

Civil Arrest?  
(Another) St. Louis Case Study in Unconstitutionality

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INTRODUCTION

This Article advances a simple claim in need of enforcement in this country right now: no person may be arrested for an alleged violation of civil, as opposed to criminal, law. Indeed, courts have long interpreted the Fourth Amendment as prohibiting arrest except when probable cause exists to believe that a crime has been committed and that the defendant is the person who committed the crime. However, in many places police take citizens into custody without a warrant for the non-criminal conduct of allegedly breaking civil laws.

This unfortunate phenomenon received national attention in St. Louis, Missouri following the death of Michael Brown, an unarmed African-American teen shot by City of Ferguson police officer Darren Wilson during a pedestrian stop in 2014.<sup>1</sup> The tragic incident resulted in angry protests targeted at local government and police for their history of problematic police practices used primarily against poor and minority residents. But in a cruel irony, such public calls for reform around municipal ordinance enforcement were met with

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1. Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>.

further widespread arrests. Arrests that we believe were, and are, wholly unlawful.<sup>2</sup>

As lawyers involved in the protest movement, we are aware of countless individuals handcuffed by St. Louis-area police, forcibly removed from the streets, and taken into custody for everything from “failing to disperse” to “interfering with police officer duties” to “unlawful assembly.”<sup>3</sup> Many were held in jail for hours; some for days. Many paid bail to secure their release from custody pending trial, while others spent time in overcrowded and often filthy jail cells until they could be seen by the judge.<sup>4</sup> Those found guilty of their alleged acts were generally sanctioned with fines.

These events led to further critiques and some lawsuits, including one brought by the United States Department of Justice against the City of Ferguson.<sup>5</sup> Attorneys and community activists deployed a range of arguments against police actions during this time. For instance, some challenged police treatment of arrestees; others alleged jail conditions failed to meet minimum standards.<sup>6</sup> Money

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2. As will be further discussed below, this Article seeks to expand upon our prior advocacy work in St. Louis following Michael Brown’s death, including testimony before the Ferguson Commission and litigation on behalf of those arrested during protests. *See infra* Part II.

3. MO. REV. STAT. § 574.040 (LEXIS through 2016 legislation) (unlawful assembly); MO. REV. STAT. § 574.060 (LEXIS through 2016 legislation) (failing to disperse); ST. LOUIS, MO., MO. CODE ORD. § 701.110 (2016), [https://www.municode.com/library/mo/st\\_louis\\_county/codes/code\\_of\\_ordinances?nodeId=TITVIIIPUSAMO\\_CH701DEPO\\_701.110INOFUN](https://www.municode.com/library/mo/st_louis_county/codes/code_of_ordinances?nodeId=TITVIIIPUSAMO_CH701DEPO_701.110INOFUN) (interfering with a police officer).

4. *See, e.g.*, Amanda Terkel & Ryan Reilly, *Ferguson Protestors Deal with Fallout After Arrests*, HUFFINGTON POST (Sept. 9, 2014, 2:41 PM), [http://www.huffingtonpost.com/2014/09/09/ferguson-arrests\\_n\\_5791136.html](http://www.huffingtonpost.com/2014/09/09/ferguson-arrests_n_5791136.html); Kimberly Kindy & Wesley Lowery, *Ferguson Police Continued Crackdown on Protesters After Federal, State Intervention*, WASH. POST (Oct. 10, 2014), [https://www.washingtonpost.com/politics/ferguson-police-continued-crackdown-on-protesters-after-federal-state-interventions/2014/10/09/15df8a2a-4e40-11e4-aa5e-7153e466a02d\\_story.html](https://www.washingtonpost.com/politics/ferguson-police-continued-crackdown-on-protesters-after-federal-state-interventions/2014/10/09/15df8a2a-4e40-11e4-aa5e-7153e466a02d_story.html).

5. Laura Wagner, *Justice Department Sues Ferguson After City Amends Police Reform Deal*, NPR (Feb. 10, 2016, 6:01 PM), <http://www.npr.org/sections/thetwo-way/2016/02/10/466329269/justice-department-sues-ferguson-after-city-amends-police-reform-deal>; *Investigation of the Ferguson Police Department*, U.S. DEP’T OF JUST. (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

6. *See, e.g.*, Stephen Deere, *Suit Seeks \$20 Million, Alleging Wrongful Arrests, Prosecutions in Ferguson*, ST. LOUIS POST-DISPATCH (Aug. 9, 2016), [http://www.stltoday.com/news/local/crime-and-courts/suit-seeks-million-alleging-wrongful-arrests-prosecutions-in-ferguson/article\\_be51dc4a-0f99-5a5d-a512-7aae4cac94ec.html](http://www.stltoday.com/news/local/crime-and-courts/suit-seeks-million-alleging-wrongful-arrests-prosecutions-in-ferguson/article_be51dc4a-0f99-5a5d-a512-7aae4cac94ec.html); Matt Pearce, *Missouri Cities,*

bail practices working to keep poor people in custody were attacked, as were mandatory fines that could not be satisfied by indigent defendants. Yet we believe these practices suffer from an even more fundamental problem—that police engage in forcible arrests for allegations that amount to nothing more than civil infractions.

