VOLUME 133 APRIL 2020 NUMBER 6

HARVARD LAW REVIEW FORUM

ATWATER AND THE MISDEMEANOR CARCERAL STATE†

*Alexandra Natapoff**

INTRODUCTION

Mac was three years old and Anya was five when, sitting in the family car, they watched a police officer arrest their mother for a seat belt violation.[1] After that, Mac was terrified of police.[2] The next morning on the way to school, Mac hid in a ditch because he thought he saw a police car.[3] When a police officer came to the daycare center, the three-year-old fell to the floor and huddled in a fetal position.[4] According to a child psychologist, Mac "felt very guilty that he couldn't stop this horrible thing [and that] . . . he was powerless to help his mother."[5] As Mac's mother concluded, her children had learned a terrible lesson: "[T]he bad person could just as easily be the policeman as it could be the most horrible person they could imagine."[6]

Mac is now twenty-six years old: he calls his mother's arrest "one of the most formative moments of my life."[7] "I saw them take her out of the car," he recalls.[8] "I remember my mother being cuffed. . . . I felt really helpless."[9] I asked him if the experience had affected his view of

† Responding to Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

* Chancellor's Professor, University of California Irvine School of Law. Many thanks to Amna Akbar, Beth Colgan, Sharon Dolovich, Eisha Jain, Allegra McLeod, and Jocelyn Simonson for comments on earlier drafts. My deepest gratitude to Mac Haas for his willingness to share his experiences with me.

1 Marcia Coyle, *Three Who Dared: The Perfect Case*, NAT'L L.J., Mar. 26, 2001, at A1.

2 *See id.*

3 *See id.*

4 *Id.*

5 Atwater v. City of Lago Vista, 532 U.S. 318, 370 (2001) (O'Connor, J., dissenting) (omission in original).

6 *Id.*

7 Email from Mac Haas to author (Jan. 3, 2019, 08:38 EST) (on file with the Harvard Law School Library).

8 Telephone Interview with Mac Haas (Jan. 26, 2020) (on file with the Harvard Law School Library).

9 *Id.*

police. "It feels like a primal thing," he said.[10] "It's physical, I get very anxious if I'm pulled over . . . [e]ven if I'm doing nothing wrong."[11]

We do not know how many American children have watched a parent or family member get arrested, but it is likely in the millions. At least five million children — about seven percent of all minors — have had a parent in prison or jail.[12] Over half of all people in prison are parents.[13] Roughly forty-five percent of all Americans have had a member of their immediate family incarcerated.[14] Mac and Anya are white and from an economically stable family,[15] but these kinds of experiences are disproportionately visited on poor children of color: poor people are more likely to be arrested and jailed, and black children are twice as likely as white children to have experienced the incarceration of a parent.[16] With more than ten million annual arrests, hundreds of thousands of children likely experience the fear and trauma of watching a police officer take a loved adult into custody every year.[17]

The past decade has seen a deepening public and scholarly reckoning with the extraordinary human costs of the American carceral state. Those costs are physical and psychological as well as economic. They are wealth-based, racial, and gendered. They are individual as well as collective, private as well as political. They may include the lasting financial pain of a heavy fine or the trauma of incarceration. Such costs affect children, families, and entire communities. These costs have been

---

[10] *Id.*

[11] *Id.*

[12] Dan Levin, *As More Mothers Fill Prisons, Children Suffer "A Primal Wound,"* N.Y. TIMES (Dec. 28, 2019), https://nyti.ms/39lUAbF [https://perma.cc/S5JK-CP2D] (citing DAVID MURPHEY & P. MAE COOPER, CHILD TRENDS, PARENTS BEHIND BARS 1 (2015), https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf [https://perma.cc/MPD2-VAYL]).

[13] LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (rev. ed. 2010), https://www.bjs.gov/content/pub/pdf/pptmc.pdf [https://perma.cc/HN6B-RZVR].

[14] Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey*, 5 SOCIUS, article no. 17, at 1, 5 (2019).

[15] *See* Coyle, *supra* note 1.

[16] *See* GLAZE & MARUSCHAK, *supra* note 13, at 2, 17 tbl.9 (finding that thirty percent of state prisoner parents who provided primary financial support earned less than $1,000 in personal income in the month before their arrests); MURPHEY & COOPER, *supra* note 12, at 4.

[17] *2018 Crime in the United States: Table 29: Estimated Number of Arrests*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-29 [https://perma.cc/4CCA-JEKU]; *see also* Cynthia Burnson, *How Witnessing a Parent's Arrest Affects a Child*, NAT'L COUNCIL ON CRIME & DELINQ.: NCCD BLOG (Jan. 15, 2019) https://www.nccdglobal.org/blog/how-witnessing-parents-arrest-affects-child [https://perma.cc/6Q46-JDK2] (noting that one-quarter of caregivers in study reported "their child had experienced [a parent's] arrest, and most reported the experience as 'extremely distressing'" (citing Julie Poehlmann-Tynan et al., *Attachment in Young Children with Incarcerated Fathers*, 29 DEV. & PSYCHOPATHOLOGY 389, 396 (2017))).

especially and historically profound for African Americans, but the carceral state burdens many vulnerable groups, including Latinx communities, immigrants, the poor, the homeless, and those suffering from mental health and substance abuse disorders. After thirty-plus years of mass incarceration, these burdens have distorted the life trajectories of multiple generations of Americans.

In her Foreword, Professor Dorothy Roberts argues that abolitionism is the best response to this legacy of carceral destructiveness, not only as a matter of principle and policy but also as a matter of constitutional interpretation.[18] As Roberts and others describe it, abolitionism is a movement that aspires to eradicate prison, police, the death penalty, and the carceral state that deploys them, and to replace them with alternative forms of dispute resolution and investments in social welfare aimed at a more peaceful, egalitarian society.[19] At the center of abolitionism sits a historical, racial, and economic analysis that understands the American criminal apparatus as a direct descendent of chattel slavery.[20] In this view, structural racism and the carceral impulse are inseparable: the modern carceral state advances racism and exploitation, while racism and exploitation shape and drive the expansion of the carceral state.

Prison abolitionism is not new — its roots and influences range from Marxism to W.E.B. DuBois to the Black Panthers.[21] Likewise, there is a long intellectual history to the claim that a more robust and egalitarian welfare state would obviate much of the need for prison.[22] But these ideas have gained renewed traction in the modern era of racialized mass incarceration, stop-and-frisk, the Movement for Black Lives, and the

---

[18] Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 108–20 (2019).

[19] *See, e.g.*, Allegra M. McLeod, *Envisioning Abolition Democracy*, *in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1613, 1618 (2019) (describing abolitionism as "a long-term political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment" (quoting CHARLENE A. CURRUTHERS, UNAPOLOGETIC: A BLACK, QUEER, AND FEMINIST MANDATE FOR RADICAL MOVEMENTS, at x (2018))); Roberts, *supra* note 18, at 6–8.

[20] *See* Roberts, *supra* note 18, at 19–20. *See generally id.* at 19–42.

[21] *See* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 95–96 (2005) (discussing DuBois's theory of abolition); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 447–60 (2018) (tracing linkages between Movement for Black Lives and critiques of racial capitalism); Roberts, *supra* note 18, at 44 (describing DuBois's influence); *id.* at 47–48, 110 (noting influence of Black Panthers on abolitionism).

[22] *See, e.g.*, Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 12–13 (2018) ("Many of the states with the least generous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation's highest incarceration rates."). *See generally* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016) (describing how failures in President Lyndon Johnson's War on Poverty programmatically increased the criminalization of poor African Americans); LOÏC WACQUANT, PUNISHING THE POOR (2009) (arguing that the expansion of the criminal apparatus is tied to the devolution of the welfare state).

new debtor's prison. These phenomena have fueled widespread recognition that the carceral state remains a central driver of racial and class inequality in the United States, inextricably intertwined with the ways that we discriminate against people of color and punish the poor.[23]

Until relatively recently, prison abolitionism was primarily the terrain of community activists and movement theorists. The Movement for Black Lives that emerged after Ferguson and community groups from New York to Chicago to Los Angeles have all made various forms of abolition central to their advocacy and movement-building efforts.[24] Those ideas, however, have also been making their way into the scholarly legal discourse,[25] and Roberts paves the way for even broader academic engagement. Roberts herself has been writing about abolitionism for over a decade.[26] With this Foreword, she has issued a 122-page invitation to constitutional scholars to reconsider the role of racialized incarceration in light of abolitionist principles traced back to the Reconstruction Amendments and the eradication of slavery. "[H]uman freedom required slavery abolition then," she writes.[27] "[T]oday it requires the abolition of the prison industrial complex that has replaced slavery as the bulwark of racial capitalism."[28]

Roberts does not distinguish between constitutional criminal procedure in particular and constitutional law more generally, although many of the cases she discusses are criminal procedure icons.[29] Part of her point is that the entire Constitution — not just its expressly criminal provisions — is implicated in the modern racialized carceral state and the "relentless antiblack violence of constitutional doctrine."[30] Obviously,

---

[23] WACQUANT, *supra* note 22, at 41.

[24] *See, e.g.*, Akbar, *supra* note 21, at 460–73; McLeod, *supra* note 19, at 1624–27 (describing the Chicago torture reparations project).

[25] *See, e.g.*, Akbar, *supra* note 21, at 460–73; César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017); McLeod, *supra* note 19, *passim*; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015); Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 304 (2019); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison,"* 3 CALIF. L. REV. CIR. 184, 186 (2012); Tracey L. Meares, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad [https://perma.cc/X56Q-S6NC] ("[P]olicing as we know it must be abolished before it can be transformed."). The *Harvard Law Review* devoted its 2019 *Developments in the Law* issue to abolitionism, publishing pieces by Professor Dylan Rodríguez, Professor Allegra McLeod, Angel E. Sanchez, Patrisse Cullors, and Roberts. *See Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1568 (2019).

