener's legal argument, he analyzed the reasonableness of the arrest under three criteria: the government's interest in effecting the seizure; the degree of certainty that the seizure would in fact further the governmental interest; and the extent of the infringement on the individual's constitutionally protected liberties.\textsuperscript{51} The Judge concluded that such a balancing here would result in finding that the arrest was objectively unreasonable because of the pervasive intrusion on Atwater's liberty measured against the countervailing interest of society in securing her arrest for the seatbelt violation.\textsuperscript{52} Legitimate interests to consider in making a custodial arrest, Judge Wiener observed, are to prevent flight, the need to interrogate or search an individual, and the need to protect the community from a threat of

\textsuperscript{53} See Atwater, 195 F.3d at 244.
\textsuperscript{54} See Whren v. United States, 517 U.S. 806, 818 (1996).
\textsuperscript{55} See Atwater, 195 F.3d at 246.
\textsuperscript{56} See id. at 247-51 (Wiener, J., dissenting).
\textsuperscript{57} See id. at 248 (Wiener, J., dissenting).
\textsuperscript{58} See id. (Wiener, J., dissenting).
\textsuperscript{59} See id. (Wiener, J., dissenting).
\textsuperscript{60} See id. Ironcally, Officer Turek failed to seatbelt Atwater in the squad car. See Atwater v. City of Lago Vista, No. A-97 CA 679, at 57a (W.D. Tex. filed Feb. 13, 1999) (unpublished opinion on file with the author).
\textsuperscript{61} See Atwater, 195 F.3d at 248-49 (Wiener, J., dissenting).
\textsuperscript{62} See id. at 249-50 (Wiener, J., dissenting).
harm that the individual poses. Judge Wiener’s dissent concluded that none of these interests were served by the arrest of Gail Atwater.

Separately, Judge Garza observed, in his dissent, that Officer Turek may not have been the best candidate to qualify as a police officer in the first place. A member of the Recruitment Unit of the Austin Police Department submitted an affidavit indicating that, after reviewing Turek’s personnel file, he would not have recommended Turek for hire because of his lack of maturity, evidenced by his reasons for leaving previous employment, his failure of two out of three reported psychological tests at the Austin Police Department, and his failure to give complete information to the department.

3. The Supreme Court

In April of 2001, the Supreme Court issued its 5-4 opinion in favor of the City of Lago Vista. Justice Souter wrote for a majority that included Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Justices Stevens, Ginsburg and Breyer joined Justice O’Connor’s dissent.

The question posed to the Court was “whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine.” The Court first turned to Atwater’s argument that police officers’ authority to make warrantless arrests for misdemeanors was restricted at common law. The majority here went into a lengthy historical discussion, concluding that neither the common law nor early American history unequivocally supported Atwater’s position that misdemeanor arrests were limited to “breach of the peace” instances.

63. See id. at 250 (Wiener, J., dissenting); see also infra notes 231-40 and accompanying text.
64. See id. at 250 (Wiener, J., dissenting).
65. See id. at 247 (Garza, J., dissenting).
66. See id. (Garza, J., dissenting).
68. See id. at 322.
69. See id.
70. Id. at 323.
71. See id. at 326-27.
72. See id. at 326-46. Professor LaFave would disagree with the Supreme Court: “A warrant was required except when a breach of the peace occurred in the presence of the arresting officer.” 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, § 5.1, at 13 (3d ed. 1996). For a thorough analysis of the Supreme Court’s historical arguments, see Davies, supra note 15. The article argues that: [Justice] Souter’s claims bear little resemblance to authentic framing-era arrest doctrine . . . his supposed historical analysis consisted almost entirely of rhetorical ploys and distortions of historical sources. The historical authorities regarding arrest authority
Second, the Court addressed Atwater's argument that a modern arrest rule should be adopted that forbids custodial arrest, even upon probable cause, when conviction could not result in incarceration and the government fails to show compelling need for immediate detention. The Court noted that if such a rule were applied to the Atwater facts, she could very well win. However, the Court rejected such a broad-brush rule on the ground that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." The justification offered for avoiding ad hoc decision-making in this instance is that it would be difficult for the officer on the street to know which crimes are and which are not punishable with incarceration. The Court concluded that "the standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.'" An officer can arrest without violating the Constitution whenever he witnesses even a very minor criminal offense committed in his presence.

actually show that warrantless misdemeanor arrests for minor offenses were usually unlawful, except in some categories of minor offenses that gave rise to an unusual need for a prompt arrest . . . .

Id. at 246. Interestingly, Davies' historical research revealed that the framers envisioned due process protections to apply to arrest standards. See id. at 394.

73. See Atwater, 532 U.S. at 346.
74. See id.
75. Id. at 347.
76. See id. at 348. This conclusion that an officer would not, and should not, be expected to know which offenses may result in incarceration has been disputed by Leading Case, 115 HARV. L. REV. 306, 340 (2001). "If the determination whether a particular crime is statutorily arrestable falls within the competence of police officers (as most criminal codes assume), it is not clear why it would exceed their competence to learn which crimes are statutorily jailable and thus constitutionally arrestable." Id. (footnote omitted).


A police officer may arrest a person if he has probable cause to believe that person committed a crime. Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.

Id. at 7-8 (internal quotations and citations omitted). While the Court in Atwater seems to be ending the inquiry with the determination that probable cause exists, this precedent suggests that there is still a need to conduct the reasonableness inquiry.

