VIRGINIA V. MOORE IS LESS: *THE SUPREME COURT TAKES THE LAWFUL OUT OF "LAWFUL ARREST"*

The following is an excerpt taken from the transcript of the oral argument of *Virginia v. Moore*, argued before the Supreme Court of the United States on January 14, 2008:

> JUSTICE GINSBURG: If this officer had complied with State law, this is he had issued a summons, then you agree that the exclusionary rule would apply if he went ahead and searched.
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> MR. McCULLOUGH: That's correct. If the had issued a summons, Knowles would apply and the evidence would be excluded.
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> JUSTICE GINSBURG: So would you explain the logic of saying that when police violate State law, then the evidence can come in; but when they comply with State law, it can't. [1]

I. INTRODUCTION

In April 2008, the Supreme Court of the United States handed down its decision in *Virginia v. Moore*.[2] *Moore* encourages police misconduct by signaling the Court's willingness to look the other way so long as the misconduct is fruitful. Incomprehensibly, Justice Scalia wrote for a *near unanimous* Court—the exception being Justice Ginsberg, who wrote in concurrence—that although state statute prohibited Moore's arrest, the arrest and subsequent search did not violate the Fourth Amendment.[3]

This Casenote seeks to illustrate that such a holding is at odds with the "touchstone" of the Fourth Amendment—reasonableness.[4] The Court argued that the caselaw is such that when an arrest is based on probable cause, the arrest is always reasonable.[5] However, the Court failed

[1] Transcript of Oral Argument at 4, Virginia v. Moore, 128 S.Ct. 1598 (2008) (No. 06-1082).
[2] Virginia v. Moore, 128 S.Ct. 1598 (2008).
[3] *See id.*
[4] Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977).
[5] *See Moore*, 128 S.Ct. 1598.

to address the distinction between the caselaw it cited and *Moore*. In the former, the arrests were authorized by state law and prohibited in the latter.

In its brief, the State of Virginia noted that if it were not for the state law at issue here, Moore's arrest would have been entirely proper under *Atwater v. City of Lago Vista*.[6] A reading of *Atwater* requires one to agree with this statement.[7] But it is precisely the existence of the Virginia statute prohibiting Moore's arrest that warrants a discussion of the Fourth Amendment. A review of state law enforcement conduct is not limited to only standards of state law, but it also allows for a constitutional analysis.[8] As such, a violation of a state statute by law enforcement may simultaneously be a violation of the Fourth Amendment.[9]

When state law enforcement conducts a search and seizure in violation of state law, such conduct can neither be reasonable under a balancing of interest nor the principles of logic. Where a state legislature has enacted a prohibition on an individual's arrest, the government has no interest that outweighs an individual's liberty interest. As the legislature classifies certain conduct as criminal, it also determines the penalty for such conduct. Where a legislature has generally forbidden arrest as a penalty for certain conduct, it has also determined that the governmental interest in deterring that conduct by arrest does not outweigh an individual's liberty interest. Therefore, it follows that an arrest for such conduct would be unreasonable. Had the legislature found otherwise, the offense would surely be an arrestable one. Such a conclusion hardly requires a stretch of the imagination.

Moreover, the reasonableness of an arrest conducted in violation of state law is not supported by logic. It is the very nature of this act—violation of the law—that has made the

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[6] Brief of the Petitioner at 26, Virginia v. Moore, 128 S.Ct. 1598 (2008) (No. 06-1082).
[7] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[8] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) (stating that the Fourth Amendment has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment).
[9] *Id.*

conduct of an arrestee unreasonable and permits the restraint of his liberty. Reasonableness cannot be made to turn upon the identity of the actor. Violation of the law is not any less unreasonable simply because it occurs by those who are sworn to uphold it. Arguably, such a violation is more unreasonable than a violation by an ordinary citizen. It is the police who are charged with the enforcing the morals of society, which are made manifest by the people through the legislature. Additionally, the interest of preserving the integrity and authority of law enforcement also counsels against legitimizing police misconduct. If we allow the police to violate the very laws they are sworn to uphold and protect, they will become but mere licensed tyrants.

The purpose of his Casenote is not to criticize a decision of the Court that personally offends the conscience, but to demonstrate the shortcomings of the Fourth Amendment analysis advanced in *Moore*. In *Moore*, the Court advanced a view of Fourth Amendment seizure analysis that is centered solely on probable cause. It is advocated here that such an analysis is untenable. For an arrest to be reasonable, and therefore valid under the Fourth Amendment, it must not only meet the traditional requirement of probable cause, but it must also adhere to state arrest laws. Part II of this Casenote will provide details surrounding Moore's arrest and the Court's decision in *Moore*. Part II will also offer some background on the trinity of cases that most affect *Moore*—*Atwater v. City of Lago Vista*, *Knowles v. Iowa*, and *United States v. Robinson*. Then in Part III, the Court's decision will be examined and an alternate Fourth Amendment analysis, which addresses the Court's concerns as stated in *Moore*, will be applied. Finally, Part IV will summarize the danger *Moore* poses to the Fourth Amendment right of individuals, as well as advocate for the Court to adopt a new bright-line rule to ensure the integrity of the Fourth

Amendment.

II. BACKGROUND

A. *Virginia v. Moore* - Facts and Procedural History

On February 20, 2003, Detective Karpowski of the City of Portsmouth Police Department overheard discussion on his police radio concerning a man named "Chubs," who was driving a vehicle in the area.[10] Knowing that a man with that nickname had recently been released from federal prison and was driving on a suspended license, Karpowski radioed to his fellow officers and told them to stop Chubs.[11] Acting upon that message, Detectives Anthony and McAndrew observed David Lee Moore, known to Detective Anthony as Chubs, driving his vehicle, and they performed a traffic stop.[12] Although Moore was not the Chubs referred to by Detective Karpowski, unfortunately for Moore, he too was driving on a suspended license[13]—a Class 1 misdemeanor under Virginia law.[14]

Under Virginia statute, whenever an officer detains or places any person in custody for any violation of local or state law that is punished as a Class 1 misdemeanor, the officer *must* issue a summons or otherwise notify him to appear at a specified place and time.[15] However, the statute does provide several exceptions allowing for the arrest of a motorist driving on a suspended license; those exceptions are: 1) when a motorist is driving while intoxicated; 2) if a motorist has failed or refuses to discontinue such activity; 3) if police believe the motorist is likely to disregard the summons; and 4) if the police reasonably believe the motorist is likely to