[26] *See, e.g.*, Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261 (2007).

[27] Roberts, *supra* note 18, at 48.

[28] *Id.*

[29] *Id.* at 81–84 (discussing *Heien v. North Carolina*, 135 S. Ct. 530 (2014), and *Utah v. Strieff*, 136 S. Ct. 2056 (2016)); *id.* at 91–93 (discussing *McCleskey v. Kemp*, 481 U.S. 279 (1987)).

[30] *Id.* at 10.

however, criminal procedure plays a unique role in the carceral infrastructure. By its nature, criminal procedure validates the exercise of violent, coercive state force against some of the most vulnerable members of the polity. The Fourth Amendment authorizes searches and seizures.[31] The Fifth Amendment authorizes deprivations of life, liberty, and property.[32] The Sixth Amendment constitutionalizes the prosecutorial infrastructure.[33] The Eighth Amendment validates the imposition of bail, fines, and punishment.[34] From an abolitionist perspective, this makes criminal procedure part of the carceral problem, perhaps irredeemably so.[35] But Roberts encourages us not to throw the constitutional baby out with the bathwater. Rather, she argues that we should take the post-Reconstruction Constitution — and by extension the Bill of Rights as incorporated against the states through the Fourteenth Amendment — seriously as a potential vehicle for more egalitarian and less violent democratic practices.

In that spirit, this Response accepts Roberts's invitation to reexamine constitutional criminal procedure in light of the abolitionist insight that the American carceral impulse is tied to, driven by, and a major contributor to structural racism. This means that expansive carceral doctrines — cases that strengthen and validate the state's authority to deploy the police power to coerce and to incarcerate — represent judicial investments in the state's racialized powers of social control.[36] Put differently, when the Supreme Court elevates carceral values over individual liberty and privacy, it puts its thumb on the scale in favor of punitive and inegalitarian police practices.[37] Roberts zeroes in on the racial half of this equation: how the doctrinal colorblindness of criminal

---

[31] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[32] *See id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[33] *See id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

[34] *See id.* amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[35] *See, e.g.*, ALEC KARAKATSANIS, USUAL CRUELTY 16 (2019) ("If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well."); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

[36] *See* Roberts, *supra* note 18, at 80 (arguing that the Court's colorblind jurisprudence permits "police [to] enforce a carceral grip on entire communities").

[37] *See* Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (pointing out how various Supreme Court doctrines adopt presumptions in favor of law enforcement).

procedure permits the carceral power to do destructive racial work.[38] This Response zeroes in on the carceral half: the ways that criminal procedure validates, maintains, and promotes a specifically carceral police power.

I focus in particular on misdemeanor arrest doctrine. Low-level offenses are central to the carceral ethos and its racial consequences.[39] Such offenses include jailable as well as nonjailable misdemeanors, decriminalized offenses, violations of municipal ordinances, and traffic violations.[40] Such offenses expand the power of the state to criminalize large numbers of people for common, rarely culpable, often harmless conduct, and they confer vast discretion on police to aim that carceral power in racially disproportionate ways. By definition, misdemeanors do not lead to prison[41] and therefore have not been prominent in the mass incarceration conversation, but they are carceral in the deepest sense: they fuel the use of policing, jail, and criminal punishments as modes of governance and social control. Historically, misdemeanors have been central to the racialization of crime, to the criminalization of black men in particular, and to the criminalization of poverty in general.[42] At the same time, misdemeanors are currently an active site for decarceral experimentation[43] and thus offer an especially fertile space to grapple with abolitionist ideas.

As a way of surfacing the power of the misdemeanor carceral phenomenon, I revisit one of the most important carceral decisions in the criminal procedure pantheon, *Atwater v. City of Lago Vista*.[44] In that case, the Supreme Court held that police officers have discretion to effectuate a full custodial arrest for the most minor, nonjailable offenses, including the seat belt violation for which Gail Atwater — Mac and Anya's mother — was arrested.[45] *Atwater* does not always get its full share of attention in the mass incarceration conversation because it is not explicitly about race, punishment, or prison. But *Atwater* is foundational for its expansion of the police power to incarcerate, and it is

---

[38] *E.g.*, Roberts, *supra* note 18, at 81 (noting the Court's "colorblind disregard of the effect gutting Fourth Amendment protections will have as police gain ever-greater power to reign over marginalized communities").

[39] *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 7–12, 149–70 (2018).

[40] *See id.* at 47–49, 220–25 (detailing the large and diverse universe of low-level offenses).

[41] Misdemeanor sentences of less than one year are typically served in jail, not prison. *See id.* at 21.

[42] *Id.* at 9–11.

[43] *See, e.g.*, Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1631 (2012) (describing "a decarceration model" for low-level specialized courts that "aims to reduce reliance on incarceration while achieving other social goals"). *See generally* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

[44] 532 U.S. 318 (2001).

[45] *See id.* at 323–24.

one of the core constitutional decisions that make the modern carceral state possible. It permits custodial arrest and intrusive searches for any offense, no matter how minor. It converts racial profiling into jailtime. As a matter of governance structure, the decision authorizes police to insist upon incarceration even where the democratically elected state legislature has expressly decided that incarceration would be excessive punishment. *Atwater* is, in that sense, a doctrinal pillar of the American police power.

Ever since I started thinking systematically about misdemeanors,[46] I have thought that *Atwater* was wrongly decided. It understates and mischaracterizes the extraordinary influence of the low-level misdemeanor machinery, especially with respect to fine-only and traffic offenses. It minimizes and demeans the pain, fear, and burdens that attend a full custodial arrest. It guts the meaning of the Fourth Amendment term "reasonable." But Roberts's Foreword helped me see more clearly just how influential *Atwater* has been in normalizing the carceral presumption, that is, making it "seem[] ordinary and natural" to cage "subordinated people."[47] By permitting police to fill the nation's jails for offenses deemed by state legislators too petty to warrant incarceration, the *Atwater* Court implicitly elevated the state's police power to incarcerate over its democratically tempered power to punish.[48]

This Response adopts Roberts's abolitionist lens to explore *Atwater*'s contributions to the culture and practices of the misdemeanor carceral state. Specifically, it offers an interpretive template to identify the *Atwater* Court's overt and covert carceral commitments, and to surface the Court's often empirically questionable justifications for sacrificing individual liberties to the police power. It then extends that template to *Atwater*'s progeny — *Florence v. Board of Chosen Freeholders*,[49] *Virginia v. Moore*,[50] and *Utah v. Strieff*[51] — exploring how these cases vastly expand the carceral power and consequences of a misdemeanor arrest. Like *Atwater*, these cases normalize and deregulate the state's deployment of force, fear, and incarceration as regular features of governance.

---

[46] *See generally* NATAPOFF, *supra* note 39; Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) (identifying erosion of the individual fault model in misdemeanor processing); Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (identifying structural barriers to effective misdemeanor representation); Alexandra Natapoff, Gideon*'s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015) (discussing the welfarization of crime through petty offenses); Natapoff, *supra* note 43 (pointing out the net-widening and inegalitarian effects of decriminalization); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING, *supra* note 37, at 71 (theorizing the erosion of rule of law regarding the pettiest offenses).

[47] Roberts, *supra* note 18, at 16.

[48] *See infra* Part III, pp. 167–77.

[49] 566 U.S. 318 (2012).

[50] 553 U.S. 164 (2008).

[51] 136 S. Ct. 2056 (2016).

They downplay the impact of such governance strategies on the individuals most affected by them. Finally, they elevate the carceral police power over competing decarceral choices contained in state law and in other constitutional doctrines. These pro-carceral moves weaken core precepts that are central to the Bill of Rights: due process, equality, and, perhaps most obviously, freedom from government coercion and intrusion.

Abolition constitutionalism is thus a provocative invitation to scholars to reconsider the carceral presumptions that permeate criminal procedure doctrine and that tilt the balance in favor of the state's power to incarcerate and control. At the same time, it provides an opportunity to reaffirm the deep liberty and equality principles of criminal procedure, and to consider how elevating those principles over the police power and its carceral impulses might advance a more just and egalitarian criminal process.

I. ABOLITIONISM AND AN INVITATION TO LEGAL SCHOLARS

Abolition has been described variously as a social movement, a philosophy, and a psychology. "According to abolitionist thinker, writer, and organizer Mariame Kaba: 'Prison abolition is two things: It's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it's also the building up of new ways of . . . relating with each other.'"[52] Prototypically associated with eliminating prison, the abolition movement extends to policing, surveillance, and other carceral forms of social control, a "struggle against . . . *carceral state violence*, including but not limited to imprisonment, jailing, detention, and policing."[53] Its practitioners seek to disrupt the normalcy of incarceration as a way of ushering in a new vision of public safety: as Professor Jocelyn Simonson puts it, "moving away from the incarceration of poor people and people of color, and toward other ways of addressing wrongdoing and promoting public safety."[54] At the end of the day, abolition is aimed at healing and building new social structures. "Justice in abolitionist terms," writes Professor Allegra McLeod, "involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably."[55]

---

[52] McLeod, *supra* note 19, at 1617 (omission in original) (quoting *Episode 29 — Mariame Kaba*, at 34:32–:59, AIRGO (Feb. 2, 2016), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba [https://perma.cc/9CJ7-YFYQ]).

[53] Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, *in Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1575, 1576 (2019).

[54] Simonson, *supra* note 25, at 304.