This Article seeks to advance this largely overlooked claim. And it does so as activists have again taken to the streets—not just in Ferguson, but across the country to express their grief and outrage around further unnecessary acts of violence on the part of law enforcement against people of color. As they publicly express their disgust with the killing of Philando Castille in Minnesota, Korryn Gaines in Maryland, Alton Sterling in Louisiana, and Paul O’Neil in Illinois,<sup>7</sup> many peaceful protestors are again being met with arrest for alleged non-crimes relating to their peaceful assembly. And in the weeks leading up to the second anniversary of Mike Brown’s death, more demonstrators in the St. Louis area were arrested for protest activities.<sup>8</sup>

In Part I.A, we explain how the act of arresting residents for municipal ordinance violations, generally considered civil infractions under state law, is unconstitutional. Thus, such civil arrest practices—unlawful under the Fourth Amendment—should not only be abandoned in Ferguson, but across the country as a matter of law. Moreover, as a matter of policy, failure to take such action will not only leave local governments open to yet more litigation, but

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*Including Ferguson, Sued over ‘Grotesque’ Jail Conditions*, L.A. TIMES (Feb. 9, 2015, 5:37 PM), <http://www.latimes.com/nation/la-na-ferguson-lawsuit-20150209-story.html>.

7. Priscilla Alvarez, *Korryn Gains and the Conflicts Between Black Women and the Police*, ATLANTIC (Aug. 2, 2016), <http://www.theatlantic.com/politics/archive/2016/08/korryn-gaines-baltimore/494123/>; Camila Domonoske & Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting ‘Absolutely Appalling at All Levels,’* NPR (July 7, 2016, 7:19 AM), <http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video>; Alton Sterling, *Father of Five, Murdered by Police Two Months After “Blue Lives Matter” Bill Signed*, DEMOCRACY NOW (July 7, 2016), [http://www.democracynow.org/2016/7/7/alton\\_sterling\\_father\\_of\\_five\\_murdered](http://www.democracynow.org/2016/7/7/alton_sterling_father_of_five_murdered); William Lee, *Autopsy: Paul O’Neal Fatally Shot by Police in Back*, CHI. TRIB. (Aug. 17, 2016, 8:13 PM), <http://www.chicagotribune.com/news/local/breaking/ct-paul-oneal-autopsy-20160817-story.html>.

8. See, e.g., Rebecca Rivas, *Four Arrested Disrupting Munny Show Singing ‘Freedom Song’ on Anniversary of Mike Brown’s Death*, ST. LOUIS AM. (Aug. 9, 2016), [http://www.stlamerican.com/news/local\\_news/four-arrested-while-disrupting-munny-show-singing-freedom-song-on/article\\_834a9046-5eb0-11e6-9b9b-13c534a4eca3.html](http://www.stlamerican.com/news/local_news/four-arrested-while-disrupting-munny-show-singing-freedom-song-on/article_834a9046-5eb0-11e6-9b9b-13c534a4eca3.html).

continue to deplete their already limited budgets and further exacerbate tensions in police-citizen relations in these fragile times.

In Part I.B, we explain why civil arrest should be seen as unconstitutional under the Fourth Amendment to the United States Constitution. Although the United States Supreme Court has never squarely addressed the issue, its search-and-seizure jurisprudence supports a determination that custodial arrest for alleged civil wrongdoing is simply unlawful. And while the Court's traffic violation cases allow a fair amount of latitude for officers on the beat dealing with low-level matters, the Court has never countenanced widespread custodial arrest policies to address civil liability.

As Part II describes, many police officers across the country effectuate arrests based on activities that do not rise to the level of criminal conduct. It focuses on Missouri to provide a striking example of civil arrest in practice. But until recently, such custodial encounters for low-level civil violations remained under the national legal radar. This occurred for a range of reasons—from a lack of lawyers for persons charged with such acts, the preference of litigators to settle cases without trial, and arcane provisions surrounding local legal proceedings. However, widespread arrests of Ferguson protestors for local municipal violations since the shooting death of Michael Brown have helped shine a light on problematic local practices that many of us already knew too well.<sup>9</sup>

Over the decades, St. Louis County residents—particularly youth of color—have been routinely subjected to full-blown arrests for low-level local ordinance violations. And despite the May 2016 settlement agreement reached between the United States Department of Justice and the City of Ferguson, as citizens again take to the streets to publicly mourn shootings of more black citizens by police, they are still being met by civil arrest.<sup>10</sup>

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9. Tribune Wire Reports, *Several Arrests on 4th Night of Ferguson Protests*, CHI. TRIB. (Aug. 11, 2015, 12:41 AM), <http://www.chicagotribune.com/news/nationworld/ct-ferguson-protest-shooting-20150810-story.html>; see also Terkel & Reilly, *supra* note 4 and accompanying text.

10. Terkel & Reilly, *supra* note 4; Consent Decree, *United States v. City of Ferguson*, No. 4:16-cv-000180-CDP (E.D. Mo. 2016); see also Matt Apuzzo & John Eligon, *Department of Justice Reaches Settlement with Ferguson*, N.Y. TIMES (Jan. 27, 2016), <http://www.nytimes.com>.

In Part III, we call on municipalities to use common sense and cull their local codes to ensure they do not permit arrest in connection with mere civil or quasi-criminal cases. State legislatures should also create preemptive statewide standards that mandate citation for such matters to ensure that local officers do not overstep their roles. And police departments themselves can embrace citation requirements through training and otherwise to rethink the problematic practice of civil arrest. Unless and until these changes occur, local governments may find themselves contending with endless lawsuits and unnecessary costs as activists and their attorneys—who stand ready to take the issue to the United States Supreme Court—fight to ensure that peaceful protest is not met with uncivil act of civil arrest.

#### I. LACK OF CONSTITUTIONAL AUTHORITY FOR CIVIL ARREST

Ask almost any young child to tell you what the word “arrest” means and they can do so. In our experience representing children and teens this is based upon representation in television shows; pervasiveness in popular culture; and, sadly, in many instances, based upon their own experiences in the modern world.<sup>11</sup> And yet the United States Constitution’s Bill of Rights—the document seen as most fundamental to the law of arrest—does not even use the word.<sup>12</sup> Instead, over time, case law interpreting the Fourth Amendment’s requirements for lawful searches and seizures has developed the

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com/2016/01/28/us/departement-of-justice-reaches-agreement-with-ferguson.html?\_r=0 (noting the “agreement . . . calls for officers to stop making unwarranted arrests”).