[10] Moore v. Commonwealth, 609 S.E.2d 74, 76 (2005).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] VA. CODE ANN. §46.2-301(C) (West 2008).
[15] VA. CODE ANN. §19.2-74(A)(1) (West 2008).

cause harm to himself or another person.[16] Despite lacking articulable facts satisfying any of these exceptions, the City of Portsmouth detectives handcuffed and arrested Moore.[17] Subsequent to his arrest, Moore was searched by Detective McAndrews, who discovered crack cocaine and $516 in cash in Moore's pocket.[18]

Since Virginia does not have an exclusionary rule—Moore argued at trial that the Fourth Amendment required the evidence to be suppressed as the fruit of an illegal arrest.[19] The trial court declined to suppress the evidence[20] and convicted Moore of possession with intent to distribute cocaine.[21] The trial court stated that because Moore committed a misdemeanor in the presence of the detectives, they were permitted to arrest Moore.[22] Moore appealed his conviction to the Court of Appeals of Virginia.[23] Finding that the search by the City of Portsmouth detectives violated the Fourth Amendment, the court reversed his conviction.[24] However, upon rehearing en banc, the court of appeals affirmed the decision of the trial court and reinstated Moore's conviction.[25] But after further appeal, the Virginia Supreme Court reversed Moore's conviction. The court held that because the detectives should have given Moore a citation, and because the Fourth Amendment does not support a search incident to citation, the search violated Moore's Fourth Amendment right.[26] Upon petition by the State of Virginia, the Supreme Court of the United States granted cert in September of 2007.[27]

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[16] *Id.*
[17] *Moore*, 609 S.E.2d at 76.
[18] *Id.*
[19] *See* Virginia v. Moore, 128 S.Ct. 1598, 1602.
[20] *Moore*, 609 S.E.2d at 76.
[21] *Moore*, 128 S.Ct. at 1602.
[22] *Moore*, 609 S.E.2d at 77 (citing Atwater v. City of Lago Vista, 532 U.S. 318 (2001)).
[23] Moore v. Commonwealth, 636 S.E.2d 395, 396 (Va. 2006).
[24] *Id.*
[25] *Id.*
[26] *See Moore*, 636 S.E.2d at 400 (relying on Knowles v. Iowa, 525 U.S. 113 (1998), and Lovelace v. Virginia, 526 U.S. 1108 (1999)).
[27] Virginia v. Moore, 128 S.Ct. 28, *cert granted*, (U.S. Sept. 25, 2007) (No. 06-1082).

B. Scalia Delivered the Court's Decision

Justice Scalia delivered the opinion of the Court, which held that although the City of Portsmouth detectives violated state law when they arrested and searched Moore, there was no violation of the Fourth Amendment, and therefore, suppression of the evidence was not required.[28]

Scalia first sought to justify the holding in "light of traditional standards of reasonableness."[29] This standard requires a balancing of the intrusion of an individual's privacy on one hand and the need to promote legitimate governmental interests on the other.[30] Moore argued that because Virginia expressly prohibited an arrest in his situation, save for a couple exceptions, the state had no interest in his arrest.[31] Scalia, however, disagreed. Just because the State of Virginia did not authorize Moore's arrest does not mean that it had *no* interest in arresting him—only that the cost savings of issuing a citation is of greater interest than the costs of conducting an arrest, stated Scalia.[32] When the state elects to forego issuance of a citation and instead make an arrest, the state's interest is furthered by ensuring that the arrestee is not permitted to continue his offense and that he appears for trial.[33] Stated more directly, Scalia asserted that unless the seizure has been conducted in an extraordinary manner,[34] a seizure based

[28] *Moore*, 128 S.Ct. 1598 at 1608.
[29] *Id.* at 1604.
[30] *Id.*
[31] *See id.* at 1605.
[32] *See id.* at 1606.
[33] *Id.*
[34] *See* Whren v. United States, 517 U.S. 806, 818 (1996).

on probable cause is constitutionally reasonable because, in that instance, the governmental interests will *always* outweigh an individual's privacy or liberty interests.[35]

The rule that a seizure based on probable cause is therefore a constitutional one does not prohibit states from providing—as a matter of state law—greater protections from arrest than the Constitution requires, Scalia asserted.[36] And because they are solely creatures of state law, violation of those protections *must* be remedied by state law.[37] In *Moore*, Scalia found that it was not the Fourth Amendment that was violated, but only the greater protections provided by the State of Virginia.[38] This is because he finds that reasonableness "within the meaning for the Fourth Amendment . . . has never depended on the law of [a] particular State. . . ."[39] However, unable to ignore a handful of cases in which the Court held that state law *did* determine the reasonableness of the search or seizure, Scalia stated that they were not constitutional rulings, and he simply dismissed them as either decided on the basis of the Court's supervisory power[40] or as dicta.[41] Instead, he cited *Whren v. United States*—in which he wrote the opinion—for the proposition that it has been a long held view of the Court that the meaning of the Fourth Amendment does not change with varying practices of local law enforcement.[42]

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[35] *See Moore*, 128 S.Ct. at 1605 (citing Devenpeck v. Alford, 543 U.S. 146 (2004); Gerstein v. Pugh 420 U.S. 103 (1975); and Brinegar v. United States, 338 U.S. 160 (1949)).
[36] *Id.* at 1604.
[37] *See id.*
[38] *Id.* at 1608.
[39] *Id.* (quoting California v. Greenwood, 486 U.S. 35 (1988), which held that a search of an individual's garbage, while prohibited by California law, was not forbidden by the Fourth Amendment).
[40] *Id.* at 1605-06 (stating that the rule that the legality of warrantless arrests should be judged according to state law standards, which was stated in United States v. Di Re, 332 U.S. 581 (1948) and affirmed in Johnson v. United States, 333 U.S. 10 (1948), was plainly not a constitutional one because Congress was repeatedly invited to change the rule by statute).
[41] *Id.* at 1606 ("[W]hile our opinion said that 'whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law,' it also said that a warrantless arrest satisfies the Constitution so long as the officer has 'probable cause to believe that the suspect has committed or is committing a crime.' [W]e need not pick and choose among the dicta . . . .") (referring to Michigan v. DeFillippo, 443 U.S. 31 (1979)).
[42] *Moore*, 128 S.Ct. at 1605 (citing Whren v. United States, 517 U.S. 806 (1996)).