[55] McLeod, *supra* note 19, at 1615.

A core abolitionist insight is that the state's carceral power is inherently and unavoidably racial. It is racial in practice, through its disproportionate deployment against people of color, black people in particular.[56] It is racial in history, stemming from the legacy of U.S. slavery, Jim Crow, segregation, and the racialization of crime.[57] And it is racial in spirit: the polity would resist putting so many people in cages if those people were not deemed lesser citizens of diminished value.[58] Its racialized nature means that legal and technical reforms will be at best incremental, and at worst perpetuating. "Given their historical and contemporary entanglements with anti-Black racism," explains Professor Amna Akbar, "police cannot be reformed or fixed. The state must be transformed, the law must be transformed, the police must be eliminated, or at least their social and fiscal footprint . . . must be considerably diminished, if not eliminated."[59]

Such insights are not unique to abolitionism. Critical race scholarship and much of criminal procedure scholarship have been pointing out the deep connections between race, crime, and inequality for decades.[60] But abolitionism is especially insistent on the unavoidable quality of the linkages. It is not an accident or a bug in the system that it is racially disproportionate. Rather, it is inherent in the carceral power of the state and the DNA it inherited from chattel slavery that the carceral state aims to control and subordinate black people and other politically marginalized groups.[61]

Roberts describes the three central tenets of abolitionism as follows:

> First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, [it currently] . . . functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems. These tenets lead to the conclusion that the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex.[62]

---

[56] *See, e.g.*, Roberts, *supra* note 18, at 13–14.

[57] *See id.* at 19–20. *See generally id.* at 19–42.

[58] *See id.* at 16.

[59] Akbar, *supra* note 21, at 460; *see also* Roberts, *supra* note 18, at 20 ("[T]he carceral system cannot be fixed — it must be abolished.").

[60] *See, e.g.*, Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 693 n.83 (1995) (describing early critical race theory addressing criminal law); *see also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1008–09 (2002). *See generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

[61] *See* Roberts, *supra* note 18, at 42–43.

[62] *Id.* at 7–8 (footnotes omitted); *see id.* at 12.

One of the challenges of writing about abolitionism for a law review is that many abolitionists are suspicious of legal solutions.[63] Roberts embraces this suspicion herself[64] but offers a theoretical bridge between the skeptical view that law is a tool of oppression and the egalitarian and liberating possibilities of constitutional law. Specifically, she argues that the Constitution became a meaningful player in the abolitionist project of human freedom after Reconstruction with the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments.[65] Abolition and its antiracism were baked into the Constitution through the Reconstruction Amendments in a way that now invites, if not demands, an abolitionist rereading of the entire document.

Roberts is not the first to argue that the Reconstruction Amendments were a kind of "second founding" that changed the nature of the Constitution, or even that they render unconstitutional parts or all of the racialized carceral system.[66] But Roberts assembles an enormous arsenal of history and analysis in order to draw out the full constitutional implications of Reconstruction and the abolition of slavery for the prison industrial complex and the modern carceral state. It is not an originalist argument. Those nineteenth-century abolitionists were not against prison — in 1868 the prison industrial complex did not yet play the racial governance role that it now does.[67] Today, however, Roberts argues that the modern fusion of structural racism with the carceral state demands a new, updated version of abolitionism in which the full

---

[63] *Id.* at 105–07. *But see* Akbar, *supra* note 21, at 409 ("[I]t would be wrong to think the movement has given up on law.").

[64] Roberts, *supra* note 18, at 10 (noting that "white supremacy is deeply woven into the fabric of every legal institution in the United States" and thus rejecting a "naïve faith in U.S. law [and] the judges who apply it").

[65] *See id.* at 108 ("We can see the Reconstruction Amendments as a compromised embodiment of the unfinished revolution for which abolitionists today continue to fight.").

[66] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); *see* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066 (2011) (arguing that "the history and structure of the Reconstruction Amendments should be seen as informing present-day concepts of equality"); Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1204 (2009) (focusing on the meaning of the Constitution in light of the Civil War Amendments); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1733–51 (2012) (listing numerous arguments that the Thirteenth Amendment may be read to prohibit not just slavery and involuntary servitude but also a vast array of other practices); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003) (arguing that federalism jurisprudence systematically obscures the significance of the Reconstruction Amendments).

[67] Roberts, *supra* note 18, at 48; *see* David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1201 (1992) (arguing that the history and nature of the Reconstruction Amendments impose constitutional "interpretive responsibilities" that exceed bare originalism).

eradication of slavery in its modern manifestations requires prison abolition. More generally, it calls for deeper critical engagement with the American carceral impulse, its governance implications, and its destructive role in generating and maintaining racial and economic inequalities.

This Response takes up that challenge by uncovering the carceral presumptions that run throughout misdemeanor arrest doctrine, starting with *Atwater*. *Atwater* is a pillar of the modern police power that validates the routine incarceration of millions of individuals for minor, often harmless conduct for purposes other than punishment. The case is central to the expansive misdemeanor system, which forms the low-status, low-visibility foundation for the excesses of American mass incarceration. *Atwater* is therefore a prime candidate for abolitionist rereading.

II. *ATWATER* AND THE EXPANSION OF THE MISDEMEANOR CARCERAL STATE

Atwater held that the Fourth Amendment permits police to effectuate a full custodial arrest as long as they have probable cause for any offense, no matter how minor.[68] This includes fine-only offenses such as the seatbelt violation for which Gail Atwater was arrested, which cannot legally trigger incarceration as punishment. This Part explores the specific argumentative mechanisms through which the decision expanded and elevated the carceral power; it identifies the logical and empirical flaws in the Court's reasoning; and it charts the trajectory of *Atwater*'s progeny, which further expanded the misdemeanor carceral power to search and seize notwithstanding state law and constitutional constraints.

A. Elevating the Carceral Police Power

The heart of Gail Atwater's civil rights claim[69] was that going to jail for a nonjailable offense should be a presumptively unreasonable seizure under the Fourth Amendment. Unlike jailable offenses for which a convicted person may be punished by incarceration, nonjailable offenses by definition do not authorize incarceration. Accordingly, Atwater argued, incarceration upon arrest for such an offense is a disproportionately carceral state response and hence unreasonable.[70] But Justice Souter, writing for a five-member majority, decided that the police arrest power was both too important and too indeterminate to be constrained by legal distinctions that might convert "every discretionary judgment in the field . . . into an occasion for constitutional review."[71] Worrying that

---

[68] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

[69] Atwater "pleaded no contest to the [original] seatbelt offense and paid a $50 fine." *Id.* at 324.

[70] *Id.* at 326–27.

[71] *Id.* at 347.

police would not be able to distinguish on the street between arrestable and non-arrestable offenses, the Court decided that the state has "an essential interest in readily administrable rules"[72] that outweighs the individual liberty deprivations involved in a particular arrest. Fearing that restrictions on the police power would create "a systemic disincentive to arrest," Justice Souter wrote that "the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked."[73]

In support of this pro-arrest balancing, Justice Souter offered a series of normative assessments of misdemeanors, the misdemeanor system, and the experiences surrounding misdemeanor arrests. Broadly speaking, he concluded that misdemeanors and misdemeanor arrests are not particularly problematic in the grand scheme of things and do not pose constitutional problems.[74] "The very fact that the law has never jelled the way Atwater would have it leads one to wonder whether warrantless misdemeanor arrests need constitutional attention, and there is cause to think the answer is no."[75] In effect, Justice Souter assumed that the legal status quo must be acceptable because otherwise it would have already been changed. Justice Souter noted that there are already various existing constraints on inappropriate misdemeanor arrests, including judicial review and state law limitations on the arrest power,[76] which he deemed to be working fine: "[T]here simply is no evidence of widespread abuse of minor-offense arrest authority."[77] "The upshot," he concluded, "is a dearth of horribles demanding redress. . . . [S]urely[,] the country is not confronting anything like an epidemic of unnecessary minor offense arrests."[78]

The opinion also normalized the physical and psychological harms of arrest. Acknowledging that her arrest was "surely 'humiliating'"[79] and "inconvenient and embarrassing to Atwater,"[80] Justice Souter described it as "no more 'harmful to . . . privacy or . . . physical interests' then the normal custodial arrest."[81] Indeed, one of the ironies of the *Atwater* decision is that even as it validated the police power to arrest for minor nonjailable offenses, the Court admitted that the arrest of Gail Atwater herself was not reasonable. "In her case," wrote Justice Souter,

---

[72] *Id.*
[73] *Id.* at 351.
[74] *Id.* at 351–54.
[75] *Id.* at 351–52.
[76] *Id.* at 352.
[77] *Id.* at 353 n.25.
[78] *Id.* at 353; *see also id.* at 353 n.25.
[79] *Id.* at 354 (quoting Brief of Petitioners at 28, *Atwater*, 532 U.S. 318 (No. 99-1408)).
[80] *Id.* at 355.
[81] *Id.* at 354 (omissions in original) (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

"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."[82] Nevertheless, the Court concluded that the need to establish a clear, broad police power to arrest outweighed Gail Atwater's fear, humiliation, indignity, and her experience of forcible arrest and confinement.[83] The Court never addressed the harms to Mac and Anya at all. The importance of preserving the carceral police power outweighed everything.