11. Travis M. Andrews, *Six-Year-Old Handcuffed and Several Other Children Under 11 Arrested in Tennessee, Sparking Outrage*, WASH. POST (Apr. 20, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/20/six-year-old-handcuffed-and-several-other-children-under-age-11-arrested-in-tennessee-sparking-outrage/>; *More Young Children Getting Arrested*, ABC NEWS (July 31, 2016), <http://abcnews.go.com/GMA/story?id=126807> (“Florida Department of Juvenile Justice reported that more than 100 children aged 5 and 6 have been arrested in Florida in the past 12 months.”).

12. See Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. & CRIMINOLOGY 393, 403 (1963) (“[D]ifficulties arise from the expression of the amendment’s protection in terms of ‘seizure’ rather than arrest.”).

concept and contours of what is considered “an arrest” in the United States<sup>13</sup> and when such action may be undertaken by police.<sup>14</sup>

*A. Under Arrest in the Supreme Court*

Obviously, not every encounter with police amounts to an arrest. As one commentator has noted, the question of whether an arrest has occurred generally cannot be answered in the abstract.<sup>15</sup> Instead, context is important. It is determined based upon the totality of the circumstances, viewed from the perspective of a “reasonable person” in the defendant’s situation.<sup>16</sup> Thus, while an arrest does not have any firm, bright-line features, the longer the detention, the more movement from the place of initial encounter, and/or the more restrictions imposed on the suspect, the more likely the interaction has shifted from a consensual encounter of no constitutional import, to one that is considered a full-blown arrest for purposes of the Fourth Amendment.<sup>17</sup>

Over time, the United States Supreme Court’s cases have provided some guideposts for what conduct rises to the level of a full-blown arrest and must, therefore, be justified under the Fourth Amendment. For instance, the Court has made clear a “brief, on-the-spot stop on the street” does “not fit comfortably within the traditional concept of an ‘arrest.’”<sup>18</sup> In contrast, however, where a

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13. Richard Williamson, *The Dimensions of Seizure: The Concepts of “Stop” and “Arrest,”* 43 OHIO ST. L.J. 771, 771 (1982) (“Surprisingly, the development of the law governing seizures of people has been the stepchild of fourth amendment jurisprudence.”).

14. *Id.* at 776 (“Thus, to fully define the scope of fourth amendment limits on seizures of people, the Supreme Court must not only define the circumstances under which a seizure will be permissible, but it also must define with specificity the types of activity that constitute a seizure.”). For a comprehensive text describing constitutional arrest doctrine through 1965 and prior to the development of the *Terry*-stop doctrine for less intrusive seizures, see generally WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (Frank J. Remington ed., 2d ed. 1965) [hereinafter LAFAVE I].

15. WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* 199 (5th ed., 2009) (“The question of when arrest occurred cannot be answered in the abstract . . .”) [hereinafter LAFAVE II].

16. *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (“whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“[I]n view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . .”).

17. See LAFAVE I, *supra* note 15, at 242–44.

18. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

defendant was picked up from his neighborhood, driven to police headquarters in a squad car, and then subjected to police questions, he was considered arrested for Fourth Amendment purposes.<sup>19</sup>

### *B. Arrest Justification Jurisprudence*

But when are arrests permitted under the Fourth Amendment? The Fourth Amendment to the United States Constitution provides for “[t]he right of people to be secure in their persons . . . against unreasonable . . . seizures . . . .”<sup>20</sup> It continues that this right “shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation . . . .”<sup>21</sup> Forming the foundation of our law of arrest, these few sentences have in many ways confounded academics, advocates, and law enforcement agents over the decades.<sup>22</sup>

One recurring question is whether the Fourth Amendment requires warrants to effectuate seizures but allows for exceptions deemed reasonable as a matter of law, or if it allows for all reasonable searches and seizures, with those based upon a warrant being among those deemed reasonable.<sup>23</sup> Under either scenario, police action rooted in probable cause is a key concept.<sup>24</sup> The question then becomes, *probable cause for what?*

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19. *Id.* at 212 (noting that the defendant was not told he was under arrest was irrelevant).

20. U.S. CONST. amend. IV.

21. *Id.*

22. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 62–63 (4th ed. 2010) (referring to the Fourth Amendment’s “text and its mysteries”). Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999) (noting the Fourth Amendment’s “text does not indicate” how its different clauses “fit together[.]”).

23. DRESSLER & THOMAS, *supra* note 22, at 62 (“Perhaps the most controversial feature of Fourth Amendment jurisprudence relates to the relationship between the . . . ‘reasonableness clause’ . . . and the . . . ‘warrant clause.’”); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (describing the debate regarding the primacy of the warrant clause versus the reasonableness clause, and declaring the latter controls); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994) (disagreeing with Amar and urging warrant requirement as “touchstone of constitutionally ‘reasonable searches’”).

24. *See* *Bailey v. United States*, 133 S. Ct. 1031, 1044 (2013) (Scalia, J., concurring) (“It bears repeating that the ‘general rule’ is that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause.”); *see also* Leagre, *supra* note 12, at 406 (“[I]n the few arrest cases

Here, too, the Fourth Amendment is silent.<sup>25</sup> Thus, the United States Supreme Court, case by case, has built our modern understanding of what probable cause modifies in the context of the law of arrest. Taken together, we believe, the Court's past decisions make clear that arrest should take place only when there is a high probability—or probable cause—that a crime has been committed and that the defendant is the one who committed it. That is, an officer must possess a sufficiently firm belief that actual criminal conduct—rather than some other law violation—has been committed by the defendant before the officer can place the defendant under arrest.