78. See Atwater, 532 U.S. at 354.
Justice O’Connor dissented on the ground that the balancing test required by the Fourth Amendment weighs in favor of Ms. Atwater. According to Justice O’Connor, reviewing the appropriate factors, specifically the state’s interest in effecting the arrest in this particular circumstance, points strongly toward the conclusion that the arrest was unreasonable. Furthermore, Justice O’Connor would adopt a new rule 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.

Justice O’Connor also observed that the city’s arguments as to why the arrest was necessary were meritless. The city argued that the arrest promoted the enforcement of child safety laws and encouraged Atwater to appear for trial. However, Justice O’Connor believed it would have been more productive to issue a citation to teach Atwater to secure her children in seatbelts. Furthermore, Atwater was an established resident of the community, not a flight risk for a seatbelt violation.

III. SUBSTANTIVE DUE PROCESS—AN OVERVIEW

A. Atwater’s Substantive Due Process Claim

In Atwater’s initial complaint, filed in the district court, she claimed that her due process rights had been violated. This claim was dismissed along with all her other claims when Judge Sparks granted summary judgment for the City of Lago Vista.
When the panel for the Fifth Circuit looked at the case, it considered Atwater's Fourth Amendment claim and no other, because the panel believed that was the only meritorious claim. The later Fifth Circuit decision, en banc, as well as the Supreme Court case, also considered only Atwater's Fourth Amendment claim. Thus, the Court of Appeals for the Fifth Circuit and the Supreme Court overlooked the substantive due process claim, which requires further discussion. The current standards that the Court applies in evaluating executive action under the rubric of substantive due process make the Atwater facts, at the very least, a close case.

Whether an arrest for the violation of a fine only traffic offense violates the Constitution is not a new question. However, in the past, such questions were usually addressed in the context of the Fourth Amendment. Now, since that Fourth Amendment issue has been firmly settled, a closer look at substantive due process protections should be undertaken.

B. Substantive Due Process—A Controversial Concept

Substantive due process review can be defined as "[t]he doctrine that the Due Process Clauses of the 5th and 14th Amendments require legislation to be fair and reasonable in content and to further a legitimate governmental objective." Courts have used substantive due process

89. See Atwater, 165 F.3d at 384 n2.
91. See infra Part V.
92. See generally Salken, supra note 12.
93. See id. at 140-53.
94. At least one other commentator writing on this subject has suggested applying due process principles to arrests for minor traffic offenses.

[C]hose making arrests do not share the Court's vision of arrests as inextricably linked to prosecution. Instead, police increasingly use arrests for a variety of other ends including deterrence, retribution, and order-maintenance—ends which are essentially indistinguishable from those of punishment.... Delinked as a practice from criminal prosecution, arrests merit less justification and receive less regulation. These factors in turn undercut the rationale for not subjecting all arrests, like other government deprivations of liberty, to due process review.

Leading Case, supra note 76, at 344. In 1973, Justice Stewart remarked, "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner [Gustafson] for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." Gustafson v. Florida, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring).

95. BLACK'S LAW DICTIONARY 517 (7th ed. 1999). This definition, however, fails to take into account that executive actions can also be reviewed. Cf. 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 14.6, at 530 (3d ed. 1999) ("By 'substantive
review to hold legislative and executive actions unconstitutional when they violate natural or fundamental rights. The use of the substantive due process doctrine by the courts continues to be controversial. On one side of the dispute are commentators such as John Hart Ely who believe that substantive due process is a contradiction in terms. Professor Ely points out that nothing in the text of the Due Process Clause authorizes a court to undertake substantive review. A major concern with applying substantive due process is that the judiciary is imposing its personal beliefs over those of the elected legislature. The Supreme Court has nonetheless continued to use the doctrine of

96. Belief in the existence of "natural rights" predates the establishment of the American republic. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-1, at 1335 (3d ed. 2000). Natural rights, such as personal security, personal liberty and private property, could not be infringed upon by the government acting within its rightful jurisdiction. See id. at 1336. Such rights are "inherent," and belong to the citizens by virtue of their citizenship. See id.

97. See, e.g., Roe v. Wade, 410 U.S. 113 (1973). In Roe, the Supreme Court held that the right of privacy founded in the Fourteenth Amendment's concept of personal liberty covered a woman's decision to terminate her pregnancy. See id. at 153. The Court also stated it is "clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." Id. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

98. "The doctrine of substantive due process is notorious both for the controversy that perennially surrounds it and the unusual degree of analytical confusion that it generates." Robert Chesney, Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action, 50 SYRACUSE L. REV. 981, 981-82 (2000) (footnotes omitted); see also Rochin v. California, 342 U.S. 165, 172 (1952).

99. JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (Harv. Univ. Press 1980). Professor Ely opines that substantive due process is a contradiction in terms much like "green pastel redness." Id. Professor Ely believes that the Fourteenth Amendment only authorized the Court to review procedures, and that substantive review is "probably wrong." Id. at 15. However, Professor Ely does admit that "one cannot absolutely exclude the possibility that some [framers of the Fourteenth Amendment]... had the question been put, would have agreed that the Due Process Clause they were including could be given an occasional substantive interpretation." Id. at 16.

100. See id. at 16 ("[T]he most important datum bearing on what was intended is the constitutional language itself.").

101. Justice Black believes that courts should not have the power to review substantive matters under the Due Process Clause; such power would be inconsistent with the Constitution. Justice Black stated, "[T]he 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."