B. Getting Misdemeanors Wrong: Atwater*'s Empirical Fallacies*

At the heart of *Atwater*'s rationale is Justice Souter's sunny and circular evaluation of the health of the misdemeanor apparatus. The opinion assumes that the size and workings of the misdemeanor system are unproblematic, that there is no "epidemic of unnecessary minor-offense arrests," and that the "dearth of horribles" obviates any need for judicial intervention.[84] Such empirical assertions were at best naive at the time; they are now demonstrably incorrect in light of what we have learned over the past decade regarding the American misdemeanor carceral machine.[85]

For example, nowhere does the *Atwater* opinion acknowledge the sheer size of the misdemeanor system and the commensurate significance of authorizing arrest in every misdemeanor case. Indeed, the opinion does not discuss the actual number of misdemeanor arrests or cases in 2001 at all. To be fair, that number was difficult to find at the time: misdemeanor dockets have traditionally been underdocumented, and there were no public national estimates of the size of the U.S. misdemeanor docket until 2009.[86] Data remains elusive, although today there is more of it. The most recent research shows that six years after *Atwater*

---

[82] *Id.* at 346–47.

[83] *Id.* at 351.

[84] *Id.* at 353.

[85] *See* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) (calling for "a new generation of criminal procedure jurisprudence, one that places empirical and social scientific evidence at the very heart of constitutional adjudication"); *see also* Andrew Manuel Crespo, *The Unavoidably Empirical Fourth Amendment: A Case Study of* Kansas v. Glover, 1 CTS. & JUST. L.J. 217, 218 (2019) ("[T]he Fourth Amendment inquiry, at its core, is all about facts.").

[86] *See* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf [https://perma.cc/33WN-Y2LX].

was decided, the 2007 U.S. misdemeanor docket was 16 million cases, at which point it was probably already declining.[87] Felony and traffic filings also began declining around the same timeframe.[88] Today, over 13 million criminal misdemeanor cases are filed every year, representing eighty percent of American criminal dockets.[89] If you include criminal traffic offenses of the kind for which Gail Atwater was arrested, the national number triples to over 33 million misdemeanors.[90] In Texas alone, more than 45 thousand people were arrested and jailed for non-jailable Class C traffic infractions in 2018.[91] In other words, today's multimillion-case national misdemeanor docket, although apparently somewhat smaller than it was when *Atwater* was decided, represents an enormous amount of carceral work being done by the state, work that *Atwater* nowhere acknowledged.[92]

The lack of data regarding misdemeanor dockets is mirrored by a lack of information on the workings of the low-level criminal process. The *Atwater* majority asserted that "there simply is no evidence of widespread abuse of minor-offense arrest authority."[93] "Indeed," wrote the Court, "when Atwater's counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one."[94] Such reasoning is circular because it assumes the systemic availability of such evidence. Lower courts tend to hold

---

[87] Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 747 (2018) (estimating national misdemeanor dockets since 2007); *see also* Jacob Gershman, *Arrests for Low-Level Crimes Are Plummeting, and the Experts Are Flummoxed*, WALL ST. J. (Oct. 6, 2019, 5:30 AM), https://www.wsj.com/articles/arrests-for-low-level-crimes-are-plummeting-and-the-experts-are-flummoxed-11570354201 [https://perma.cc/F3AX-SWQX]; *Research Network on Misdemeanor Justice*, DATA COLLABORATIVE FOR JUST. JOHN JAY C., https://datacollaborativeforjustice.org/project/research-network-on-misdemeanor-justice/ [https://perma.cc/GEC7-GBCP] (presenting six studies documenting falling misdemeanor filing rates in Durham, NC, Los Angeles, CA, Louisville, KY, Prince George's County, MD, Seattle, WA, and St. Louis, MO).

[88] *See* Stevenson & Mayson, *supra* note 87, at 747 (documenting declining felony dockets); *Court Statistics Project*, NCSC (N. Waters et al. eds., Nov. 20, 2019), http://popup.ncsc.org/CSP/CSP_Intro.aspx [https://perma.cc/58W6-A5Z4] (select "Traffic/Violations"; then select Data Year "2012" or "2018"; then select Chart "Statewide Traffic Caseloads and Rates") (showing total 2012 state traffic caseload of approximately 47 million compared with 2018 state traffic caseload of approximately 37 million).

[89] NATAPOFF, *supra* note 39, at 256–58 (documenting approximately 13 million annual state misdemeanor filings); *see also* Stevenson & Mayson, *supra* note 87, at 747 (same).

[90] *See* NATAPOFF, *supra* note 39, at 45 (estimating criminal traffic offenses).

[91] SCOTT HENSON, JUST LIBERTY, THOUSANDS OF SANDRA BLANDS: ANALYZING CLASS-C-MISDEMEANOR ARRESTS AND USE-OF-FORCE INCIDENTS AT TEXAS TRAFFIC STOPS 4 (2019).

[92] *Cf.* Utah v. Strieff, 136 S. Ct. 2056, 2068–69 (2016) (Sotomayor, J., dissenting) (acknowledging the enormous scale and influence of misdemeanor and traffic warrants).

[93] Atwater v. City of Lago Vista, 532 U.S. 318, 353 n.25 (2001).

[94] *Id.* at 353.

few hearings,[95] many proceed without defense counsel present,[96] and some are not even courts of record.[97] It is true, as the *Atwater* Court observed, that few appellate cases document the dysfunction of the misdemeanor arrest system. But this is due to an almost nonexistent working appellate process. In 2019, Professors Nancy King and Michael Heise conducted a national empirical study and found that misdemeanor appeals are vanishingly rare.[98] Fewer than one in 1250 misdemeanor convictions are appealed to state appellate courts.[99] By contrast, as many as one in seventeen felony convictions are appealed.[100] Misdemeanor appeals are rare for a variety of reasons, including lack of access to counsel, high plea rates, and the typically short duration of incarcerative sentences.[101] The resulting reality is that misdemeanor arrests, cases, and convictions are largely insulated from error correction and legal scrutiny. This explains, at least in part, why Atwater's counsel could not come up with comparison cases.

The misdemeanor informational landscape has changed quite a bit since 2001. We are better informed today regarding the scope and abuses of the misdemeanor process and low-level courts, not because the appellate process is working any better, but because forces outside the misdemeanor system have started to intervene.[102] Indeed, many of those forces are the same ones that are informing and motivating abolitionism. Community groups from Los Angeles to Chicago to New York have been surfacing data about racialized stop-and-frisk, misdemeanor

---

[95] *See, e.g.*, BRONX DEFS., NO DAY IN COURT: MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS 2 (2013), https://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf [https://perma.cc/964P-3VPS]; *see also* NATAPOFF, *supra* note 39, at 81–83.

[96] BORUCHOWITZ ET AL., *supra* note 86, at 14.

[97] *See, e.g.*, COLO. REV. STAT. §§ 13-6-203(2)–(3), 13-10-106(1) (2019) (establishing qualifications for municipal court judges); Town of Frisco v. Baum, 90 P.3d 845, 847 (Colo. 2004) (noting that, under state law, a judge must be an attorney only if the municipal court is a court of record).

[98] Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1941 (2019).

[99] *Id.* (finding eight misdemeanor appeals for every ten thousand convictions).

[100] *Id.* ("[O]ne in every seventeen to forty-five defendants convicted of a felony files an appeal.").

[101] *Id.* at 1945; *see also* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 694 (2007) (explaining that, because defendants typically cannot raise ineffective assistance of counsel claims until collateral review, "the grim reality is that the performance of trial counsel in almost all misdemeanor and many felony cases is largely unchecked"); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 337 (2011) (arguing that misdemeanor defendants "may not even be aware of" or advised regarding their right to appeal).

[102] For example, in 2009 the National Center for State Courts collected misdemeanor docket information from twelve states; today it collects from thirty-five states. *Compare* BORUCHOWITZ ET AL., *supra* note 86, at 11, *with Court Statistics Project*, *supra* note 88 (select "Criminal"; then select Data Year "2018"; then select Chart "Statewide Misdem. Caseloads and Rates").

arrests, and low-level police practices.[103] The ArchCity Defenders in St. Louis identified problems in the Ferguson municipal court even before the U.S. Department of Justice issued its seminal report in 2015.[104] Civil rights litigation has uncovered persistent violations of the Equal Protection Clause as low-income individuals are arrested and jailed based solely on their inability to pay misdemeanor fines and fees.[105] Scholars and advocates have exposed how innocent people arrested for misdemeanors routinely plead guilty.[106] Investigations of lower courts by nonprofit organizations, the ABA, and Congress have revealed massive flouting of the misdemeanor right to counsel.[107] Such abuses, had they been known at the time, would have transformed Justice Souter's "dearth of horribles" into a veritable parade.

The *Atwater* majority also diminished the import of arrest by formalistically treating it as an isolated event dissociated from the rest of the criminal process. But due to the dysfunctions of the misdemeanor adjudicative process, the initial police decision to arrest exerts a strong influence over events and decisions made further down the pipeline. Gail Atwater was not indigent; she had access to $50 to pay her fine and get out of jail.[108] But many misdemeanor arrestees do not have the resources to pay a fine or bail, and therefore will remain incarcerated until their cases are resolved. That incarceration, in turn, puts pressure on defendants to plead guilty. The defunding of the misdemeanor defense bar, moreover, means that even if defendants are given lawyers, they may still lack the resources to challenge additional incarceration

---

[103] *See, e.g.*, Akbar, *supra* note 21, at 421–22, 421 nn.71–72, 422 nn.73–75; McLeod, *supra* note 19, at 1613–15.

[104] *See* ARCHCITY DEFS., MUNICIPAL COURTS WHITE PAPER (2014) https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [https://perma.cc/BSU6-EMLQ]; CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/N7GK-AW8B].

[105] ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS 6–7 (2010), https://www.aclu.org/sites/default/files/field_document/InForAPenny_web.pdf [https://perma.cc/L9MK-TFH2]; Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 9–10 (2018).