In *Whren*, despite a departmental policy barring such conduct, plainclothes vice-squad officers with the Metropolitan Police Department of the District of Columbia conducted a traffic stop of a vehicle.[43] The Court held that although the officers violated departmental regulations, the stop was based on probable cause and therefore, a valid seizure under the Fourth Amendment.[44] To hold otherwise would allow the Fourth Amendment to turn upon the "trivialities" of varying law enforcement policies, held the Court.[45]

To find that the detectives violated the Fourth Amendment when they arrested Moore in violation of state law would subject the Fourth Amendment to the same trivialities prohibited by *Whren*, Scalia argued.[46] He also stated that allowing state law to figure in Fourth Amendment analysis "would produce a constitutional regime [that is] vague and unpredictable . . . ," and render the Constitution "only as easy to apply as the underlying state law . . . ."[47] And even if the courts were able to adequately determine and apply state law, the potential for different decisions among the states based on the same facts would produce the sort of variation prohibited by *Whren*.[48]

Furthermore, incorporating state law into Fourth Amendment interpretation would fly in the face of the Court's asserted interest in providing police with bright-line rules.[49] Scalia noted that in *Atwater v. City of Lago Vista*,[50] the Court declined to discourage the police from making legitimate arrests by requiring them to engage in just the sort of considerations required under

[43] *See Whren*, 517 U.S. at 808, 815.
[44] *See id.*
[45] *See id.* at 815.
[46] *Moore*, 128 S.Ct. at 1607.
[47] *Id.*
[48] *See id.* at 1607.
[49] *See id.* at 1606 ("In determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.'").
[50] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

Virginia law.[51] Additionally, in *United States v. Robinson*,[52] the Court plainly stated that the police may perform a search of a person upon lawfully arresting that individual.[53] The justification for the search is twofold. It allows officers to preserve evidence of the crime found on the person, but more importantly, it serves to ensure officer safety.[54] Scalia also acknowledged[55] the rule clearly stated in *Knowles v. Iowa*, which held that because the twin rationales for the *Robinson* rule do not exist when an officer issues a citation instead of making an arrest, a search incident to citation is *not* a reasonable intrusion of privacy.[56] Although the Virginia statute required the City of Portsmouth detectives to issue Moore a citation,[57] Scalia found that *Knowles* did not apply because the detectives arrested Moore—therefore *Robinson* controls.[58]

In summary, the Court's holding rested on the view that 1) when judged in light of the traditional standard of reasonableness, the City of Portsmouth detectives arrest and subsequent search of Moore did not run afoul of the Fourth Amendment;[59] 2) the Court has not previously looked to state law to determine reasonableness under the Fourth Amendment;[60] 3) to do so now would result in a constitutional scheme that is vague and unpredictable in its application;[61] and 4) the interest of providing police with bright-line rules counsels against requiring them to engage in complex statutory considerations.[62] This Casenote will show that all four points offered by Scalia and the Court are unsustainable, and each will be addressed below. However, more

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[51] *See Moore*, 128 S.Ct. at 1606.
[52] United States v. Robinson, 414 U.S. 218 (1973).
[53] *Moore*, 128 S.Ct. at 1607.
[54] *Id.*
[55] *Id.* at 1608.
[56] *See* Knowles v. Iowa, 525 U.S. 113, 119 (1998).
[57] VA. CODE ANN. §19.2-74 (West 2008).
[58] *Moore*, 128 S.Ct. at 1608.
[59] *See id.*
[60] *See id.*
[61] *See id.* at 1606.
[62] *See id.*

immediately, it will be helpful to briefly discuss the trinity of cases—*United States v. Robinson*, *Knowles v. Iowa,* and *Atwater v. City of Lago Vista*—which bear most directly on *Moore*.

1. *United States v. Robinson* – Search Incident to Arrest Exception

Writing for the Court in *United States v. Robinson*, Justice Rehnquist reaffirmed what he saw as a well-settled exception to the warrant requirement of the Fourth Amendment—police may conduct a search of person incident to a lawful arrest.[63] In reaching that conclusion, the Court overturned the conviction of Willie Robinson, who was convicted for possession of heroin.[64]

In *Robinson*, Officer Richard Jenks, who was a fifteen-year veteran of the District of Columbia Metropolitan Police Department, performed a traffic stop of Robinson, who he had stopped just four days earlier. In the earlier stop, Jenks learned that Robinson was operating his vehicle without a license, and it was this knowledge that prompted Jenks to stop Robinson.[65] Under D.C. statute at the time, operating a motor vehicle without a license carried a mandatory jail term, fine, or both.[66] Acting upon authority of the statute, Jenks arrested Robinson.[67] Upon arresting him, Jenks completed a full search of Robinson, during which he discovered heroin capsules in a cigarette package.[68] Robinson was subsequently convicted for possession of heroin.[69]

In its discussion of the well-established rule that a search incident to a *lawful* arrest is an exception to the warrant requirement of the Fourth Amendment, the Court rested its decision on

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[63] United States v. Robinson, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.").
[64] *Id*. at 223.
[65] *Id.* at 469-70.
[66] *Id.* at 470 (citing D.C. CODE ANN. §40-302(d) (1967)).
[67] *See id.* at 470.
[68] *Id.* at 471.
[69] *See id.* at 471.

two main reasons for the exception.[70] First, the Court noted the importance of allowing police to search in order to preserve evidence of the means or fruits of a crime.[71] Second, and most importantly, police may perform a search in order to remove any weapons or other items that pose a danger to the officer.[72] These two rationales, viewed in light of the fact that a custodial arrest based on probable cause is a reasonable intrusion under the Fourth Amendment, clearly establish that a search incident to that lawful arrest is reasonable.[73]

2. *Knowles v. Iowa* – No Search Incident to Citation Exception

In 1998, twenty-five years after it detailed the basis for the search incident to arrest doctrine in *Robinson*, the Court decided *Knowles v. Iowa*, in which it declined to extend the doctrine.[74] Rehnquist, once again writing for the Court, found that the rationale of *Robinson* simply did not apply and reversed Knowles's conviction.[75]

While driving in Newton, Iowa, Knowles was stopped for speeding; he was driving forty-three miles per hour where the speed limit was twenty-five mile per hour.[76] Under Iowa law, the police officer had the choice to either arrest Knowles or issue him a citation for the violation[77]—the officer chose to issue a citation.[78] However—despite issuing the citation—the officer performed a full search of the car, during which he found a bag of marijuana and drug