The current Supreme Court majority does not appear to have any real affection for the substantive due process doctrine. Chief Justice Rehnquist, writing for the majority in *Albright v. Oliver*, noted: “[T]he Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” Justice Scalia, concurring in *Albright*, would go even a step (of a leap) further. He would advocate the abolishment of all unenumerated substantive due process rights while retaining the procedural aspects of the Due Process Clause.

Of particular importance to this discussion is the Supreme Court’s treatment of substantive due process claims arising in the executive action context. The Court has stated that the core of a substantive due process inquiry in this setting is “protection against arbitrary action.” The Court has developed a standard in this context that requires a governmental action to “shock[ ] the conscience” to be deemed “arbitrary” in the constitutional sense.

*Atwater* is a good case for a substantive due process review because it involves arbitrary government action. Officer Turek made a deliberate decision to arrest Gail Atwater. The arrest was not required by the statute. Officer Turek *chose* to arrest Gail Atwater instead of issuing a citation. Additionally, it should be noted that the liberty at
issue in Gail Atwater’s case, freedom from physical restraint, is properly characterized as a “fundamental” right.109

C. Substantive Due Process in the Executive Setting—The Origination of the “Shocks the Conscience” Standard

1. Rochin v. California110

Although it has traveled a somewhat tumultuous path, the standard by which executive action is judged in the substantive due process context can be traced back to Rochin v. California.111 The facts of Rochin are relatively simple. Three deputy sheriffs of Los Angeles County, acting on information that Rochin was selling narcotics, entered his home on July 1, 1949.112 The deputies found Rochin and spied two capsules beside the bed next to him.113 Rochin quickly ingested the capsules.114 After the police were unable to manually retrieve the capsules, they took Rochin to a doctor where a stomach pumping procedure was performed.115 Rochin was induced to vomit and the officers recovered the two capsules, which were found to contain morphine.116

The Court was faced with the question as to what limitations they were required to put on the conduct of the states in light of the protections of the Due Process Clause.117 Although the Court realized that the contours of the Due Process Clause were “indefinite and vague,” they were still forced to announce a standard by which to judge executive action.118 The Court reasoned that due process requires:

an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc

109. It should be noted that the “liberty” contemplated by the language of the Fifth Amendment’s Due Process Clause, entails, at the least, freedom from bodily restraint. See Charles Warren, The New “Liberty” Under the Fourteenth Amendment, 39 HARV. L. REV. 431, 440 (1925-1926).
111. See id. at 173.
112. See id. at 166.
113. See id.
114. See id.
115. See id.
116. See id.
117. See id. at 166.
118. Id. at 172.
and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society."119

The Court concluded, in light of an evaluation of the facts of the case, that the executive action in question "shock[ed] the conscience."120

2. The Evolution of Substantive Due Process in the Supreme Court Since Rochin

Following Rochin, the Court tackled the issue of what exactly would and would not constitute a substantive due process violation in the executive setting.121 An act of negligence will not rise to the level of a substantive due process violation.122 In Daniels v. Williams, an inmate in a local jail slipped and fell on a pillow negligently left on the stairs by a corrections officer.123 The Court observed that the history of the Due Process Clause indicates that it has only been applied to situations where the government has acted deliberately to injure a plaintiff, and not negligently.124 Therefore, negligent conduct by a state official causing injury does not amount to a due process violation.125

Although the application of the "shocks the conscience" test may not have been uniform after Rochin, the Court once again applied this standard in holding that another negligence-based claim did not amount to a substantive due process violation.126 In Collins v. City of Harker Heights, the Supreme Court found that the failure to provide a reasonably safe work environment did not constitute a substantive due process violation.127 In Collins, an employee in the Texas sanitation department died after entering a manhole to unstop a sewer line.128 The plaintiff's estate alleged that his substantive due process rights were

119. Id. (citation omitted).
120. Id. For a discussion of the plight of the "shocks the conscience" standard, see Matthew D. Umhofer, Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting, 41 SANTA CLARA L. REV. 437, 455-76 (2001).
121. See, e.g., Daniels v. Williams, 474 U.S. 327 (1986).
122. See id. at 328.
123. See id.
124. See id. at 331.
125. See id. at 336.
126. See Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992). See also Umhofer, supra note 120, at 462. Umhofer observes that "[t]he shocks the conscience standard was rarely mentioned after Rochin . . . [a]fter a long period of dormancy, the shocks the conscience test resurfaced in Collins v. City of Harker Heights. Id. However, the Supreme Court has disagreed. See County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) ("[I]n the intervening years we have repeatedly adhered to Rochin's benchmark.").
127. See Collins, 503 U.S. at 128.
128. See id. at 117.
violated because the city deprived him of life due to its failure to provide a reasonably safe work environment. The Court quickly concluded, "we... are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."

The Court has stopped short of requiring deliberate action in all executive action cases in order to substantiate a due process violation. When asserting a section 1983 claim that a police officer's lack of training amounts to a due process violation, a plaintiff must show "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." In City of Canton v. Harris, the Supreme Court remanded the case to determine if the failure to provide medical attention to an arrestee met the threshold of deliberate indifference as to the adequacy of the training provided by the municipality. More recently, the Court again addressed the issue of executive action and substantive due process in County of Sacramento v. Lewis.

D. The Modern Formulation of Substantive Due Process in the Executive Setting

County of Sacramento v. Lewis held that different levels of "deliberateness" will be required when attempting to prove a substantive due process violation. In County of Sacramento, a police officer witnessed two youths operating a motorcycle at a high rate of speed and the officer decided to give chase. Both the motorcycle and the patrol car reached speeds of up to 100 miles per hour during this brief, seventy-five second pursuit. The chase ended as the motorcycle tipped over after attempting a sharp left turn. The officer was unable to stop in time to avoid hitting and killing the sixteen year old, Philip Lewis, who was riding on the back of the motorcycle.