[106] BRONX DEFS., *supra* note 95, at 14; Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1009 (2018); *see* Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 784, 810–11 (2018).

[107] *See Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Sen. Chuck Grassley, Chairman, S. Comm. On the Judiciary); BORUCHOWITZ ET AL., *supra* note 86, at 14–17; AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 23–26 (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/5P3Q-2AG3].

[108] Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001).

and ultimately conviction.[109] The moment of arrest, in other words, is the beginning of a process in which enormous carceral pressure is brought to bear on individuals accused of low-level offenses.[110]

The *Atwater* majority further supported its decision by understating the impact of the experience of arrest itself.[111] According to the Court, the arrest was not made in an "extraordinary manner, unusually harmful to [Atwater's] privacy or . . . physical interests."[112] "The arrest and booking were inconvenient and embarrassing to Atwater"[113] as well as "humiliating,"[114] acknowledged the Court, "but it was no more 'harmful to . . . privacy or . . . physical interests' than the normal custodial arrest."[115] This description implicitly diminishes the violent, frightening, intrusive experience of a "normal custodial arrest." As Justice Sotomayor has written:

> [F]ew may realize how degrading a stop can be . . . . The indignity of the stop is not limited to an officer telling you that you look like a criminal. . . . [H]e may order you to stand "helpless, perhaps facing a wall with [your] hands raised." . . . [T]he officer may "feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." . . . If the officer chooses, he may handcuff you and take you to jail . . . [where] he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals."[116]

The *Atwater* Court also ignored the vast and often permanent ramifications of an arrest, including the record it generates, the numerous collateral consequences it triggers, and the presumption of guilt to which it gives rise.[117]

---

[109] *See* BORUCHOWITZ ET AL., *supra* note 86, at 14–17.

[110] Alexandra Natapoff, *A Stop Is Just a Stop:* Terry*'s Formalism*, 15 OHIO ST. J. CRIM. L. 113, 119–29 (2017) (charting the nearly frictionless process that begins with a police stop and runs through arrest to bail through plea bargaining that converts low-level stops and arrests into convictions).

[111] *See* Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2266 (2002) ("*Atwater* revealed the extent to which the Court minimizes harmful emotions, especially humiliation, suffered by those who are searched and seized.")

[112] *Atwater*, 532 U.S. at 354 (omission in original) (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).

[113] *Id.* at 355.

[114] *Id.* at 354 (quoting Brief of Petitioners, *supra* note 79, at 28).

[115] *Id.* (omission in original) (quoting *Whren*, 517 U.S. at 818).

[116] Utah v. Strieff, 136 S. Ct. 2056, 2069–70 (2016) (Sotomayor, J., dissenting) (third, fifth, sixth, seventh, ninth, tenth, and eleventh alterations in original) (first quoting Terry v. Ohio, 392 U.S. 1, 17 (1968); then quoting *id.* at 17 n.13; then quoting Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 323 (2012); and then quoting *id.*).

[117] *See* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–1012 (2019).

Finally, although *Atwater* did not acknowledge it, low-level arrests are a powerful engine of racial discrimination and stratification. African Americans comprise approximately thirteen percent of the U.S. population[118] but nearly twenty-four percent of low-level arrests.[119] Black people are arrested at two, four, sometimes ten times the rate of whites for offenses such as gambling, loitering, resisting arrest, and marijuana possession.[120] Black drivers in many cities are racially profiled and pulled over more often than white drivers are.[121] People of color stopped for traffic violations, in turn, are more likely to be searched than white drivers are.[122] Arrest also exposes people of color to the risks of police violence. In Baltimore, police arrested Jeffrey Alston for speeding and put him in a chokehold that left him quadriplegic.[123] In Austin, Texas, during an arrest for speeding, police slammed Breaion King onto the hood of her car and hurled her across the parking lot.[124] When Philando Castile was killed by Minneapolis police during a traffic stop, he had been pulled over at least forty-nine times in the previous thirteen years.[125]

For all these kinds of reasons, *Atwater*'s analysis was logically and empirically flawed. The case was wrongly decided in light of what was known at the time, and even more so in light of everything we have

---

118 *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045218 [https://perma.cc/BL4S-299L].

119 NATAPOFF, *supra* note 39, at 154 tbl.6.1 (documenting FBI arrest data for low-level offenses).

120 *Id.* at 149–57 (documenting widespread racial disparities in all varieties of misdemeanor arrest); *see, e.g.*, *Picking Up the Pieces: A Minneapolis Case Study*, ACLU, https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces [https://perma.cc/4C9E-JE54] (finding African Americans over eight times more likely than whites to be arrested for low-level offenses in Minneapolis).

121 CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 52–73 (2014); *see, e.g.*, IAN AYRES & JONATHAN BOROWSKY, ACLU OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT 5–6 (2008), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf [https://perma.cc/LRR8-ZHZD].

122 LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 9 (2016), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf [https://perma.cc/X8F5-6B3F] (noting that black and Hispanic drivers are about three times more likely to be searched during a traffic stop than white drivers); *see, e.g.*, AYRES & BOROWSKY, *supra* note 121, at 6.

123 CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 112–13 (2016), https://www.justice.gov/opa/file/883366/download [https://perma.cc/R2JC-ZG28].

124 HENSON, *supra* note 91, at 1, 3; Amanda O'Donnell, *Two Years After Violent Arrest, Breaion King "More at Peace" upon Learning of Officer's Firing*, STATESMAN (Sept. 22, 2018, 12:19 AM), https://www.statesman.com/news/20180124/two-years-after-violent-arrest-breaion-king-more-at-peace-upon-learning-of-officers-firing [https://perma.cc/RJ73-3VHX].

125 Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), https://nyti.ms/29YcF2k [https://perma.cc/5CKN-7HNV].

learned since then about the dysfunctional scope of the misdemeanor apparatus and the significance of misdemeanor arrests.

C. After Atwater

Atwater was the beginning of a string of decisions in which the Court expanded the doctrine and legal consequences of misdemeanor arrest, thereby substantially enlarging the scope of the misdemeanor carceral police power. In *Florence v. Board of Chosen Freeholders*,[126] the Court upheld multiple strip searches, including genital searches, of a person arrested for a noncriminal, fine-only violation.[127] Although Albert Florence could not have been incarcerated for the underlying civil fine, he spent seven days in two different jails, where he was strip-searched twice.[128] Eventually a court dismissed the outstanding failure-to-pay warrant against him as faulty because he had, in fact, paid the underlying fine years before.[129] The Supreme Court held that the strip searches were reasonable out of deference to jail officials and on the rationale that "[m]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees."[130] Citing *Atwater*, the Court concluded that differentiating people in jail based on the minor or nonjailable nature of their offenses was "unworkable"[131] and that Florence's liberty and privacy interests were outweighed by the "security imperatives involved in jail supervision."[132]

Florence not only extends the consequences of an *Atwater* arrest but surfaces its class implications. Albert Florence was jailed not for the commission of a crime but on a failure-to-pay warrant. Together, *Florence* and *Atwater* expose thousands of poor and working people to incarceration and intrusive physical searches, not as legal punishment but as a debt-collection mechanism.[133]

Many states limit police authority to arrest for various misdemeanor offenses, but in *Virginia v. Moore*,[134] the Court held that misdemeanor arrests remain constitutionally reasonable even when prohibited by state law.[135] Ironically, Justice Souter had implied in *Atwater* that the impact of the holding — broadened authorization for minor arrests — would

---

126 566 U.S. 318 (2012).
127 *Id.* at 323–24, 330.
128 *See id.* at 323–24.
129 *Id.*
130 *Id.* at 328 (quoting Bell v. Wolfish, 441 U.S. 520, 546 (1979)).
131 *Id.* at 334, 337.
132 *Id.* at 330; *see id.* at 338 (citing Atwater v. City of Lago Vista, 532 U.S. 318 (2001)).
133 *Cf.* Colgan, *supra* note 105, at 18–24.
134 553 U.S. 164 (2008).
135 *Id.* at 167, 176.

be blunted by the number of states that limit warrantless arrests for minor offenses by statute.[136] Seven years later, however, *Moore* held that state law does not affect the Fourth Amendment reasonableness inquiry — custodial arrest is constitutional as long as there is probable cause.[137] In other words, even if state legislatures have determined that arrest is an unreasonably carceral response to a low-level offense, the Fourth Amendment police power remains unaffected.

Both *Moore* and *Atwater* expanded the carceral police power at the expense of state legislative authority. *Moore* disregards state legislative judgments on the scope of the police power; *Atwater* likewise disregards substantive state criminal law limitations on the availability of incarceration. This suggests that the carceral impulse has become a one-way constitutional ratchet. The Supreme Court usually defers to state legislative decisions regarding the affirmative imposition of criminal liability.[138] When the state attempts to ratchet back the police power, however, the Court is less deferential.

Most recently, in *Utah v. Strieff*,[139] the Court held that the Fourth Amendment's exclusionary rule does not apply to an illegal stop if police discover, after the fact, that the stopped person happens to have an outstanding misdemeanor traffic warrant.[140] The usual rule is that police cannot use the fruits of an illegal seizure.[141] This bar is the heart of the exclusionary rule's constraint on unconstitutional police conduct and a foundational legal protection against police carceral overreach.[142] But *Strieff* rolled back this protection by permitting the use of illegally seized evidence if the person has an unrelated warrant. The scope of this exception is enormous: there are millions of outstanding traffic and failure-to-pay warrants;[143] the latter are, by their very nature, issued more frequently against the poor. *Strieff* thus exempts the police power from

---

136 *See Atwater*, 532 U.S. at 352 (listing eight states, including Virginia, that limit arrest authority).