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[70] *See id.*
[71] *See id.* at 472 (explaining that the Court has recognized this principle in Chimel v. California, 395 U.S. 752 (1969); Angello v. United States, 269 U.S. 20 (1925); and Weeks v. United States, 232 U.S. 383 (1914)).
[72] *See id.* at 472 (explaining that the Court has recognized this principle in Chimel v. California, 395 U.S. 752 (1969); Angello v. United States, 269 U.S. 20 (1925); and Weeks v. United States, 232 U.S. 383 (1914)).
[73] *See id.* at 477.
[74] *See* Knowles v Iowa, 525 U.S. 113, 119 (1998).
[75] *See id.*
[76] *Id.* at 114.
[77] *Id.* at 115 n.1 ("Iowa law permits the issuance of a citation in lieu of arrest for most offenses for which an accused person would be 'eligible for bail.").
[78] *Id.* at 114.

paraphernalia.[79] Knowles was subsequently arrested and convicted for possession of controlled substances.[80]

In seeking to suppress the evidence seized in the search, Knowles argued the search incident to arrest rule from *Robinson* did not apply because he was not arrested.[81] However, the Iowa Supreme Court declined to suppress the evidence and upheld the search based on a search incident to citation exception.[82] Reversing the Iowa Supreme Court, the United States Supreme Court agreed with Knowles—stating that *Robinson* does not justify such an exception.[83]

First, the Court noted that the threat posed to officer safety, as discussed in *Robinson*, is not present when an officer issues a citation.[84] Instead, the Court likened the issuance of a citation more to a *Terry* stop, which is much more informal than a custodial arrest.[85] Second, the Court seized on the opportunity to point out that if the officer had reasonable suspicion to believe that Knowles posed any danger, he had other authority to protect himself. Under *Pennsylvania v. Mimms*[86] and *Terry v. Ohio*,[87] the officer could have ordered the driver out of the vehicle and conducted a "patdown" of the individual.[88] Additionally, *Michigan v. Long* allowed the officer to examine the passenger compartment of the vehicle in search of weapons. [89] Finally, the Court stated that because the violation was speeding, the evidentiary rationale of *Robinson* was not

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[79] *Id.* at 114.
[80] *See id.* at 114.
[81] *Id.* at 114.
[82] *Id.* at 115.
[83] *Id.*
[84] *Id.* at 117. ("The threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest.").
[85] *Id.*
[86] Pennsylvania v. Mimms, 434 U.S. 106 (1997) (holding that an officer may lawfully order the driver and any passengers out of the vehicle in order to ensure his safety).
[87] Terry v. Ohio, 392 U.S. 1 (1968) (holding that an officer may perform a "patdown" of an individual if the officer has reasonable suspicion the individual is armed and dangerous).
[88] Knowles v Iowa, 525 U.S. 113, 117 (1998).
[89] Michigan v. Long, 463 U.S. 1032 (extending Terry v. Ohio, 392 U.S. 1 (1968) to search of a vehicle for weapons).

present here because there was no evidence to be preserved.[90] As such, the Court held the bright-line from *Robinson* could not be extended to the searches such as the one in *Knowles*.[91]

3. *Atwater v. City of Lago Vista* – Arrest for Minor Crimes Based on Probable Cause

In March 1997, as Gail Atwater and her three-year-old son and five-year-old daughter, were driving through Lago Vista, Texas, they were stopped by Police Officer Turek.[92] Officer Turek stopped Atwater when he observed that neither she nor her two children were wearing safety belts as required by Texas law.[93] Under Texas law, failure to wear a safety belt is a misdemeanor punishable by fine or arrest.[94] Despite the fact that Atwater had her children with her, Officer Turek chose to arrest her.[95] Atwater was driven to the local police station where she was booked, placed in a jail cell, brought before a magistrate, and ultimately released on bond.[96]

Claiming that her Fourth Amendment right to be free from unreasonable seizure was violated, Atwater filed a 42 U.S.C. §1983 claim against the City of Lago Vista and the Chief of Police.[97] Atwater claimed that her arrest was unreasonable because founding-era common law rules permitted only misdemeanor arrests for instances where there was a breach of the peace—which was not the nature of the misdemeanor in her case.[98] However, Justice Souter, writing for a five-four majority, found no violation of Atwater's Fourth Amendment rights. The Court found probable cause to be the cornerstone of a constitutionality valid arrest, stating that "[i]f an officer

[90] *Knowles*, 525 U.S. at 118.
[91] *Id.* at 119.
[92] Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
[93] *Id.* at 323-24.
[94] *Id.* at 323.
[95] *Id.* at 324.
[96] *Id.* at 324.
[97] *Id.* at 325.
[98] *Id.* at 327.

has probable cause to believe that an individual has committed even a very minor criminal offense in his presence he may, without violating the Fourth Amendment, arrest the offender."[99]

The Court in *Moore* also emphasized this heavy reliance on probable cause, to the exclusion of other considerations, when determining the reasonableness of an arrest.[100] However, adhering to this single-factor bright-line rule does not serve the principles of justice found in the Fourth Amendment.[101]

IV. ANALYSIS

The Fourth Amendment to the United States Constitution, made applicable to the States through the Due Process Clause the Fourteenth Amendment,[102] states that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[103]

Implicit in its language, the fundamental policy of the Fourth Amendment is to ensure that one's liberty is not subject to arbitrary and capricious invasion by the government.[104] Justice Brennan once noted that

> there exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestor's time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure for a free society.[105]

In *Virginia v. Moore*, the Court held that although law enforcement violated state law prohibiting Moore's arrest, the arrest was reasonable and, therefore, did not violate the Fourth

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[99] *Id.* at 354.
[100] *See* Virginia v. Moore, 128 S.Ct. 1598 (2008).
[101] *See Atwater*, 532 U.S. 318, 362 (O'Connor, J., dissenting).
[102] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961).
[103] U.S. CONST. amend. IV.
[104] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 90 MICH. L. REV. 547, 557 (1999).
[105] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

Amendment.[106] *Moore* is anathema to fundamental policy of the Fourth Amendment; it neither preserves nor resembles the spirit of the Fourth Amendment. And by signaling its willingness to look the other way so long as the search and seizure is fruitful, the Court's decision in *Moore* will have the effect of encouraging police to engage in unreasonable conduct.