129. See id. at 126.
130. Id. at 128.
132. Id.
133. See id. at 392.
135. See generally id. at 836-56.
136. See id. at 836.
137. See id. at 837.
138. See id.
139. See id.
In evaluating the Lewis' claim that Philip's substantive due process rights had been violated, the Court reiterated that the correct standard was whether the police action in question "shocks the conscience." The Court also went further than it had in the past to discuss what circumstances would and would not support a due process violation. It noted "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." But, the Court also ruled that there was "behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."

The Court applied a time-based inquiry in evaluating whether the officer violated Lewis' substantive due process rights. If the actor has sufficient time to deliberate about his actions, the test then asks if the actor was deliberately indifferent to the plaintiff's well-being. If he was, liability attaches; if not, no liability attaches. If the actor did not have time to deliberate, only a intent to injure the plaintiff will be sufficient for liability to attach. The Court held that when an incident occurs during a high-speed chase, in which there is little time for deliberation, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience...." With little time to deliberate and no intent to

140. See id. at 848-49.
141. See id.
142. Id. at 849.
143. Id. Nowak and Rotunda suggest that three categories of official conduct exist. In the first, negligently inflicted harm which never could "shock the conscience." Second is a middle range, conduct more than negligent but less than intentional. Here, a case-by-case analysis is necessary to determine if the action "shocked the conscience." Finally, intentional infliction of injury to persons by a government official was the most culpable. See ROTUNDA & NOWAK, supra note 95, at 564.
144. See Unhofer, supra note 120, at 448-49.
145. See id. at 449.
146. See id.
147. See id.
harm Philip Lewis, the officer's actions in this case did not shock the conscience of the Court.\textsuperscript{149}

Depending on the facts and circumstances of the case, what may "shock the conscience" in one context may not suffice in another.\textsuperscript{150} The most important factor seems to be the time element. The Court provided the example that when a prison riot occurs, the police will be given a high level of deference because of the necessity to restore order.\textsuperscript{151} Similarly, in a high speed chase, the police will also be given a high level of deference.\textsuperscript{152}

IV. INITIAL HURDLES IN THE CONSTITUTIONAL ARGUMENT

A. Graham v. Connor

The Supreme Court, in Graham v. Connor\textsuperscript{153}, took a restrictive step in effectuating rights under substantive due process.\textsuperscript{154} In Graham, the Court held that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach."\textsuperscript{155}

In Graham, Dethorne Graham, a diabetic, requested that a friend drive him to a nearby convenience store to purchase orange juice to counteract an insulin reaction.\textsuperscript{156} When faced with a long line of patrons at the convenience store, Graham quickly departed and urged the friend to drive him to another location to acquire the juice.\textsuperscript{157} An officer observed the actions of Graham at the store, became suspicious, and eventually pulled the car over.\textsuperscript{158} The encounter quickly spun out of

\textsuperscript{149} See id. The lower courts have applied the framework enunciated in County of Sacramento. See Leamer v. Fauver, 288 F.3d 532, 546-47 (3d Cir. 2002); Brown v. NationsBank Corp., 188 F.3d 579, 591-92 (5th Cir. 1999).

\textsuperscript{150} See County of Sacramento, 523 U.S. at 850.

\textsuperscript{151} See id. at 852-53.

\textsuperscript{152} See id. at 853.

\textsuperscript{153} See id. at 859.

\textsuperscript{154} See Toni M. Massaro, Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process, 73 N.Y.U. L. REV. 1086, 1121 (1998). Massaro states, "Graham is a tiny tail, but it may wag a very big dog, insofar as it is best read as a renunciation of judicial authority to define or craft any uncharted rights under substantive due process." Id. (emphasis omitted).

\textsuperscript{155} Graham, 490 U.S. at 395.

\textsuperscript{156} See id. at 388.

\textsuperscript{157} See id. at 388-89.

\textsuperscript{158} See id. at 389.
control; a physical altercation ensued and the officers accused Graham of being intoxicated. As a result of the incident, Graham suffered a broken foot, lacerations on his wrist, a bruised forehead, and an injured shoulder.

In pursuit of redress, Graham brought an excessive force claim under 42 U.S.C. § 1983. On review, the Supreme Court stated that because section 1983 is not a source of substantive rights in itself, but merely vindicates rights elsewhere conferred, an analysis under the section must begin with an identification of the specific constitutional right infringed. The validity of the claim must then be measured in reference to the specific constitutional standard which governs the right, rather than a generalized excessive force standard.

Thus, the Court held that because of the nature of the situation that arose in Graham—an excessive force claim in the context of an investigatory stop—a Fourth Amendment analysis is proper. As a result, a substantive due process analysis is foreclosed. The Court stated that, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

In his concurrence, Justice Blackmun stated: "I see no reason for the Court to find it necessary further to reach out to decide that prearrest excessive force claims are to be analyzed under the Fourth Amendment rather than under a substantive due process standard."