For instance, in the context of issuing warrants, the Court has repeatedly made clear the focus must be on whether the information provided by police demonstrates the accused has engaged in actual “criminal activity . . . .”<sup>26</sup> In *Spinelli v. United States*, the warrant application should have been denied as it did not sufficiently prove “that a crime[,]” there bookmaking, “was probably being committed.”<sup>27</sup> Of course, the more rigid two-part test advanced in *Spinelli* has given way to *Gates*'s more flexible “totality of the circumstances” standard for warrant applications.<sup>28</sup> But that has not lessened the level of wrongdoing at the heart of the Fourth Amendment.<sup>29</sup> Indeed, the *Gates* Court also spoke in terms of a sufficient showing relating to actual “criminal activity . . . .”<sup>30</sup>

In the contexts of warrantless arrests, the Court has gone even further to drive home the need for an underlying crime to support an arrest—not some lesser or different kind of wrongdoing. For instance, in *United States v. Watson*, the Court—for the first time—

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to reach it, the Court has clearly held that reasonableness for an arrest without a warrant requires the same degree of probable cause as is necessary for the issuance of a warrant.”); DRESSLER & THOMAS, *supra* note 22, at 141 (referring to “probable cause” as the “traditional standard” under the Fourth Amendment) (internal citation and quotation marks omitted).

25. See generally U.S. CONST. amend. IV.

26. See, e.g., *Spinelli v. United States*, 393 U.S. 410, 416–18 (1969).

27. *Id.* at 416–20.

28. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

29. Three years ago, in *Bailey v. United States*, the majority decision noted: “This Court has stated ‘the general rule that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause’ to believe that the individual has committed a crime.” *Bailey*, 133 S. Ct. at 1037 (2013) (quoting *Dunaway v. New York*, 442 U.S. 200 (1979)).

30. *Gates*, 462 U.S. at 271–72.



permitted a warrantless arrest even when there was time to obtain a warrant.<sup>31</sup> In doing so it made repeated reference to the fact that the defendant was suspected of not just a crime, but one that was a felony.<sup>32</sup>

Indeed, it is worth noting *Watson*'s focus on the common law differences between felony and non-felony arrests.<sup>33</sup> The former was appropriate even if the crime did not occur in the presence of the officer but was based upon a report provided by someone else.<sup>34</sup> As to the latter, the requirements were more stringent.<sup>35</sup> An arrest without a warrant would be permitted upon probable cause for misdemeanors only when the crime was committed in the presence of the officer.<sup>36</sup> Thus, while it did not expressly embrace the same “in presence” requirement for misdemeanor arrests, *Watson* suggested misdemeanor crimes—and not anything less—provided the floor for lawful warrantless arrests.<sup>37</sup>

Countless treatises, textbooks, and officer training materials describe the Fourth Amendment in the same way—as relating to the investigation of crimes as compared to other activity. For instance, professors Erwin Chemerinsky and Laurie Levenson devote an entire section of their Criminal Procedure casebook to the inquiry: “For What Crimes May a Person be Arrested?”<sup>38</sup> Wayne LaFave’s popular hornbook further refers to probable cause to arrest for crimes, spending a great deal of time discussing the common law distinction between warrantless felony and misdemeanor arrest.<sup>39</sup> This analysis, too, underscores the fact that misdemeanor conduct is the minimum requirement for warrantless arrests. Even police materials assume

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31. *United States v. Watson*, 423 U.S. 411 (1976).

32. *Id.* In that instance, the crime in question was a felony—and still it would not justify warrantless arrest inside of a home—only in a public place. *Id.* at 424.

33. *Id.* at 421–23.

34. *Id.* at 418.

35. *Id.* at 422.

36. *Id.*

37. *See United States v. Watson*, 423 U.S. 411 (1976).

38. ERWIN CHERMERINSKY & LAURIE LEVENSON, CRIMINAL PROCEDURE 310 (2d ed. 2013).

39. LAFAVE II, *supra* note 15, at 198–203.

that crimes are the only thing for which an officer can make an arrest based on probable cause.<sup>40</sup>

The Supreme Court has sometimes used different vocabulary to frame the issue. For instance, the Court has discussed “probable cause” that an offense—rather than a crime—has occurred. This choice of words finds its genesis in early case law.<sup>41</sup> But in most instances, the Court was referencing the same kind of activity: a violation of some component of criminal law, whether a felony or misdemeanor.<sup>42</sup>

### *C. The Court’s Minor Misdemeanor Matters*

Over the last twenty years, the Court has turned its attention to the special problem of police engagement with traffic violators. The Supreme Court’s traffic cases suggest officers have a fair amount of latitude when dealing with quick-moving roadside encounters. But quite surprisingly, it has never squarely faced the question of whether full-blown arrests for civil traffic violations are lawful. Nevertheless, taken together, the Court’s traffic stop and search decisions further support a distinction between criminal activity and civil law violations for Fourth Amendment purposes.

Perhaps one of the Court’s most well-known, and most lamented, traffic violation decisions involved Gail Atwater, a Texas mother who was stopped by a local police for failing to secure her young children with seatbelts.<sup>43</sup> During the stop, rather than merely issue a ticket for the violation, the officer—who had encountered Ms. Atwater before—placed her in handcuffs, turned her children over to a friend, and transported her to the police station where she was booked.<sup>44</sup> She secured her release by posting a bond, and ultimately

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40. See, e.g., Devallis Rutledge, *Probable Cause and Reasonable Suspicion*, POLICE MAG. (June 7, 2011), <http://www.policemag.com/channel/patrol/articles/2011/06/probable-cause-and-reasonable-suspicion.aspx> (“‘Probable cause’ means reasonably reliable information to suspect there is a ‘fair probability’ that a person has committed a crime . . .”).