The Court used probable cause as some sort of talisman to find that any arrest based on probable cause is constitutionally valid.[107] However, "[w]hile probable cause is surely a necessary condition for warrantless arrests for fine-only offenses, any realistic assessment of the interests implicated by such arrests demonstrates that probable cause alone is not a sufficient condition."[108] The *per se* rule announced in *Moore* is at odds with the touchstone of Fourth Amendment analysis—which is a determination of whether the government invasion of privacy was *reasonable*.[109]

According to Thomas Y. Davies, the modern debate surrounding the Fourth Amendment centers on differing constructions of reasonableness.[110] Davies is a Professor of Law at the University of Tennessee, a widely recognized expert in criminal procedure, and has been cited by the Supreme Court several times—including its decision in *Moore*.[111] In his view, there are two modern formulations of reasonableness—a warrant-preference view and a general-reasonableness view.[112] The warrant-preference construction of reasonableness focuses on the use of probable cause to seek and execute valid warrants.[113] The warrant process allows for judicial supervision of police conduct, which helps to ensure protection of rights. [114] However,

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[106] *Moore*, 128 S.Ct. at 1608.
[107] *Moore*, 128 S.Ct. at 1604.
[108] *Atwater*, 532 U.S. at 363 (O'Connor J., dissenting).
[109] *Id.* at 306.
[110] Davies, *supra* note 104, at 559.
[111] http://www.law.utk.edu/faculty/davies/index.shtml (providing biographical information on Thomas Y. Davies).
[112] *Id.*
[113] *Id.*
[114] *Id.*

this construction does not address the multitude of situations—like *Moore*—where the police do not act pursuant to a warrant. For this reason, the Court has shifted away from the warrant-preference formulation and adopted the general-reasonableness construction.[115]

Under a general-reasonableness construction, the Court will determine the reasonableness of the police conduct in light of the totality of the circumstances.[116] The Court refers to this as the traditional standard of reasonableness, in which governmental interests are balanced against those of the individual.[117] While this view may empower police to aggressively enforce the law,[118] when the Court is willing to find that probable cause can magically transform illegal activity into constitutional conduct, it also has the potential to result in the abridgment of fundamental rights. To ensure the fullest protection of rights, when performing its reasonableness analysis, the Court ought not to forget that in the founding era unreasonableness carried a meaning apart from the circumstantial view adopted by the Court.[119] In the founding era, unreasonable was also understood to mean illogical or inconsistent.[120] But regardless of which of these constructions of reasonableness is adopted, neither can support a finding that the arrest and subsequent search of Moore was in fact reasonable.

A. The Balancing of Interests Under the Traditional Standards of Reasonableness

Taking the balancing approach first, it is clear that Moore's interest in the preservation of his right to remain free from an unreasonable arrest is not outweighed by any governmental interest. The federal government is one of delegated power. That power inherently rests in and flows from the people, and was delegated only to further the interests of the people.[121] This is

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[115] *See id.*
[116] *Id.*
[117] Virginia v. Moore, 128 S.Ct. 1598, 1604 (2008).
[118] Davies, *supra* note 104, at 560.
[119] *See id.* at 686-87.
[120] *Id.* at 687.
[121] *See, e.g.,* U.S. CONST. pmbl.

also true of the government of the states.[122] The will and reason of the people of a state is made manifest by and through their legislature.[123] That being the case, when the legislature enacts the criminal laws of that state, it can be said that the people have determined what conduct is unreasonable. And in turn, the penalties that are established are deemed a reasonable sanction for such conduct. Accepting this to be true, one must also accept the premise that when a state prohibits a penalty—such as arrest—for certain conduct, it has made the determination that such a penalty is an unreasonable sanction and intrusion of one's liberty.

Because the government was formed to serve the interests of the people, the interests of the government are those of its people—which are expressed by and through the legislature. In *Moore*, the Court finds government interest in Moore's arrest by calling attention to the state's interest in ensuring that Moore appear to answer for the charges, that he does not continue the crime, and the preservation of evidence of his crime.[124] The Court is correct in stating that these are legitimate government interests. However, reasonableness requires not only the presence of government interests, but that those interests sufficiently outweigh the individual's interests.[125] It is reasonable to infer that when the penalty for a crime is debated by the state legislature, the interests that the Court recites are considered. And after considering those interests and the penalty for the crime at issue in *Moore*—driving on a suspended license—the legislature determined that those interests did not sufficiently outweigh the liberty interest of citizens as to permit their arrest. If the legislature would have concluded otherwise, the offense would be an arrestable one. In her *Atwater* dissent, Justice O'Connor noted the importance of such legislative determination, stating that "[w]e have said that 'the penalty that may attach to any particular

[122] *See, e.g.,* V.A. CONST. art. I, §§ 1-2.
[123] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 50 (Barnes and Noble Books 2004) (1690).
[124] Virginia v. Moore, 128 S.Ct. 1598, 1605 (2008).
[125] *See id.* at 1604; *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 365 (2001) (O'Connor, J., dissenting).

offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.'"[126]

When analyzing the reasonableness of police conduct, the State of Virginia and the Court are content to look only to those state laws that criminalize conduct and ignore those that discuss the penalties for engaging in such conduct.[127] But to do so does not give equal treatment to all parts of the law; the state may not pick and choose the parts of the law it feels are important.[128] The laws of a state determine what conduct is reasonable, and it necessarily follows that any conduct that is counter to the law is unreasonable. Therefore, an arrest made in violation of state law is an unreasonable seizure and a violation of the Fourth Amendment.[129]

B. The Court Finds Logic Where There is None

Turning now to the construction of reasonableness as that which is consistent with logic, it is clear that the Court's holding finds no more support under such a construction than under a balancing approach. The above exchange between Justice Ginsberg and Mr. McCullough, counsel for the State of Virginia, clearly demonstrates the absurdity of the Court's holding in *Moore*. If the City of Portsmouth detectives would have issued Moore a citation—as required by law—[130] the search would be unconstitutional under *Knowles*.[131] However, because they exceeded their authority and arrested Moore—in violation of state law—the search was viewed as incident to his arrest and, therefore, constitutional under *Robinson*.[132] Stated alternatively, because the detectives violated the rule of law their conduct was deemed consistent with the

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[126] *Atwater*, 532 U.S. at 365 (O'Connor, J., dissenting) (citing Welsh v. Wisconsin, 466 U.S. 740 (1984)).
[127] Brief for Petitioner at 17, 128 S.Ct. 1598 (2008) (No. 06-1082).
[128] *Cf.* McGinnis v. Royester, 410 U.S. 263, 276 (1973) (stating that courts may not pick and choose among legitimate legislative aims to determine which is primary and which subordinate).
[129] U.S. CONST. amend. IV (stating that citizens are to be free from unreasonable seizures).
[130] VA. CODE ANN. §19.2-74(A)(1) (West 2008).
[131] *See* Knowles v. Iowa, 525 U.S. 113 (1998) (holding that there is no search incident to citation exception to the Fourth Amendment).
[132] United States v. Robinson, 414 U.S. 218 (1973) (holding that the constitution supports a search incident to arrest exception to the Fourth Amendment).