137 *See Moore*, 553 U.S. at 178.

138 *See, e.g.*, Ewing v. California, 538 U.S. 11, 24–28, 30–31 (2003) (giving deference to state legislative penal judgments); Patterson v. New York, 432 U.S. 197, 201, 205–06, 210 (1977) (explaining higher level of judicial deference to state decisions that define crimes); *cf.* Dolovich, *supra* note 37, at 117 tbl.6.1 (discussing the Court's persistent deference to law enforcement and other state officials); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 558 (2001) (asserting that legislative supremacy over crime definition constrains the availability of constitutional remedies).

139 136 S. Ct. 2056 (2016).

140 *Id.* at 2059.

141 *See id.* at 2061.

142 *See, e.g.*, *id.* at 2071 (Kagan, J., dissenting) ("The exclusionary rule serves a crucial function — to deter unconstitutional police conduct.").

143 *Id.* at 2068 (Sotomayor, J., dissenting). There is also evidence that warrants are issued disproportionately against African Americans. *See, e.g.*, CIVIL RIGHTS DIV., *supra* note 104, at 62 (finding that ninety-two percent of arrest warrants are issued against black defendants); Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J. GENDER RACE & JUST. 183, 187 (2002) (finding, through an empirical study of San Diego County, that African American and Hispanic

constitutional constraints while subjecting millions of vulnerable people to greater carceral authority. In dissent, Justice Sotomayor decried the scope of this new power:

> By legitimizing [this police] conduct . . . this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.[144]

In these various ways, *Atwater* and its progeny create a vast constitutional edifice of intrusive police authority to arrest, search, and incarcerate — key features of the carceral power at which abolitionism is aimed. This police authority applies, counterintuitively, to the very individuals least likely to justify it. Under *Atwater*, it applies to those who do not face incarceration pursuant to substantive criminal law. After *Moore*, it applies to those who the state has expressly decided should not be arrested. And after *Strieff*, it applies to those who would otherwise be protected by the Fourth Amendment against being arrested and searched at all. After *Atwater*, in other words, the police carceral power displaces law itself, including state criminal law, state criminal procedure, and the Fourth Amendment exclusionary rule.

III. ABOLITION *ATWATER*

This Part accepts Roberts's invitation to further explore *Atwater*'s systemic penal and constitutional implications through an abolitionist lens. Through that lens, we can view the *Atwater* police power as part of a larger authorization to use incarceration as a form of social, economic, and racial control, a gateway into a carceral logic of which prison is an extreme but not the only expression.

This rereading highlights the special importance of misdemeanors to mass incarceration and, as Roberts describes it, to the abolitionist project. The term "mass incarceration" originated as a prison- and felony-centric idea, a reaction to America's off-the-charts prison population of roughly 1.5 million people.[145] But nearly 11 million people pass through U.S.

---

individuals "were significantly over-represented as targets of narcotics search warrants"); *see also 2018 Crime in the United States: Table 43: Arrests by Race and Ethnicity, 2018*, FBI, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-43 [https://perma.cc/4AGH-HRJE] (showing racial disparities in overall arrest rates).

144 *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting).

145 Oliver Roeder, *Just Facts: Quantifying the Incarceration Conversation*, BRENNAN CTR. FOR JUST. (July 16, 2014), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-quantifying-incarceration-conversation [https://perma.cc/9X5V-BB8U]; *see* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/4D5A-MZ7T].

jails every year, approximately one-third of them for misdemeanors.[146] The 13 million criminal misdemeanor cases filed annually — 33 million if you count criminal traffic offenses[147] — all threaten people with incarceration, either up front as punishment, along the way if they cannot afford bail, or on the back end if they cannot afford to pay the associated fines. Misdemeanors thus effectuate their own kind of low-level mass incarceration for tens of millions of people, establishing a logic that normalizes incarceration for minor conduct, for the inability to pay, and — as exemplified by *Atwater* — typically in the absence of a serious threat to public safety.[148]

Atwater is conceptually integral to the spread of misdemeanor mass incarceration. Not only because it authorizes police to put millions of people in jail, but also because at its root it constitutionalizes the ethos that locking people up is a normal, not particularly violent, everyday state practice. Indeed, it normalizes putting people in cages while they are presumptively innocent, for conduct for which they could not legally be put in a cage were they found guilty. In effect, *Atwater* officially transformed the nation's traffic codes, municipal ordinances, and a vast array of minor offenses into an expansive authority to arrest and to fill the nation's jails. The *Atwater* arrest power thus turns out to be a crucial ingredient in mass incarceration, validating the carceral ethos, and fueling the carceral criminalization of poverty.

A. Calling Out the Misdemeanor Carceral State

A major abolitionist criticism of the criminal system is that it is pretextual, actually preoccupied with racialized social control and not authentically concerned with true public safety.[149] Misdemeanors are one of the clearest examples of this sleight of hand: They reveal the carceral state as a project of social control only loosely tied to rationales of individual culpability, harm, and public safety — that is to say, only loosely tied to principles of criminal law. Misdemeanors permit the arrest and conviction of people who engage in commonplace, unremarkable conduct, who may not be at all dangerous, and who have not done anything particularly bad or harmful.[150] As McLeod writes, "[f]or abolitionists,

---

[146] TODD D. MINTON & ZHEN ZENG, U.S. DEP'T OF JUSTICE, JAIL INMATES IN 2015, at 1 (2016), https://www.bjs.gov/content/pub/pdf/ji15.pdf [https://perma.cc/EY6J-U6HF].

[147] *See supra* p. 160.

[148] Alexandra Natapoff, Opinion, *How a Simple Misdemeanor Could Land You in Jail for Months*, N.Y. POST (Feb. 2, 2019, 10:36 AM), https://nypost.com/2019/02/02/how-a-simple-misdemeanor-could-land-you-in-jail-for-months/ [https://perma.cc/KR8W-CWPM].

[149] *E.g.*, Roberts, *supra* note 18, at 35 (describing "disconnect between social harm and carceral punishment" that permits police, prosecutors, and white collar offenders to escape punishment even for inflicting serious harm).

[150] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); NATAPOFF, *supra* note 39, at 3.

much of the conduct that is the focus of criminal law enforcement should not be understood as criminal at all. The vast majority of police stops, arrests, and prosecutions in the United States involve low-level quality-of-life offenses and other trivial infractions."[151]

Order-maintenance offenses in particular elevate the racialized police power while devaluing the importance of individual culpability.[152] As Roberts puts it, "order-maintenance policing relies on an association between the identification of lawless people and racist notions of criminality to legitimize routine police harassment and arrest of black people."[153] Low-level offenses like loitering, trespassing, and disorderly conduct are not designed to identify dangerous, culpable conduct or individuals.[154] They are tools that empower police more broadly and that shore up the carceral impulse.[155] When states like Georgia treat speeding as a criminal misdemeanor,[156] it is not because speeding is culpable in the classic criminal sense: the state is expanding its police powers and its reliance on carceral forms of regulation. Misdemeanors are thus central to understanding the attenuated relationship between the police power on the one hand and classic criminal law precepts of blameworthiness and harm on the other.

Abolitionism does not exempt any particular type of crime from its critique: misdemeanors and felonies, drug offenses, and violent crimes alike are all part of the carceral problem. But not all types of crime pose the same conceptual challenges. Murder, for example, is clearly harmful, obviously wrong, and thus generates the loudest calls for state penal intervention. Indeed, the state's failure to respond to black homicide victimization is part and parcel of the carceral state's discriminatory personality, a concrete devaluation of black lives, and one of the reasons that abolitionists cite when they say they have lost faith in the criminal

---

151 McLeod, *supra* note 19, at 1633.

152 Natapoff, *Aggregation and Urban Misdemeanors*, *supra* note 46 (arguing that order-maintenance policing and prosecution criminalize people in the aggregate).

153 Roberts, *supra* note 18, at 16; *see also id.* at 23 ("Like overseers and slave patrols, Jim Crow police . . . used terror primarily to enforce racial subjugation, not to apprehend people culpable for crimes."); *id.* at 27 ("[O]rder-maintenance policies give police wide discretion to control black people's presence on public streets.").

154 *Cf.* NATAPOFF, *supra* note 39, at 7–8 ("[The misdemeanor system] can kick in regardless of whether the person deserves it or has committed anything resembling a blameworthy or dangerous offense." *Id.* at 8.).

155 Papachristou v. City of Jacksonville, 405 U.S. 156, 165 (1972) ("Here the [vagrancy] net cast is large, not to give the courts the power to pick and choose but to increase the arsenal of the police."); *see also* CHRISTY E. LOPEZ, AM. CONST. SOC'Y, DISORDERLY (MIS)CONDUCT: THE PROBLEM WITH "CONTEMPT OF COP" ARRESTS 5–10 (2010). *But see* Whren v. United States, 517 U.S. 806, 811, 819 (1996) (upholding pretextual traffic stops aimed at enforcing more serious crimes).

156 GA. CODE ANN. § 40-6-1(a) (2019) (traffic code penalty section defining all violations as misdemeanors).

system.[157] As Akbar describes it, abolitionists are often challenged with questions that effectively ask "who is going to protect us?" from murder in a world without prisons.[158] By contrast, misdemeanors present an especially weak case for state carceral intervention because so many misdemeanor offenses are neither harmful nor morally wrong. We can imagine an array of noncarceral, noncoercive responses to loitering, disorderly conduct, and speeding; many states have in fact engaged in decriminalization on this rationale.[159] Or to put it more philosophically, the less serious the offense, the more implausible the Hobbesian rationale for the violent, coercive state to which consenting citizens submit for their own safety.[160] When it comes to jaywalking, the carceral state is overkill.