41. See, e.g., *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

42. See, e.g., *Brinegar*, 338 U.S. 160 (1949) (focusing on whether probable cause existed for a state law violation of transporting liquor).

43. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

44. *Id.* at 324.

pled guilty to the seatbelt violation, which carried a fine of twenty-five and fifty dollars.<sup>45</sup>

Ms. Atwater later filed a civil rights suit, seeking to challenge her arrest for a fine-only offense as a violation of her Fourth Amendment rights.<sup>46</sup> The Court disagreed with Ms. Atwater. Rather than looking to the nature of the possible penalty, the Court focused on the characterization of the alleged wrongdoing. Under Texas law, failure to secure a child with a seatbelt did not carry a jail term, but did amount to a misdemeanor.<sup>47</sup> In other words, the Texas legislature somewhat unusually saw fit to include it within crimes covered by its state code.<sup>48</sup> Thus, it made no difference to the Court whether it was a violent misdemeanor, or could have been dealt with by way of a ticket. The civil-criminal distinction was implicitly at the heart of the Court's analysis.

Similarly, in *Virginia v. Moore*, the Court upheld the arrest of David Moore, an individual who was driving on a suspended license, even though state law indicated such non-violent conduct was to be met with a ticket rather than custodial arrest.<sup>49</sup> Even in the face of officers violating the State's "cite and release" provisions, what mattered to the Court for purposes of suppression was that a driving-without-a-license charge amounted to a misdemeanor crime under Virginia's Code.<sup>50</sup> It explained that "warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution . . . ."<sup>51</sup>

Interestingly, the vast majority of the Court's traffic stop cases stand in stark contrast to *Atwater* and *Moore*. In these matters, the Court has spent a great deal of time comparing traffic stops to the kind of brief encounter first permitted in *Terry v. Ohio*.<sup>52</sup> By and large, traffic stops should involve the officer engaging in a brief

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45. *Id.* at 323.

46. *Id.* at 325.

47. *Id.*

48. *Id.*

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

50. *Id.* at 167.

51. *Id.* at 176.

52. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (rejecting the notion that "'stop' and 'frisk' . . . police conduct is outside the purview of the Fourth Amendment").

investigation of the situation at hand and then allowing the individual to go on their way with a ticket<sup>53</sup>—unless there is some independent basis to believe the defendant has committed a crime.<sup>54</sup> Thus, an assumption in most Supreme Court traffic cases is that the underlying violations are mere civil infractions, and not crimes in and of themselves. Arrest for such conduct would therefore be inappropriate under the Fourth Amendment.

#### *D. Lower Court Rejection of Civil Arrest*

While the United States Supreme Court has not squarely faced the question of whether arrest for civil violations violates the Fourth Amendment, lower courts have explored the issue. The United States Court of Appeals for the Fourth Circuit recently decided *Santos v. Frederick City Board of Commissioners*, a case involving a state officer who arrested someone for a civil immigration law violation.<sup>55</sup> According to the court:

A law enforcement officer may arrest a suspect only if the officer has “‘probable cause’ to believe that the suspect is involved in criminal activity.” Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity.<sup>56</sup>

In *Eggerly v. San Francisco*, the United States Court of Appeals for the Ninth Circuit reinstated a false-arrest claim based on a San

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53. See *Berkemer v. McCarty*, 468 U.S. 420, 439 n.29 (1984) (“[M]ost traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.”); see also *Whren v. United States*, 517 U.S. 806, 809 (1996); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

54. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1616–17 (2015) (“The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand.”); see also *Brendlin v. California*, 551 U.S. 249 (2007).

55. *Santos v. Frederick Cty. Bd. Of Comm’rs*, 725 F.3d 451 (4th Cir. 2013).

56. *Id.* at 465 (quoting *Brown v. Texas*, 433 U.S. 47, 51 (1979)) (internal citation omitted).

Francisco police officer taking an individual into custody for an alleged civil violation.<sup>57</sup> Relying largely on state law interpretation of trespass, seen as an infraction for first-time offenders versus a misdemeanor, the court overturned a jury verdict against Mr. Edgerly.<sup>58</sup> His matter was remanded for further proceedings, where he could prevail on his civil rights violation claim.

## II. CASE STUDY IN UNCONSTITUTIONALITY: ST. LOUIS COUNTY & MUNICIPAL POLICING

In light of this background, physical arrest for anything less than clearly criminal conduct should seem patently out of step with responsible jurisprudence. Yet the practice of civil arrest is alive, well, and the accepted norm. Indeed, recent events in the St. Louis area highlight the unabashed use of civil seizures by municipalities in Missouri.

St. Louis County, Missouri is home to eighty-eight distinct municipalities;<sup>59</sup> those St. Louis County areas not governed by a municipality are unincorporated, and are thereby governed by St. Louis County itself—another municipal organization.<sup>60</sup> Both St. Louis County and its municipalities have their own local ordinances.<sup>61</sup> This Part examines the history of municipal ordinance prosecution in Missouri and current widespread practices of civil arrest in the region.

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57. *Edgerly v. San Francisco*, 713 F.3d 976, 978 (9th Cir. 2013) (holding that arrest for California civil infraction could provide grounds for false arrest claim).

58. *Id.*

59. *Municipalities*, ST. LOUIS COUNTY, <http://www.stlouisco.com/YourGovernment/Municipalities> (last visited Oct. 29, 2016).