Justice Blackmun, who was joined by Justices Brennan and Marshall, found that because the respondents in this case acknowledged that the case arose

159. See id.
160. See id. at 390.
161. See id. at 394; 42 U.S.C. § 1983 states in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
162. See Graham, 490 U.S. at 393-94.
163. See id. at 394.
164. See id.
165. See id.
166. Id. at 395.
under the Fourth Amendment, there was no need to go further.\textsuperscript{168} Justice Blackmun would have ended the inquiry by stating that since both parties acknowledge the protections of the Fourth Amendment apply, that was the appropriate test in this specific case.\textsuperscript{169} Patently, he did not want to foreclose the possibility of a substantive due process inquiry in other prearrest cases, and Justice Blackmun's concurrence has been aptly described as posing the question whether a substantive due process claim should be allowed as an alternative basis for recovery in excessive force cases.\textsuperscript{170}

\section{B. The Expansion of Graham}

Initially, the question arose as to whether the \textit{Graham} rule should be limited to excessive force claims in the Fourth Amendment context, or whether the rule should be construed more broadly. The Supreme Court answered the question in favor of the latter approach over the next decade.\textsuperscript{171} Nevertheless, some uncertainty still exists as to the scope of the \textit{Graham} rule, though it has become obvious that the rule will not be a narrow one. One article, written shortly after the decision, suggested that the \textit{Graham} holding was quite narrow, and that "[i]t did not purport to apply beyond law enforcement excessive force where the [F]ourth [A]mendment is not properly invoked."\textsuperscript{172} Now, however, it appears as if \textit{Graham} will be applied to all substantive due process claims where a more specific constitutional right can be identified.\textsuperscript{173}

1. The Justification for \textit{Graham} Revisited in the Excessive Force Context

In \textit{Saucier v. Katz},\textsuperscript{174} the Court again had occasion to explain the rationale for the \textit{Graham} rule in the excessive force context.\textsuperscript{175} In \textit{Saucier}, a protestor was shoved into a van by security forces when he walked toward the Vice President at a public speaking engagement.\textsuperscript{176}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{168} See id. at 400 (Blackmun, J., concurring).
\item\textsuperscript{169} See id. (Blackmun, J., concurring).
\item\textsuperscript{170} See id. (Blackmun, J., concurring); J. Michael McGuinness and Lisa A. McGuinness Parlagreco, \textit{The Reemergence of Substantive Due Process as Constitutional Tort: Theory, Proof, and Damages}, 24 NEW ENGL. L. REV. 1129, 1157 (1990).
\item\textsuperscript{172} McGuinness & McGuinness Parlagreco, \textit{supra} note 170, at 1156.
\item\textsuperscript{173} See Massaro, \textit{supra} note 154, at 1089.
\item\textsuperscript{174} 533 U.S. 194 (2001).
\item\textsuperscript{175} See id. at 205.
\item\textsuperscript{176} See id. at 198.
\end{enumerate}
\end{footnotesize}
The protestor subsequently brought suit alleging the excessive use of force by law enforcement.\textsuperscript{177}

Justice Kennedy offered a narrow explanation for the \textit{Graham} rule.\textsuperscript{178} In the context of an excessive force case, Justice Kennedy opined that a Fourth Amendment standard rather than a substantive due process test is correct because law enforcement officials are often forced to make quick decisions.\textsuperscript{179} Such decisions should not be judged in hindsight, but with the appropriate level of deference considering the circumstances at hand.\textsuperscript{180}

Justice Kennedy’s reasoning can be reconciled with the majority’s holding in \textit{Graham}. In \textit{Graham}, the majority stated “the ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”\textsuperscript{181} While it may be sensible to take into account the circumstances of the incident when evaluating the appropriateness of a police officers actions, there is no reason to reach the conclusion that a substantive due process inquiry wouldn’t serve just as effectively here.

The Court in \textit{County of Sacramento} clearly indicated that the first question in the substantive due process inquiry was whether the actor had time to deliberate; the standard of culpability is then adjusted accordingly.\textsuperscript{182} While Justice Kennedy appropriately believes that police officer’s need a level of deference when confronted with a situation where a quick decision is required, his conclusion that a Fourth Amendment analysis is necessary is unpersuasive. Both a substantive due process inquiry as well as a Fourth Amendment analysis supply an appropriate level of deference to an officer’s circumstances.

2. The Expansion of \textit{Graham} Beyond Excessive Force

The Supreme Court has applied the \textit{Graham} rule in a malicious prosecution case, and has also considered its application to a case involving the seizure of property.\textsuperscript{183} In \textit{Albright v. Oliver}, the Court found that a wrongful prosecution case brought under 42 U.S.C. § 1983

\begin{itemize}
  \item \textsuperscript{177} See \textit{id.} at 199.
  \item \textsuperscript{178} See \textit{id.} at 205.
  \item \textsuperscript{179} See \textit{id.}
  \item \textsuperscript{180} See \textit{id.}
  \item \textsuperscript{181} Graham v. Connor, 490 U.S. 386, 397 (1989).
  \item \textsuperscript{182} See supra Part III.D.
\end{itemize}
needs to be analyzed under the Fourth Amendment rather than substantive due process. In that case, Albright turned himself over to authorities after learning a warrant had been issued for his arrest. The warrant had been issued on the basis of information provided by an unreliable informant. At a preliminary hearing, the court found probable cause to bind Albright over for trial. At a later pretrial hearing, the court dismissed the underlying accusatory instrument.

Albright then brought suit under section 1983 alleging that his substantive due process rights under the Fourteenth Amendment had been violated because he was prosecuted without probable cause. The Supreme Court found that the framers envisioned the Fourth Amendment to protect against pretrial deprivations of liberty. Therefore, his suit would have to proceed under the Fourth Amendment, not a substantive due process claim, in order to comply with the Graham guideline. The Court found that, incorporating some of the language from the Graham holding and expanding the rule’s applicability from the Fourth Amendment to any amendment “[w]here [the] particular amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’” The dicta in Graham, suggesting that the rule would apply to any amendment, thus became the holding in Albright.