Atwater fuels this carceral overreach by specifically authorizing the arrest and detention of people who cannot be incarcerated as punishment. The decision elevates the police power over the state's power to punish, openly dissociating the police power to incarcerate from legal justifications for punishment. Indeed, *Atwater* acknowledged as much when the Court admitted that Gail Atwater's arrest was gratuitous, pointless, and an exercise of poor police judgment.[161] Her incarceration was justified neither by the laws of crime and punishment nor by principles of sound policing.

Put differently, one might say that *Atwater* elevated the state's sovereign power to incarcerate over its democratically constrained power to punish.[162] The state cannot punish in the absence of criminal law: *nulla poena sine lege*.[163] But it can lock you up. Professor Markus

---

[157] *See, e.g.*, JILL LEOVY, GHETTOSIDE (2015) (documenting state failure to respond to homicides in low-income communities of color).

[158] Akbar, *supra* note 21, at 468 (quoting Mychal Denzel Smith, *Abolish the Police. Instead, Let's Have Full Social, Economic, and Political Equality.*, THE NATION (Apr. 9, 2015), https://www.thenation.com/article/archive/abolish-police-instead-lets-have-full-social-economic-and-political-equality/ [https://perma.cc/V9DG-KTTT]); *see also* Smith, *supra* ("What use do I have for an institution that routinely kills people who look like me, and make it so I'm afraid to walk out of my home?").

[159] *See* Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 619–20 (2006) (describing nonpolice responses to disorder); Natapoff, *supra* note 43, at 1069–71 (describing various states that have decriminalized disorderly conduct and traffic offenses).

[160] *See* Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029, 1035, 1042 (2015) (describing Hobbes's theory of the social contract, sovereign power, and punishment).

[161] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 346–47 (2001).

[162] *See* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 312–13 (2004) (explaining how the legitimacy of criminal procedures derives from the perceived democratic basis for those procedures).

[163] Rogers v. Tennessee, 532 U.S. 451, 467–68 (2001) (Scalia, J., dissenting) (calling "the maxim *nulla poena sine lege* . . . one of the most 'widely held value-judgment[s] in the entire history of human thought'" (alteration in original) (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d. ed. 1960))).

Dubber explains this conundrum by arguing that the police power is not legal in origin but is rather the raw expression of unfettered state sovereignty, a derivative of the father's patriarchal power of governance over the household.[164] It does not aspire to legality but to control. In this space, "familiar niceties of criminal law doctrine . . . [are] of no significance."[165] Dubber might as well have been talking about *Atwater* and its progeny — *Atwater*, *Florence*, *Moore* and *Strieff* all expand the police power by cabining the "niceties" of criminal law and procedure.[166]

The *Atwater* law of arrest is just one example of how the Supreme Court validates the state's power to incarcerate for purposes of control and not as punishment for crime. In *United States v. Salerno*,[167] the Court upheld the constitutionality of pretrial detention,[168] holding that such detention is "regulatory, not penal,"[169] and that the government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[170] In *Turner v. Rogers*,[171] the Court upheld a lower court's ability to incarcerate civil contemnors without giving them counsel, reasoning that "where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case."[172] The Court likewise treats immigration-related detention as civil and therefore subject to fewer constitutional constraints than criminal detention.[173]

Conversely, in *Scott v. Illinois*,[174] the Court held that only criminal sentences of incarceration, not fines or other forms of punishment or detention, trigger the Sixth Amendment right to counsel.[175] The right to counsel is the defendant's primary protection against the penal authority of the state; it attaches as soon as "the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"[176] But

---

164 MARKUS DIRK DUBBER, THE POLICE POWER 47–48 (2005).

165 *Id.* at 56.

166 *See supra* Part II, pp. 157–67 (discussing *Atwater*, *Florence*, *Moore*, and *Strieff*).

167 481 U.S. 739 (1987).

168 *Id.* at 741.

169 *Id.* at 746.

170 *Id.* at 748.

171 564 U.S. 431 (2011).

172 *Id.* at 442.

173 *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001); *see also* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351 (2014) ("The Supreme Court has steadfastly described the entire immigration process as civil.").

174 440 U.S. 367 (1979).

175 *See id.* at 373–74.

176 Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)) (holding that the right to counsel attaches at the initiation of the adversarial criminal process).

misdemeanor defendants such as Gail Atwater and Albert Florence are not entitled to representation because their underlying offenses are non-jailable, even though such defendants are in fact routinely incarcerated. Much like *Salerno* and *Turner*, *Scott* retracts the right to counsel by deemphasizing the enormous carceral authority exerted by the state above and beyond formal criminal sentences of incarceration.

Taken together, such doctrines create the legal carceral edifice that permits the state to incarcerate individuals for purposes of risk management, judicial and bureaucratic efficiency, debt collection, and other forms of social control.[177] They permit incarceration without the need to show individual guilt or culpability, and without the obligation to give defendants lawyers. *Atwater* is thus more than a case about criminal law: it is part of a group of cases that expand the state's coercive carceral powers even beyond its legal criminal authority to punish.

B. From Slavery to Penal Servitude

Atwater is also a case about how to read constitutional history. The authority to arrest is an old and protean power that has changed over time. As is conventional in Fourth Amendment analysis,[178] the *Atwater* Court looked to the common law at the time of the original Framers to determine whether police in that period had the common law authority to make warrantless misdemeanor arrests.[179] Atwater's counsel pointed to historical evidence that police lacked authority to arrest for misdemeanors that did not involve a breach of the peace.[180] As one British treatise put it, "[i]n cases of misdemeanor, a peace officer . . . has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence."[181] Justice Souter acknowledged that there was indeed some evidence to this effect and that such arguments were "by no means insubstantial"[182] but concluded that the historical record did not generally support Atwater's position and thus did not resolve the question.[183]

---

[177] *See* Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778 (1997) ("[M]odern law permits the state to impose a wide variety of burdens upon its citizens outside the confines of formal criminal proceedings.").

[178] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.").

[179] Atwater v. City of Lago Vista, 532 U.S. 318, 326–28 (2001).

[180] Brief of Petitioners, *supra* note 79, at 13–19.

[181] *Atwater*, 532 U.S. at 328 (alteration in original) (quoting 9 HALSBURY'S LAWS OF ENGLAND § 612 (1909)).

[182] *Id.* at 327.

[183] *Id.* at 327, 332–33, 335–36, 339–40, 345. *But see* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era*

Roberts argues that abolition constitutionalism should be attentive to a different constitutional history, that of the Reconstruction framers.[184] For example, in the context of jury selection, she writes that "[a]bolition constitutionalism would dig deeper into the historical relationship of jury selection, race, and white supremacy to understand the significance of juries for antebellum abolitionists. . . . [It would also] pay careful attention to how abolitionists and radical Republicans viewed juries . . . ."[185] Doctrinally speaking, this is a way of saying that the Bill of Rights should be interpreted in the context in which it became relevant to state criminal procedure, namely, when it became incorporated against the states through the Fourteenth Amendment's Due Process Clause.[186] It was at this moment, not just at the Founding, that the Bill of Rights began to assume its mantel of influence over American criminal law.

This suggests that the *Atwater* Court stopped its historical analysis too soon. The Fourteenth Amendment became law in 1868, just as postbellum Southern states were beginning to convert their low-level misdemeanor systems into a massive apparatus aimed at effectively reenslaving African Americans. In *Slavery By Another Name*, Douglas Blackmon charts how harsh misdemeanor codes and convict leasing already permeated the South in 1868, just a few years after emancipation.[187] Within a decade, in the grip of what Blackmon labels "neoslavery,"[188] thousands of black people had been rounded up, convicted of minor offenses such as vagrancy and loitering, and sold to white industrial interests who acted as "sureties"[189] for the criminal fines that defendants could not pay. Professor Eric Foner similarly concludes that using criminal law as a form of labor control was part of a broader Southern resistance.[190] "Virtually from the moment the Civil War ended," he writes, "the search began for legal means of subordinating a volatile black population that regarded economic independence as a corollary of freedom and the old

---

Arrest Doctrine in Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 247–52 (2002) (arguing that *Atwater* got this history wrong).

184 Roberts, *supra* note 18, at 99–102.

185 *Id.* at 100.

186 *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[T]he Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth . . . ."). Roberts notes that some abolitionists argued that the Fifth Amendment's Due Process Clause already prohibited slavery. Roberts, *supra* note 18, at 56.

187 DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 19, 25, 64 (2008); *accord* Roberts, *supra* note 18, at 30–31 (noting that southern states began enacting harsh misdemeanor codes in 1865).

188 *Id.* at 402.

189 *Id.* at 67.

190 *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 198–205 (1988).

labor discipline as a badge of slavery."[191] Misdemeanor arrests and convictions were those legal means.[192]

In 1868, the drafters of the Reconstruction Amendments knew that the South was using criminal law to resist emancipation. Specifically, they were aware that misdemeanor arrests, and misdemeanor authority more generally, were being used to reassert carceral and economic control over newly freed slaves. Historian James Pope relates that just two years earlier, congressional debates around the 1866 Civil Rights Act specifically included discussion of the use of misdemeanor arrest and conviction to conscript black labor in violation of the spirit of the newly minted Thirteenth Amendment.[193] Representative Burton C. Cook of Illinois warned that "[v]agrant laws have been passed[;] . . . laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude."[194] Representative Henry Deming complained that "North Carolina is now selling black men into slavery for petty larceny."[195] Radical Republican leader Thaddeus Stevens charged that southern states were "taking men . . . for assault and battery . . . and selling them into bondage for ninety-nine years."[196] Although this Response does not attempt a full historical excavation, it appears that at least some of the political representatives who passed the Fourteenth Amendment were opposed to the coercive, carceral use of misdemeanor authority to expand the state's police power.