60. Nancy Curtis, *St. Louis Neighborhoods Guide 2015: Unincorporated Living*, ST. LOUIS MAG. (Mar. 20, 2015, 11:32 AM), <https://www.stlmag.com/home/st.-louis-neighborhoods-guide-2015%3A-unincorporated-living/>.

61. *St. Louis County, Missouri Ordinance Guidebook*, ST. LOUIS COUNTY DEP'T OF PLANNING (Spring 2011), <https://www.stlouisco.com/Portals/8/docs/Document%20Library/planning/subdivision%20trustee%20resource%20center/county%20resources/Ordinance%20Guidebook%204.7.11.pdf>; Jeremy Kohler, *It's Not Just Pagedale. Lots of Things Are Against the Law in St. Louis County*, ST. LOUIS POST-DISPATCH (Jan. 17, 2016), [http://www.stltoday.com/news/local/crime-and-courts/it-s-not-just-pagedale-lots-of-things-are-against/article\\_675579d7-d522-5849-8aff-794cb46abb94.html](http://www.stltoday.com/news/local/crime-and-courts/it-s-not-just-pagedale-lots-of-things-are-against/article_675579d7-d522-5849-8aff-794cb46abb94.html).

*A. History of Municipal Matters in Missouri*

1. Local Ordinances as Civil and Not Criminal Provisions

In *Kansas City v. Clark*, Kansas City fought for the right to pursue the charge of “keeping a gambling table” under its local ordinance scheme.<sup>62</sup> In considering the issues raised by the City, the Missouri Supreme Court laid the foundation for what should be the legal nature of municipal ordinance violations. It explained:

Nor do we regard the violation of the ordinance under consideration as a *crime*, since “a crime is an act committed in violation of a *public law*,” a law co-extensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty.<sup>63</sup>

The Missouri Supreme Court reiterated this holding a few years later in *Ex parte Hollwedell*.<sup>64</sup> There, the court denied Petitioner’s writ of habeas corpus.<sup>65</sup> In so doing, the court explained in no uncertain terms that “[t]he infractions of city ordinances are in no sense crimes.”<sup>66</sup> In *Hollwedell*, St. Louis City brought a case against petitioner for “a breach of the peace . . . by assaulting, striking and fighting others, and particularly Louisa Brendley,” which it argued constituted a violation of a city ordinance.<sup>67</sup> Petitioner was convicted of the violation after a trial and sentenced to pay a fine. He challenged that conviction, arguing that it was unconstitutional because St. Louis City did not obtain an indictment nor file a criminal information before rendering judgment against him.<sup>68</sup> Citing *Clark*,

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62. *Kansas City v. Clark*, 68 Mo. 588, 589 (1878).

63. *Id.* (internal citation omitted).

64. *Ex parte Hollwedell*, 74 Mo. 395 (1881).

65. *Id.* at 395.

66. *Id.* at 396.

67. *Id.* at 399.

68. *Id.* at 400.

the Missouri Supreme Court disagreed.<sup>69</sup> “If the violation of the ordinance for which petitioner was fined is to be regarded as a criminal offense in the sense of the constitution, there would be much plausibility in the position taken by counsel. Such offenses, however, have never in this State been regarded as criminal.”<sup>70</sup>

Since *Clark* and *Hollwedell*, Missouri courts have consistently applied the rule that municipal ordinance violations are not crimes.<sup>71</sup> In 2015, for instance, the Missouri Supreme Court reiterated the now-uncontroversial proposition that “[p]rosecutions for municipal ordinance violations are civil proceedings . . . .”<sup>72</sup>

## 2. Confusion Over the Quasi-Criminal Doctrine

Yet in Missouri, as in some other places, a tension exists between the civil nature of municipal ordinances and the criminal consequences they often impose. To reconcile this tension, courts in Missouri (and elsewhere) have developed what is known as the “quasi-criminal doctrine.” As a general matter, a “quasi-criminal proceeding” is “[a] civil proceeding that is conducted in conformity with the rules of a criminal proceeding because a penalty analogous to a criminal penalty may apply . . . .”<sup>73</sup>

The Missouri Supreme Court first mentioned the phrase “quasi-criminal” in 1864.<sup>74</sup> The phrase was used in passing, without explanation, to describe a Missouri statute involving the assignment of mortgage interests.<sup>75</sup> Since that time, Missouri courts have

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69. *Id.* at 401.

70. *Id.*

71. *State ex rel. Kansas City v. Meyers*, 513 S.W.2d 414, 416 (Mo. 1974); *City of St. Louis v. St. Louis R. Co.*, 1 S.W. 305, 307 (Mo. 1886); *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo. Ct. App. 2008) (quoting *City of Ash Grove v. Christian*, 949 S.W.2d 259 (Mo. Ct. App. 1971)); *Kansas City v. Plumb*, 419 S.W.2d 457, 460 (Mo. Ct. App. 1967); *City of De Soto v. Brown*, 44 Mo. App. 148, 152 (Mo. Ct. App. 1891).

72. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. 2015).

73. *Quasi-Criminal Proceeding*, BLACK’S LAW DICTIONARY (10th ed. 2014).

74. *Ewing v. Shelton*, 34 Mo. 518, 518 (1864).