Constitution. However, had the detectives followed the rule of law, their conduct would be deemed incompatible with the Constitution. Such a contention smacks of absurdity. An invalid arrest is no more an arrest than an invalid law is a law,[133] and it cannot support a search under *Robinson*.

As is evidenced by a willingness to impose restrictions on an individual's life and liberty for non-compliance, society places great weight on adherence to the rule law and considers its violation unacceptable conduct. Logic cannot support the conclusion that the acceptability of a violation of the law depends upon the actor.

> [E]very man, by consenting with others to make on body politic under one government, puts himself under an obligation to every one [sic] of that society to submit to the determination of the majority, and to be concluded by it; or else [the] original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties. . . .[134]

When the City of Portsmouth detectives were asked why they arrested Moore instead of issuing a citation, they stated that it was "just our prerogative, we chose to effect an arrest."[135] The detectives forget, however, that they are authorized for the purpose of enforcing the will and judgment of the people made manifest by and through its legislative body,[136] and they must act within the boundaries of that authorization. Preservation of the integrity and authority of law enforcement counsels against legitimizing any conduct that is counter to their legislative authorization. "Unlawful conduct, no matter how one twists it, cannot enjoy the protection afforded lawful conduct. If it does, then why would anyone . . . ever abide by the law"?[137]

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[133] *Cf.* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1332 (2000).
[134] *See* LOCKE, *supra* note 123, at 57.
[135] Moore v. Commonwealth, 622 S.E.2d 253, 256 (Va. Ct. App. 2005) (en banc).
[136] *See* LOCKE, *supra* note 123, at 49-51.
[137] Scott Greenfield, *Simple Justice: Virginia v. Moore: The Cynics Win Again!*, http://blog.simplejustice.us/2008/04/24/virginia-v-moore--the-cynics-win-again.aspx.

C. Arrest Authorization: The Overlooked Partner of Probable Cause

The Court's determination that the search and seizure in *Moore* was reasonable is based on two magical words—probable cause.[138] When there is probable cause to believe that a law has been violated in the presence of an officer, on balance, the governmental interests will *always* outweigh those of the individual and thus render the seizure reasonable, the Court asserted.[139] A string of cases are cited for this assertion,[140] but these cases have a commonality not shared with *Moore*—authorization for the arrest.[141] Surely, one cannot quarrel with the notion that probable cause will support a warrantless arrest where there is no prohibition on such, but the suggestion that probable cause will defeat a statutory prohibition of an arrest is quite another thing and is beyond reason. Statutes are legal commands that either require or prohibit conduct.[142] Probable cause does not hold such authority; it cannot authorize an arrest that has been forbidden by statute. Probable cause is merely a threshold standard for reasonableness, which when satisfied, allows for the execution of *authorized* conduct.[143]

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[138] Virginia v. Moore, 128 S.Ct. 1598, 1604, 1607 (2008).
[139] *Id.* at 1604.
[140] *Id.* (citing Devenpeck v. Alford, 543 U.S. 146, 152 (2004); Atwater v. City of Lago Vista, 532 U.S. 318, 346 (2001); Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Brinegar v. United States, 338 U.S. 160, 164, 170, 175-76 (1949)).
[141] TEX. TRANSP. CODE ANN. § 543.001 (Vernon 2008) (authorizing the arrest at issue in *Atwater*); WASH. REV CODE ANN. § 9A.60.040 (West 2008) (making impersonating a police officer a felony charged in *Devenpeck*); Liquor Enforcement Act of 1936, ch. 815, 49 Stat. 1928 (current version at 18 U.S.C. §1262 (2008)) (authorizing the arrest for transportation of intoxicating liquor into the state in *Brinegar*); Gerstein v. Rainwater, 483 F.2d 778, 781 n.9 (5th Cir. 1973) (explaining that the arrest in *Pugh* was for felony robbery).
[142] Professor Philip Prygoski, Thomas M. Cooley Law Sch., Lecture on Constitutional Law (Sept. 02, 2008).
[143] U.S. CONST. amend. IV (allowing a warrant to issue only upon a finding of probable cause). *See also* Michigan v. Summers, 452 U.S. 692, 697 (1981) (referring to probable cause as a threshold standard required for a seizure under the Fourth Amendment); Dunaway v. New York, 442 U.S. 200, 213 (1979) (referring to probable cause as a threshold standard required for a seizure under the Fourth Amendment); Brinegar v. United States, 338 U.S. 160, 175 (1949) (discussing probable cause as a standard against which guilt is weighed to permit a governmental intrusion into privacy).

In *Moore*, the Court asserted that state law has no effect on the reasonableness of a search or seizure under the Fourth Amendment.[144] And because there was probable cause to believe that Moore violated the law, the Virginia statute prohibiting Moore's misdemeanor arrest did not render the arrest unreasonable.[145] Quoting from its earlier decision in *California v. Greenwood*, the Court in *Moore* stated that "[w]hile individual States may surely construe their own constitutions [or statutes] as imposing more stringent constraints on police conduct than does the Federal Constitution, state law [does] not alter the content of the Fourth Amendment."[146] However, the Court's reliance on *Greenwood* for its holding in *Moore* is fundamentally flawed in two ways.

First, the analysis in *Greenwood* centered on the reasonableness of a search not a seizure. The issue in *Greenwood* was the reasonableness of a warrantless search of an individual's garbage.[147] Second, *Greenwood* involved no violation of a state statute. The California Court of Appeals invalidated the search based solely on earlier caselaw that interpreted the concepts of privacy and reasonableness differently under the California Constitution than the United States Constitution.[148] The Court noted in *Greenwood* that these concepts should not fluctuate from state to state, but must be based on a broader societal understanding.[149] In the interest of preserving societal norms and culture, one should agree with this statement. However, the Court's decision in *Moore* need not follow as a direct result of such a belief.