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185. See Albright, 510 U.S. at 268.
186. Regarding the informant, [O]f the fifty people she identified as dealers, none were successfully prosecuted for any crime. The Court of Appeals, noting that [the informant] was using her informant’s reward money to buy cocaine for her own use, commented that [the supervising officer] should have suspected [the informant] was keeping the drugs she bought with his money and giving him random names from a phone book.
187. See Albright, 510 U.S. at 269.
188. See id.
189. See id.
190. See id. at 274.
191. See id. at 273-74.
192. Id. at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).
193. See Graham, 490 U.S. at 394-95.
As noted above, the Supreme Court has also considered applying *Graham* in a case involving the seizure of property.\(^{194}\) In *United States v. James Daniel Good Real Property*, the government argued that because a seizure was involved, only a Fourth Amendment claim, not a procedural due process claim, could proceed in light of the *Graham* rule.\(^{195}\) However, the Court found that *Graham* does not support "the proposition that the Fourth Amendment is the beginning and end of the constitutional inquiry whenever a seizure occurs."\(^{196}\) The Court here concluded that when the government seizes property to assert ownership and control rather than to preserve evidence of wrongdoing, the government action must comply with the procedural due process aspects of the Fifth and Fourteenth Amendments.\(^{197}\)

3. When Does the Court Apply *Graham*?

When discussing *James Daniel Good Real Property*, it is important to note the rationale the Court used in determining that it would not apply the *Graham* rule. The Court reasoned that because the "purpose and effect" of the government action in this case went beyond the "traditional meaning of search and seizure," the plaintiff was not limited to a Fourth Amendment claim.\(^{198}\) If the government had seized the property to preserve it as evidence of wrongdoing against an entity, then the United States may have a valid argument that the plaintiff should be limited to a Fourth Amendment claim.\(^{199}\) However, because the property was seized with the intent to assert ownership and control (an aspect of seizure outside of the traditional Fourth Amendment purpose) the plaintiff was allowed to proceed on *both* the Fourth Amendment and procedural due process claims.\(^{200}\) Although the government's argument that *Graham* should control failed in this case, the willingness of the Court to consider the argument demonstrates the readiness of the Court to apply *Graham* to cases involving the seizure of property as well as persons.

The Supreme Court has consistently turned to an analysis of the historical basis of the plaintiff's claim in determining whether to apply *Graham*. Thus, the Court has resorted to a historical recitation in

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195. See id. at 50.
196. Id. at 51.
197. See id. at 52.
198. Id.
199. See id.
200. See id.
Graham, Albright, and James Daniel Good Real Property. In Graham, the Court found that the history of the Fourth Amendment illustrates that it covers excessive force claims arising in the context of an investigatory stop. In Albright, the Court went all the way back to the Framers to conclude that the claim of malicious prosecution was traditionally one arising under the Fourth Amendment. And in James Daniel Good Real Property, it was held that the seizure of property by the government to assert ownership was outside the traditional scope of the Fourth Amendment.

The Court has used an historical analysis in determining whether to apply Graham as recently as 1998. In County of Sacramento v. Lewis, the Supreme Court allowed the plaintiff to proceed with his substantive due process argument and concluded that he did not have to bring his claim under the Fourth Amendment despite the Graham rule. The Court found that a police pursuit with the intention of seizing the suspects does not amount to an actual seizure within the meaning of the Fourth Amendment. Once again, the Court turned to the traditional meaning of the Fourth Amendment to determine if the current factual pattern should be covered by one amendment, or if more than one constitutional claim should be permitted. Therefore, because no specific constitutional provision was on point to preempt the substantive due process claim, the argument could proceed.

C. Would Graham Foreclose a Substantive Due Process Claim in Atwater?

The expansive reading given to Graham by the Court has caused at least one commentator to describe the rule as a “threat to the continued validity of substantive due process analysis.” Now, if a substantive due process claim merely “brush[es] up” against another constitutional provision, the Court would have the discretion to foreclose the claim.

205. See id.
206. See id. at 843-44.
207. See id.
208. Umhofer, supra note 120, at 452.
209. Id.
In fact, the lower courts have applied the *Graham* rule in the context of First, Fourth, Fifth and Eighth Amendment cases. Professor Massaro has provided the fullest and clearest criticisms of *Graham* to date. Among other reservations, he has noted that *Graham* limits the number of constitutional claims that a plaintiff may bring. In doing so, the Court has violated its “well-established interpretative principle that multiple constitutional claims may apply to a given scenario.”

Turning to the case at bar, a classic seizure was involved in the *Atwater* case, in that Gail Atwater was pulled over for a traffic violation and subsequently arrested. The only strong factual difference between *Graham* and *Atwater* is that Atwater did not allege Officer Turek used excessive force during the arrest. This fact, standing alone, would probably not be enough to take the case out of the *Graham* limitation. The absence of an excessive force allegation does not change or affect the fact that Atwater was challenging her arrest, a classic seizure within the meaning of the Fourth Amendment. Such a minor factual difference does not change the scope of the rule, nor would it have any impact on an historical analysis of the plaintiff’s claim. Therefore, *Graham* would appear to prohibit a substantive due process claim on the *Atwater* facts.