75. *Id.* Black’s Law Dictionary traces its definition of “quasi-criminal proceedings” to 1844. *Quasi-Criminal Proceeding*, *supra* note 73.

repeatedly referenced the phrase “quasi-criminal” without meaningfully grappling with the concept.<sup>76</sup>

Significantly, Missouri courts have largely avoided addressing whether municipal ordinances, as civil violations, may impose criminal punishments.<sup>77</sup> Instead, Missouri courts have repeatedly glossed over the issue by treating municipal violations as criminal for procedural purposes, thereby sidestepping the thorny constitutional issues presented by the fact that such violations remain civil in nature.<sup>78</sup> As a result, Missouri municipalities have been free to impose criminal sanctions on municipal ordinance violators despite their inability to pass and enforce criminal ordinances.<sup>79</sup> This has created an unfair system that is civil for purposes of informality, but criminal for allowing arrest and the imposition of punitive sanctions.

### *B. Current Problem of Civil Seizures: Policing Post-Ferguson*

The City of Ferguson is a municipality within St. Louis County, Missouri. On August 9, 2014, Ferguson police officer Darren Wilson shot and killed Michael Brown.<sup>80</sup> The killing sparked mass protests across the St. Louis area, and the police responded viciously. One aspect of the police response to the Ferguson uprising was the routine arrest of protestors under a number of different Ferguson and St. Louis County ordinances.<sup>81</sup> Both Ferguson and St. Louis County

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76. See, e.g., *Blewett v. Smith*, 74 Mo. 404, 408 (1881); *Ex parte Hollwedell*, 74 Mo. 395, 400 (1881); *Missouri City v. Hutchinson*, 71 Mo. 46, 49 (1879); *City of Lexington v. Curtin*, 69 Mo. 626, 627 (1879); *Kansas City v. Clark*, 68 Mo. 588, 590 (1878); *City of Stanberry v. Proctor*, 48 Mo. App. 56, 56–57 (1892); *Piper v. City of Boonville*, 32 Mo. App. 138, 139 (1888).

77. See *Kansas City v. Bott*, 509 S.W.2d 42, 45 (Mo. 1974).

78. *Id.* (discussing whether double jeopardy applies to municipal-ordinance prosecutions); *Town of Glenwood v. Roberts*, 59 Mo. App. 167, 171 (Mo. Ct. App. 1894) (discussing burden of proof on municipalities to prove someone violated one of its ordinances).

79. St. Louis County Rev. Ord. § 707.020 (making leaving a refrigerator outside in front of one’s home punishable by sixty days of imprisonment).

80. *Ferguson Protests: What We Know of Michael Brown’s Last Minutes*, BBC NEWS (Nov. 24, 2014), <http://www.bbc.com/news/world-us-canada-28841715>.

81. See, e.g., Mariah Stewart & Ryan J. Reilly, *Dozens of Protesters Were Charged under a Bad Law. Now They Could Be Arrested Again*, HUFFINGTON POST (June 1, 2016, 5:00 AM), [http://www.huffingtonpost.com/entry/ferguson-protesters-st-louis-county-municipal-court\\_us\\_574855bfe4b055bb1171e652](http://www.huffingtonpost.com/entry/ferguson-protesters-st-louis-county-municipal-court_us_574855bfe4b055bb1171e652).



have ordinances that prohibit “interfering” with police, for instance.<sup>82</sup> Protestors were arrested under such ordinances for “refusing to obey a lawful command” or “not complying fast enough,” resulting in confinement periods of twelve hours or longer.<sup>83</sup> It is difficult to quantify the number of people who police arrested during the uprising—the police have not publicly released such figures, and it is questionable whether records of arrests and detentions, as opposed to municipal-ordinance prosecutions, are even kept.

One example of arrest and prosecution in the wake of the Ferguson uprising involves the case of Melissa Bennett.<sup>84</sup> Ms. Bennett was arrested on October 22, 2014, outside the Ferguson Police Department, for violating St. Louis County Ordinance Section 701.110, which makes it “unlawful for any person to interfere in any manner with a police officer or other employee of the County in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty.”<sup>85</sup> The information St. Louis County filed to institute a prosecution against Ms. Bennett described her offending conduct as “walking and standing in the roadway after being warned not to do so by the police officer.”<sup>86</sup>

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82. ST. LOUIS, MO., MO. CODE ORD. § 701.110 (2016), [https://www.municode.com/library/mo/st\\_louis\\_county/codes/code\\_of\\_ordinances?nodeId=TITVIIPUSAMO\\_CH701DEPO\\_701.110INOFUN](https://www.municode.com/library/mo/st_louis_county/codes/code_of_ordinances?nodeId=TITVIIPUSAMO_CH701DEPO_701.110INOFUN); City of Ferguson Rev. Ord. § 29-17 (2014).

83. See, e.g., Mariah Stewart & Ryan J. Reilly, *Dozens of Protesters Were Charged Under a Bad Law. Now They Could Be Arrested Again*, HUFFINGTON POST (June 1, 2016, 5:00 AM), [http://www.huffingtonpost.com/entry/ferguson-protesters-st-louis-county-municipal-court\\_us\\_574855bfe4b055bb1171e652](http://www.huffingtonpost.com/entry/ferguson-protesters-st-louis-county-municipal-court_us_574855bfe4b055bb1171e652); Joel Currier, *Federal Judge Bars Police from Forcing Ferguson Protesters to ‘Keep Moving,’* ST. LOUIS POST-DISPATCH (Oct. 6, 2014), [http://www.stltoday.com/news/local/crime-and-courts/federal-judge-bars-police-from-forcing-ferguson-protesters-to-keep/article\\_4450191b-2430-5da7-ba40-daa55b735f4d.html](http://www.stltoday.com/news/local/crime-and-courts/federal-judge-bars-police-from-forcing-ferguson-protesters-to-keep/article_4450191b-2430-5da7-ba40-daa55b735f4d.html).