Roberts does not wager all on history.[197] As a matter of constitutional interpretation, she asks us to look forward as well as back into the ongoing role that legal practices "continue to play in either dismantling or promoting white supremacy."[198] Vagrancy and other low-level arrests played a seminal role in maintaining the subordination of African Americans for decades after the Civil War.[199] Today, low-level order-

---

191 *Id.* at 198; *see also* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 28–32 (2003) (describing postbellum transition from slavery into criminalized servitude).

192 I describe this history in more detail in NATAPOFF, *supra* note 39, at 173–76.

193 *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1478–79 (2019).

194 *Id.* at 1479 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook)).

195 *Id.* at 1478 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 332 (1866) (statement of Rep. Deming)).

196 *Id.* (first omission in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 655 (1866) (statement of Rep. Stevens)).

197 *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 345 (2001) ("Atwater does not wager all on history.").

198 Roberts, *supra* note 18, at 102.

199 RISA GOLUBOFF, VAGRANT NATION 112–46 (2016); *see also* Roberts, *supra* note 18, at 34 ("[F]or more than a century, vague vagrancy and antiloitering ordinances have given police officers

maintenance arrests remain at the center of the racialized carceral state. An abolitionist historical analysis of the misdemeanor arrest power could thus consider not only eighteenth-century British common law of arrest, but also the nineteenth century's racialization of the low-level U.S. criminal process, the misdemeanor system's close ties to slavery, and Republican framers' awareness of and opposition to the practice. This would be a way, in Roberts's words, to "help . . . revive the abolitionist values in the Reconstruction Constitution."[200]

C. Resurrecting the Liberty Presumption

At the heart of Roberts's invitation to constitutional law scholars is a hopeful reading of the Constitution. She invites us to "develop alternative doctrines for testing . . . constitutionality" that reject the carceral presumption and thus put a greater premium on individual liberty.[201] Rereading *Atwater* in that spirit brings us back to the foundational reasonableness requirement of the Fourth Amendment. The *Atwater* majority declared reasonable an arrest that it openly admitted was "gratuitous,"[202] a "pointless indignity," and an expression of "extremely poor [police] judgment."[203] In dissent, Justice O'Connor, joined by Justices Stevens, Ginsburg, and Breyer, argued for a more dignitary and less carceral view of the Fourth Amendment. Justice O'Connor decried the "obvious toll"[204] and "severe intrusion" of custodial arrest on liberty and privacy.[205] She chronicled the heavy and lasting personal impact of arrest on Atwater and her "terrified and hysterical" children,[206] calling it "counterproductive" to "child welfare."[207] She quoted Gail Atwater as saying that the arrest "just never leaves us. It's a conversation we have every other day, once a week, and it's — it raises its head constantly in our lives."[208] Constitutionally speaking, Justice O'Connor concluded that the individual interests at stake clearly outweighed the state's interest in an unfettered police power: "Justifying a full arrest by the same

---

license to arrest black people for standing in public streets — with no attention to whether or not their presence caused any harm to anyone.").

[200] Roberts, *supra* note 18, at 9.

[201] *Id.* at 103.

[202] *Atwater*, 532 U.S. at 346.

[203] *Id.* at 347; *see also* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 991 (2014) ("[I]f dignity counts constitutionally for something, then a *gratuitous* humiliation, by its very nature, cannot pass Fourth Amendment muster . . . .").

[204] *Atwater*, 532 U.S. at 364 (O'Connor, J., dissenting).

[205] *Id.* at 365; *see id.* at 363–66.

[206] *Id.* at 368.

[207] *Id.* at 370; *see id.* at 368–71.

[208] *Id.* at 370. *But see* Carbado, *supra* note 60, at 1008–09 (criticizing Justice O'Connor for recognizing the harms to Atwater, a white mother, but not to James Bostick and other African Americans subject to police coercion in other Supreme Court cases).

quantum of evidence that justifies a traffic stop — even though the offender cannot ultimately be imprisoned for her conduct — defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."[209]

Eight years later, Justice Ginsburg — who also dissented in *Atwater* — wrote in a similar anticarceral key. *Herring v. United States*[210] created yet another carceral presumption in favor of the police power, holding that the exclusionary rule does not apply where a police officer makes an arrest based on his or her reasonable, but mistaken, belief that there is an outstanding arrest warrant.[211] Justice Ginsburg dissented in defense of the exclusionary rule, calling for "'a more majestic conception' of the Fourth Amendment."[212] Describing the Fourth Amendment as "a constraint on the power of the sovereign,"[213] she argued that the exclusionary rule protects the integrity of the judiciary as well as "the people — all potential victims of unlawful government conduct."[214] In her view, the Fourth Amendment should have been a counterweight to the carceral police power to arrest in the absence of probable cause or a warrant, not a justification for it.

Put differently, the seeds of an abolitionist rereading of Atwater are already there, sitting in Justice O'Connor's dissent, in opinions and dissents in other cases, and in the text of the Fourth Amendment, which demands that the police power be exercised in a reasonable way. As Roberts writes, "[a]bolitionists are working toward a society . . . where its inhabitants 'would laugh off the outrageous idea of putting people into cages. . . .'"[215] In that society, the Fourth Amendment would be seen as a bulwark protecting the people against carceral overreach. In that society, an arrest for a fine-only offense would be self-evidently unreasonable.

In effect, decarceral constitutionalism offers a way of rebalancing Fourth Amendment interests, ratcheting down our deference to the police power and elevating our commitments to liberty. This might appear to be a radical rebalancing given the Court's recent predilections, but it could also be seen as a return to first principles. The Bill of Rights has long been interpreted as a principled limitation on the state's carceral

---

[209] *Atwater*, 532 U.S. at 364.

[210] 555 U.S. 135 (2009).

[211] *Id.* at 136–37.

[212] *Id.* at 151 (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

[213] *Id.* at 151–52.

[214] *Id.* at 152 (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

[215] Roberts, *supra* note 18, at 44 (quoting Alexander Lee, *Prickly Coalitions: Moving Prison Abolitionism Forward*, *in* ABOLITION NOW! 109, 111 (CR10 Publ'ns Collective ed., 2008)).

police power: as the Court wrote in *Mapp v. Ohio*,[216] restraint is necessary not only to regulate police but also to preserve judicial integrity.[217] In *Salerno*, even as it approved the federal Bail Reform Act, the Court cautioned that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[218] In *Papachristou v. City of Jacksonville*,[219] the Court struck down the ancient vagrancy apparatus while openly recognizing that it was limiting the police power by doing so.[220] "Of course, vagrancy statutes are useful to the police," wrote Justice Douglas.[221] "Of course, they are nets making easy the roundup of so-called undesirables."[222] But to a unanimous Supreme Court in 1972, law — not the carceral police power — was the dominant value: "[T]he rule of law implies equality and justice in its application."[223]

As in *Papachristou*, a decarceral, liberty-protective reading of the Fourth Amendment would have broad implications for modern police arrest practices. By such logic, custodial arrests for all non-dangerous public order offenses look unreasonable: caging is a disproportionate state response to loitering.[224] Arrest warrants for failure to pay might similarly be rejected as unreasonable debt-collection tools that criminalize poverty, not culpability, and do not serve a sufficiently legitimate penological purpose.[225] In sum, taking reasonableness seriously in light of anticarceral commitments could invigorate a longstanding and more majestic conception of Fourth Amendment arrest doctrine.

CONCLUSION

Some abolitionists might object to the premise of this Response. From an abolitionist perspective, there is an inherent tension in rereading — and thus potentially rehabilitating — criminal procedure doctrines that by their nature presuppose the carceral state. Like Roberts's own Foreword, such efforts assume the continued existence of objectionable legal edifices even while using the language of elimination. Roberts, however, takes a different view. She explicitly invites us to grapple with

---

[216] 367 U.S. 643 (1961).
[217] *Id.* at 659.
[218] United States v. Salerno, 481 U.S. 739, 755 (1987).
[219] 405 U.S. 156 (1972).
[220] *See id.* at 171.
[221] *Id.*
[222] *Id.*
[223] *Id.* Justices Powell and Rehnquist took no part in the decision.
[224] *Cf.* City of Chicago v. Morales, 527 U.S. 41, 60–64 (1999) (finding that gang loitering statute conferred too much discretionary police power).
[225] *See* Colgan, *supra* note 105, at 12–13 (arguing that excessive fines imposed on the poor should trigger greater constitutional protections); *cf.* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating the Excessive Fines Clause against the states).

such tensions by seeking "non-reformist reforms,"[226] which she defines as "measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[227] "To be abolitionist," she writes, "reforms must shrink rather than strengthen 'the state's capacity for violence.'"[228] Reinvigorating the anticarceral liberty interests in the Bill of Rights might be one such project.

On a more basic level, abolitionism in Roberts's telling is a heartening reminder that old battles lost in one era can be refought in another, and then again in another, with new interpretive tools, insights, and allies. The Bill of Rights has been around for a long time, and the fight over its liberty and equality commitments is far from over. Professor Dorothy Roberts has injected new energy and ideas into this ongoing contest. They can help us grapple more rigorously with the full implications of the misdemeanor carceral state, and elevate the democratic and egalitarian character of constitutional criminal procedure.

---

[226] Roberts, *supra* note 18, at 114 (quoting Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/VVJ2-26PX]).

[227] *Id.* (quoting Berger, Kaba & Stein, *supra* note 226).

[228] *Id.* (quoting Berger, Kaba & Stein, *supra* note 226).