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[144] *See* Virginia v. Moore, 128 S.Ct. 1598, 1604 (2008) (quoting California v. Greenwood, 486 U.S. 35, 108 (1988) "'Whether or not a search is reasonable within the meaning of the Fourth Amendment,' we said, has never 'depended on the law of the particular State in which the search occurs.'").
[145] *Id.* at 1607.
[146] *Id.*
[147] California v. Greenwood, 486 U.S. 35, 37 (1988) ("The issue here is whether the Fourth Amendment prohibits the warrantless search and seizure of garbage left for collection outside the curtilage of a home.").
[148] *Id.* at 37.
[149] *Id.*

Finding that an arrest is unreasonable where police have violated state law prohibiting such an arrest will not cause the concept of reasonableness to fluctuate from state to state. Instead, reasonableness under the Fourth Amendment will continue to hold the same meaning in each state, and it is only the laws of the states that change. Incorporating compliance with state law into the reasonableness analysis of the Fourth Amendment would address reasonableness in its broadest sense, thereby providing a standard against which the conduct of all law enforcement could be measured. Such a proposition does not alter the Fourth Amendment, but rather serves to uphold its true spirit. However, in *Moore*, the Court directly attacked the notion that the Fourth Amendment would carry the same meaning if interpreted in light of state law.

D. Incorporation of State Law Would Not Result in a Vague and Varying Fourth Amendment

Relying on *Whren v. United States*, the Court held that because the practices of law enforcement vary from place to place and time to time, viewing the Fourth Amendment through the lens of state law would cause its protections to turn upon trivialities.[150] But after one compares the nature of the violations in *Whren* and in *Moore*, the truth of the Court's statement can only be found in the former case.

In *Whren*, it was conceded that there was probable cause to conduct a traffic stop, but Whren argued that departmental policy barred the plainclothes officers from conducting the stop.[151] The Court held that because an officer wearing a uniform and driving a marked car was not barred from conducting the stop, a violation of department policy limiting the conduct of plainclothes officers did not violate the Fourth Amendment.[152] The nature of the violation in *Whren* was the manner in which the traffic stop was conducted—by plainclothes officers instead

[150] *Moore*, 128 S.Ct. at 1604-05.
[151] Whren v. United States, 517 U.S. 806, 810, 815 (1996).
[152] *Id.* at 815.

of uniformed officers. In other words, it was a "procedural" violation not a "substantive" violation. In *Moore*, it was just the opposite, the officers engaged in a substantive violation.

If a violation of departmental procedural rules, such as the manner in which an officer is dressed or the paint job of the car he is driving, is allowed to determine the reasonableness of an arrest, the Fourth Amendment would indeed be made to turn upon trivialities. But the same cannot be said of substantive violations. These are violations, such as in *Moore*, where the police do not comply with statutory law directly limiting their authority.[153] Violation of the law is no trivial thing. It is this very thing that society deems so unacceptable that it is willing to allow the restriction of an individual's liberty by issuing citations, making arrests, and even imprisonment for such conduct. A key difference between *Moore* and *Whren* is that in *Whren*, a regular officer was not barred from conducting a traffic stop, while in *Moore*, the arrest was prohibited and, therefore, unreasonable regardless of whom made it. To declare an arrest unreasonable when police have made a substantive violation, as in *Moore*, does not threaten to make the Fourth Amendment turn upon trivialities, but rather substantive law and basic notions of reasonableness.

The Court further resisted an interpretation of the Fourth Amendment in light of substantive state law on the grounds that such an interpretation would produce unpredictable results.[154] The Court's resistance stemmed from the notion that police officers and courts would be required to interpret complex state law while performing a constitutional analysis.[155] But the Court need not doubt the competency of the lower courts. In the performance of their duties, judicial officials of the state courts consistently deal in the complexities of state law. They are also expected to consult, interpret, and uphold the constitution in the execution of their judicial

[153] Virginia v. Moore, 128 S.Ct. 1598, 1602 (2008).
[154] *Id.* at 1606.
[155] *Id.*

duties.[156] Requiring courts to perform these calculations together adds no additional complexity, and it will serve to ensure the protection of rights—an essential function of the court.[157]

Additionally, the State of Virginia's claim that allowing Fourth Amendment analysis to turn upon questions of state law would conflict with the principles of federalism[158] cannot be sustained. Under *Erie v. Tompkins*, federal courts are already required to interpret and apply substantive state law.[159] Requiring the federal courts to consider state law in an analysis of the Fourth Amendment would not expose them to unfamiliar complexities of state law and would ensure the fullest protection of rights. "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[160]

The Court also resisted incorporating state law into the Fourth Amendment on the grounds that it is counter to their preference for bright-line rules.[161] The Court stated that a finding in favor of Moore would complicate the duties of police officers, requiring them to weigh statutory factors in each case—something the Court rejected in *Atwater*.[162] However, the Court need not doubt the incompetency of the police any more than that of the courts. The notion that police officers should also know the limits of their authority is not wildly unreasonable. In *Moore*, there were no complex factors for the detectives to weigh when they encountered Moore; Virginia law clearly established the criteria necessary before they were authorized to arrest

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[156] *See, e.g.*, VA. CONST. art. II §7 (stating, "I do solemnly swear (or affirm) that I will support the Constitution of the United States").
[157] Prygoski, *supra* note 128 (stating that the two essential functions of the courts are to serve as a check and balance on the other branches of government, as well as to protect rights).
[158] Brief for Petitioner at 20, Virginia v. Moore, 128 S.Ct. 1598 (2008) (No. 06-1082).
[159] Erie v. Tompkins, 304 U.S. 64, 78 (1938).
[160] Brennan, *supra* 105, at 503.
[161] *Moore*, 128 S.Ct. at 1606.
[162] *Id.*

Moore.[163] In *Atwater*, Justice O'Connor noted that "[g]iving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a . . . misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable."[164] If police officers are allowed to disregard the limits of their authority, "they become free-range cowboys, off to enforce their personal version of right and wrong with a state-purchased car and gun."[165] Such a result would surely be a danger to the constitutional principles of a free society and should not be encouraged.