The question then emerges, is anything lost by the imposition of the *Graham* rule on the *Atwater* facts? The answer, I believe, is a resounding “yes.” Professor Massaro correctly anticipated this situation when he stated: “[C]ases that invoke *Graham* do so to disallow a substantive due process inquiry, usually where the preferred specific textual provision yields little or no protection for the party invoking it.” The Fourth Amendment did not provide the protection that Atwater was seeking in her case.

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210. See Massaro, supra note 154, at 1088; See, e.g., Riley v. Dorton, 115 F.3d 1159, 1166 (4th Cir. 1997) (holding excessive force claim of pretrial detainee needed to be brought under Due Process Clause of the Fourteenth Amendment rather than under the Fourth, Fifth, or Eighth Amendments).

211. See Massaro, supra note 154, at 1113.

212. Id.

213. See Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001). Gail Atwater’s arrest was the quintessential seizure. “To constitute an arrest ... the quintessential ‘seizure of the person’ under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.” California v. Hodari D., 499 U.S. 621, 624 (1991).

214. Originally, one of Atwater’s ten claims was excessive force. See Atwater v. City of Lago Vista, 195 F.3d 242, 244, n.1 (5th Cir. 1999), aff’d 532 U.S. 318 (2001). However, this claim was dismissed in the district court and was never to be heard from again in any Fifth Circuit decision or the Supreme Court opinion. See id. at 244.

215. Massaro, supra note 154, at 1091 (emphasis added).
Another commentator has suggested that because the Fourth Amendment standard is generally less rigorous than the substantive due process standard, nothing is lost with the imposition of the *Graham* rule. However, this does not hold true in every instance. In *Atwater*, the existence of probable cause to arrest was a motivating factor for the Supreme Court, and a determinative factor for the court of appeals, in holding that Gail Atwater was not entitled to relief under the Fourth Amendment. The "objective reasonableness" standard the Court applied under the Fourth Amendment provided leniency for the officer's arbitrary decision to arrest. In fact, the Supreme Court has held that "[w]here probable cause has existed, the only cases in which we have found it necessary to actually perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner." Therefore, since Atwater would have no real legitimate claim that her arrest was "extraordinary," the Court would not even be forced to conduct the balancing test the Fourth Amendment requires.

Conversely, the substantive due process test would call into question the "arbitrariness" of Officer Turek's arrest of a first time seatbelt offender, instead of giving his decision deference. This is true because the first aspect of the substantive due process inquiry asks whether the police officer had time to deliberate about his actions; then, the standard of culpability is adjusted accordingly.

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216. See McGuinness & McGuinness Parlagreco, *supra* note 170, at 1157. Again, it must be remembered that the McGuinness' were writing shortly after the enunciation of the *Graham* rule and probably could not imagine the expansive reading the Court would eventually give the rule.


218. See *id*.


220. See *Atwater*, 195 F.3d at 246. *Atwater* hasn't alleged anything that could sufficiently prove the arrest was "extraordinary" in this sense of the word.

221. See *supra* note 144 and accompanying text.
V. AN ARREST FOR A MINOR TRAFFIC OFFENSE VIOLATES
SUBSTANTIVE DUE PROCESS

A. Did the Arrest of Gail Atwater Violate the Modern Formulation of
Substantive Due Process?

1. Atwater under the County of Sacramento Test

If the Atwater situation were to be treated as a substantive due
process claim, the test most recently enunciated in County of
Sacramento should guide the analysis.222 County of Sacramento involved
the application of a substantive due process analysis in the executive
setting.223 Atwater’s claim would be that her substantive due process
rights were violated by an executive official, Officer Turek.

The first factor to look at, as the Supreme Court has made clear, is
the time to deliberate element.224 Was Officer Turek forced to make a
split second decision akin to situations involving prison riots or high
speed pursuits?

The question should be answered with a definitive “no.” Officer
Turek was conducting what should have been a routine traffic stop.
Turek had time to thoughtfully consider the appropriate response in the
situation that confronted him.225

Keeping in mind that there was no time pressure, the question next
becomes what level of culpability should be used to determine if Officer
Turek’s actions “shocks the conscience?”226 Again, the Supreme Court
has made clear that when a police officer has sufficient time to consider
his actions, deliberate indifference toward the plaintiff’s well-being may
be sufficient for liability.227 In Atwater, Officer Turek acted with not only
deliberate indifference, but arguably with an intent to humiliate, which
would satisfy not only the deliberate indifference test, but also the intent
to injure required when the officer has no time to deliberate.

Additional facts shed light on Officer Turek’s intent to humiliate
Atwater. As soon as Turek approached Atwater’s vehicle, he immediately yelled something to the effect that, “we’ve met before,” and

222. See supra notes 140-52 and accompanying text.
224. See supra note 144 and accompanying text.
225. While Officer Turek may not have had unlimited time to consider his actions, his situation
was certainly not akin to a prison riot or high speed pursuit. See, e.g., County of Sacramento, 523
U.S. at 852-53.
226. See id. at 848-49.
227. See id. at 850-53.
"you're going to jail." Such an initial hostility from a police officer indicates an alternative agenda other than an equitable enforcement of the traffic law.

2. Probable Cause and the Shocks the Conscience Standard

While it is clear that the existence of probable cause to arrest plays an important part in determining if an arrest was reasonable under the Fourth Amendment, it is unclear how much deference, if any, this factor will receive in a substantive due process inquiry. Surely, it would be one factor to consider in the overall determination of whether the executive action “shocks the conscience” regardless of whether or not it fits neatly into the above-mentioned test.