To reach an opposite result in *Moore*, the preference for bright-line rules need not be abandoned. In fact, it is urged here that the Court adopt a new bright-line rule. That rule being that when state police officers make an arrest—which is prohibited by state law—while enforcing the criminal laws of that state, such an arrest is unreasonable under the Fourth Amendment. It is suggested that there are four factors for evaluating the appropriateness of a bright-line rule: 1) does the rule have clear and certain boundaries, making case-specific analysis unnecessary; 2) does the rule produce the result that would be obtained if case-specific analysis was performed; 3) have attempts to apply the rule proven to be unworkable; and 4) is the rule not readily subject to manipulation?[166]

The rule offered here clearly satisfies these four factors. First, the boundaries of the rule are clear. The rule here would find a violation of the Fourth Amendment where the police have violated substantive law prohibiting the arrest, not procedural rules governing the manner of arrest. Second, the Court acknowledges in *Atwater* that under a case-specific analysis, even where an officer is authorized to make an arrest, to do so instead of issuing a citation where there

[163] VA. CODE ANN. §19.2-74(A)(1) (West 2008).
[164] Atwater v. City of Lago Vista, 532 U.S. 318, 365-66 (2001) (O'Connor, J., dissenting).
[165] Greenfield, *supra* note 122.
[166] Richard S. Farse, *Atwater v. City of Lago Vista: How Can a Clearly Unreasonable Arrest Be a "Reasonable" Seizure?*, SEARCH AND SEIZURE LAW REPORT, Dec. 2003, at 85, 87-88.

is no specific need for an arrest may be unreasonable.[167] Third, the rule could be applied without discouraging police from making legitimate arrests as the Court asserts.[168] Under the rule, police officers would be held to a high professional standard, which would require them to know the limits of their authority. Lastly, because the rule is tied directly to the pronouncements of the state legislatures, there is no possibility for abuse or manipulation. This direct connection to the laws of the state allows for greater citizen control of the police by providing the ability to restrict or grant arrest authority as notions of reasonableness change over time.

E. "Lawfulness" Is Required for a Search Incident to a Lawful Arrest

After establishing Moore's arrest as reasonable, it was a natural conclusion for the Court to find that the subsequent search of Moore was also reasonable.[169] In *Robinson*, the Court made clear the rule that police may conduct a search of the person incident to a *lawful* arrest.[170] And in *Knowles*, the Court, just as clearly, laid down the rule that the Fourth Amendment did not support a "search incident to citation" exception. Although the Virginia statute only authorized the detectives to issue a citation, the Court got around the search limitation of *Knowles* by finding that because the detectives arrested Moore, the search was reasonable under *Robinson*.[171] The Court's application of *Robinson* sis flawed, however.

In *Moore*, the Court parses its holding in *Robinson* to arrive at a decision it finds most favorable. In doing so, it divorces the word "arrest" from the most important term in the *Robinson* decision—"lawful." In *Robinson*, the Court used the word "lawful" or "valid" a total of nineteen times in relation to an arrest.[172] Such usage was superfluous.

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[167] *See Atwater*, 532 U.S. at 346.
[168] *Moore*, 128 S.Ct. 1607.
[169] *Id.* at 1608
[170] United States v. Robinson, 414 U.S. 218, 224 (1973).
[171] *Id.*
[172] *See id.*

Justice Cardozo, while serving on the Court of Appeals of New York, recognized the importance that the arrest's validity has on the subsequent search. In *People v. Chiagles*, Cardozo stated that the "[s]earch of a person is unlawful when the seizure of the body is a trespass . . . ."[173] In its broadest meaning, a trespass occurs when police have exceeded the bounds of the rights they have been legally granted.[174] Because the detectives did not have the authority to arrest Moore, according to Cardozo, the detective's search of Moore must be deemed unlawful.

Moreover, under the circumstances in *Moore*, the outer limit of the detectives' authority was the ability to issue Moore a citation for driving on a suspended license.[175] The Court held in *Knowles* that because issuance of a citation does not carry the same safety concerns as addressed in *Robinson*, a search conducted incident to a citation violates the Fourth Amendment.[176] The detectives, acting to the fullest extent of their authorization, could not have performed a search of Moore. It was only once they exceeded the bounds of their authority and arrested Moore that the detectives were able to search him. But an invalid arrest is no more an arrest than an invalid law is a law[177] and should not permit a search under *Robinson*. To hold otherwise would render *Knowles* a nullity and totality without meaning. Where police officers lack the probable cause to search, they will simply arrest every motorist where they think a search may yield contraband.

[173] People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923).
[174] *See* 87 C.J.S. *Trespass* § 2 (2008).
[175] VA. CODE ANN. §19.2-74(A)(1) (West 2008).
[176] Knowles v. Iowa, 525 U.S. 113, 118-19 (1998).
[177] Fallon, *supra* note 133 at 1332.

VI. CONCLUSION

"The fact that the Court rules in a case . . . that [certain conduct] is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is."[178] Simply put, the Court's decision in *Moore* violates the spirit of the Fourth Amendment, which protects individuals from arbitrary and capricious government action. A finding of probable cause, while necessary to make an arrest reasonable, does not automatically make it so. For the conduct of law enforcement to comply with the spirit of the Fourth Amendment, when making an arrest, there must not only be probable cause, but also compliance with state law. An arrest cannot be reasonable when it is conducted in contradiction to an express prohibition on such. The interest of a government is no greater than the interests of its people. The laws enacted by the legislature are a direct reflection of the interests of the people and what they deem to be reasonable. Law enforcement, having been granted authority under the laws of the state, does not possess an authority greater than the state. Law enforcement may not, therefore, act beyond the limits of such authority and make arrests where expressly forbidden.

Requiring compliance with state law in order for police conduct to be reasonable under the Fourth Amendment will not cause its meaning to vary from state to state. The rule advocated here advances a notion of reasonableness that applies evenly across the states. It does not declare that an arrest for driving without a license is reasonable in one state and unreasonable in another. It addresses a broader sense of reasonableness and suggests that a violation of the substantive law of a state is unreasonable. It also ensures that not only are citizens held to the rule of law, but also that the government officials they have authorized to advance their interests are also held to the same standard. Violation of the law by the government is no more reasonable than when it is

[178] Philip J. Progoski, *War as the Prevailing Metaphor in Federal Indian Law Jurisprudence: An Exercise in Judicial Activism*, 14 T.M. COOLEY L. REV. 491, 491 (1997) (quoting Earl Warren, *The Bill of Rights and Military*, 27 N.Y.U L. REV. 181, 193 (1962)).

an individual citizen who does so. To refuse to hold the police to the rule of law and permit them to exercise their authority as they see fit is to issue a license of tyranny and totally undue the Fourth Amendment.

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