If Officer Turek had a legitimate reason to arrest Atwater, such a determination may render Atwater’s claim that Turek’s actions “shock the conscience” less forceful. The City of Lago Vista could argue that the presence of probable cause illustrates that Turek was not indifferent toward the well-being of Atwater, but rather the officer was attempting to enforce the traffic law for the benefit of society. Therefore, an inquiry is required to determine if Officer Turek had a legitimate reason to arrest.

Professor Salken opines that the five legitimate purposes of custodial arrest for a traffic offense are: “1) insuring the presence of the suspect to answer charges against him or her; 2) obtaining evidence of the crime of which the suspect is accused; 3) preventing future harm; 4) providing certain social service functions; and 5) maintaining the proper respect for law and the police.”

The Supreme Court has acknowledged that Atwater was in no way a flight risk. Her presence at trial would have been almost a certainty. Furthermore, regarding obtaining evidence, Professor Salken notes that in cases of most traffic infractions, no further evidence could be gained through detention. Preventing future harm is also a legitimate goal of a custodial arrest. However, this goal seems only applicable to cases such as an individual driving while intoxicated, where if issued a citation the offender may continue to drive. Furthermore, even a person

229. See id. at 354.
230. See supra notes 144 and accompanying text.
231. Salken, supra note 12, at 266.
233. See Salken, supra note 12, at 269.
234. See id.
235. See id. at 271.
accused of speeding would prevent a greater threat of harm than a seatbelt offender. A speeder may represent a threat to others, while one failing to wear a seatbelt is only a threat to him or herself. The social service functions that Professor Salken alludes to are also not applicable to arrest for a minor traffic offense. One example of such a function would be the arrest of a fourteen year old for underage drinking in order to return that child to his or her parents.

The best argument that Officer Turek and the City of Lago Vista could advance is that the arrest was necessary to promote a proper respect for law and the police. This argument, however, is defeated by the facts. Even the Supreme Court has acknowledged that Atwater would have “buckled up” as a condition of driving off with a citation rather than ignore the officer. Furthermore, the evidence also indicates that it was Officer Turek who was rude and belligerent throughout the encounter while Atwater attempted to remain calm. The City of Lago Vista would be hard pressed to substantiate any assertion that there was a legitimate reason to arrest Gail Atwater. Absent such a reason, Atwater should not have been arrested despite the fact that she had violated the law by not wearing a seatbelt.

VI. CONCLUSION

It appears that law enforcement officers now have a clear standard on which they can rely. The Supreme Court has said that a warrantless arrest for a fine only traffic offense is permissible in light of the Fourth Amendment. Furthermore, the current trend in the Court to restrict substantive due process claims with the Graham limitation could mean that such warrantless arrests may never be challenged on due process grounds.

There will be some situations in which an arrest for a minor or fine only traffic offense is proper. The facts in Atwater, however, did not support such a conclusion. Gail Atwater should have been issued a citation and allowed to continue on her way. The Constitution should not be interpreted to sanction such an arrest merely because a police officer

236. It must be remembered that the issue before the Court was not that Atwater failed to buckle her children, but rather that she did not use her own seatbelt.
237. See id.
238. See id.
240. See id. at 324.
241. See id. at 323.
can point to a minor violation of the law. While the conclusion that any arrest based on probable cause, absent an extraordinary method of arrest, is consistent with the case law as laid down to this point by the Supreme Court, such a conclusion is at odds with, if not the letter, the spirit of the Constitution.

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242. All fifty states authorize warrantless arrests based upon probable cause. See id. at 344. Some states limit the situations in which an officer may arrest when a traffic violation has occurred by using mandatory language such as the officer "shall complete the information section and prepare a notice to appear in court . . . and release him from custody," for certain traffic offenses. N.M. STAT. ANN. § 66-8-123 (Michie 1978). While an analysis of current state laws concerning an officer's discretion to arrest for minor traffic offenses is outside the scope of this Note, I remain strongly in favor of revising state statutory schemes to incorporate more situations in which an officer is required to issue citation in lieu of arrest. "Twenty-eight of the fifty states have no limitations on police discretion to arrest for traffic offense." Salken, supra note 12, at 249-50. Some statutes which limit the situations in which an officer can arrest even have penalties listed for officers who disobey. See, e.g., ALA. CODE § 32-1-4 (1999). The American Bar Association has even noted:

It should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective enforcement of the law. A law enforcement officer having grounds for making an arrest should take the accused into custody or, already having done so, detain him further only when such action is required by the need to carry out legitimate investigative functions, to protect the accused or others where his continued liberty would constitute a risk of immediate harm or when there are reasonable grounds to believe that the accused will refuse to respond to a citation.

LAFAVE, supra note 72, at 59 (quoting American Bar Association Standards Relating to Pretrial Release, § 2.1 (Approved Draft, 1968)).

* This Note is dedicated to my Grandparents, Bartholomew and Carmela Montefusco; I hope to live my life with the same love, compassion and kindness that they possess. This accomplishment, like any other that may come in the future, would never be possible without the continuing love and support of my Mother. My Father has also giving me the love, support and professional guidance without which I would not have achieved any goal. I would also like to thank Dominick, Linda and Jennifer for their patience and encouragement. Special thanks to the entire membership of the Hofstra Law Review as well as the individual editing contributions on this Note by Ely R. Levy, Brian D. Geldert, Kristen M. Hackford, Amy J. Weisinger and Deanna Hall. I would also like to thank Professor Robin Charlow for her continuous guidance, invaluable suggestions and the patience she has demonstrated in reading and editing countless drafts.