84. Complaint at 1–3, *Bennett v. St. Louis Cnty.*, No. 15SL-CC03628 (filed Oct. 21, 2015).

85. See *id.*; ST. LOUIS, MO., MO. CODE ORD. § 701.110 (2016), [https://www.municode.com/library/mo/st\\_louis\\_county/codes/code\\_of\\_ordinances?nodeId=TITVIIPUSAMO\\_CH701DEPO\\_701.110INOFUN](https://www.municode.com/library/mo/st_louis_county/codes/code_of_ordinances?nodeId=TITVIIPUSAMO_CH701DEPO_701.110INOFUN).

86. Complaint at 1–3, *Bennett v. St. Louis Cnty.*, No. 15SL-CC03628 (filed Oct. 21, 2015). It is worth pointing out that St. Louis County did not institute its case against Ms. Bennett via petition or complaint, as is the procedure for civil cases in Missouri. Instead, the County filed a self-styled “information,” implying that the alleged ordinance violation was a criminal violation—as criminal cases are instituted in Missouri when a prosecutor files an information against someone, or when a grand jury returns a true bill.

We believe that Ms. Bennett's arrest, as well as other similarly situated Ferguson protestors, were extra-legal. Putting other constitutional issues aside, municipal police simply lack the authority to arrest someone for a mere municipal violation, given its civil nature.<sup>87</sup> Yet they did so on a daily basis during the Ferguson uprising, and they continue to do so today.<sup>88</sup>

Such abuses of power, and the Fourth Amendment, are not limited to dramatic events that bring international news crews to the streets of St. Louis County. Indeed, they more often occur during mundane exchanges between the public and the police in St. Louis County. A recent case decided by the United States Court of Appeals for the Eighth Circuit, *Copeland v. Locke*, provides one such example.<sup>89</sup>

Police Chief Edward Locke of Bella Villa conducted a traffic stop in St. Louis County.<sup>90</sup> In so doing, Chief Locke parked his police cruiser in a way that blocked access to and from a parking lot; this prohibited a customer of Norman Steibel's welding and body shop from exiting the lot, and also blocked customers from entering.<sup>91</sup> Mr. Steibel approached Chief Locke and asked him to move his police cruiser so the customer could exit.<sup>92</sup> Chief Locke refused, despite Mr. Steibel's repeated requests.<sup>93</sup> At this point, Mr. Steibel, standing at some distance from Chief Locke, "pointed down the road, said 'move the f\* \* \*ing car,' and pointed at Chief Locke again."<sup>94</sup> Chief Locke grabbed his handcuffs and approached Mr. Steibel.<sup>95</sup> He then

slammed Steibel against a parked car, threw him to the ground, kned him in the back, yanked and twisted the handcuffs on his wrists, and applied continuing pressure to his neck and back. As a result of Chief Locke's force, Mr. Steibel suffered

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87. See *supra* Part I.

88. Dan Keating et al., *A Breakdown of the Arrests in Ferguson*, WASH. POST (Aug. 21, 2014), <http://www.washingtonpost.com/wp-srv/special/national/ferguson-arrests/>.

89. *Copeland v. Locke*, 613 F.3d 875 (8th Cir. 2010).

90. *Id.* at 878.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

lacerations to both wrists . . . and abrasions across his body caused by pieces of gravel and debris.<sup>96</sup>

Mr. Steibel required emergency room treatment for his injuries.<sup>97</sup>

Chief Locke later asserted that he arrested Mr. Steibel for violating St. Louis County Ordinance Section 701.110. Mr. Steibel challenged the arrest in a 42 U.S.C. § 1983 action, asserting that Chief Locke lacked probable cause to arrest him for violating Section 701.110. On summary judgment, the Eighth Circuit agreed.<sup>98</sup>

We doubt, however, whether merely requesting that an officer move his vehicle, which momentarily distracts the officer from conducting a routine traffic stop, constitutes interference under the ordinance. But, even assuming that a Bella Villa police officer is an officer or employee of St. Louis County, which we doubt, and that such a distraction does constitute interference under the ordinance, such expressive conduct cannot constitute an arrestable offense. That is, “[i]t is . . . fundamental that a lawful arrest may not ensue where the arrestee is merely exercising his First Amendment rights.”<sup>99</sup>

In other words, if Mr. Steibel violated Section 701.110, the arrest was nonetheless unlawful because it violated his First Amendment rights.

This is clearly the correct result, but it unfortunately overlooks the fundamental issue of whether a police officer can arrest someone for violating a civil ordinance in the first instance. Thus we believe it is time this issue is taken on squarely, in Missouri and beyond.

### III. CONCLUSION: TIME FOR REFORM AS A MATTER OF LAW AND POLICY

At this important historic moment, it is time for common sense to prevail. In the United States, people are not arrested for breaching contracts, committing torts, or engaging in other civil wrongdoings. We should not tolerate arrests for traffic violations and other low-

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96. *Id.*

97. *Id.*

98. *Id.* at 881.

99. *Id.* at 880 (quoting *Gainor v. Rogers*, 973 F.2d 1379, 1387 (8th Cir. 2008)).

level conduct that does not rise to the level of actual crime. Therefore, states and localities need to reconsider civil arrest approaches and replace them with appropriate cite and release practices. To be sure, other reforms are necessary to address the many injustices that were brought into greater light following events in Ferguson, Missouri, including ending jail sentences altogether for what amount to minor misdeeds. Some of this work may be appropriate for state legislatures.<sup>100</sup>

However, local municipal bodies can shift their priorities from maintaining jails and carceral structures to the business of building communities. The default position for any low-level local offense should be presentation of a ticket with notice of a future court date. Local police departments can implement these policies, thereby allowing resources to be used for truly violent and dangerous situations. Immediate action, in collaboration with community actors, provides local governments the opportunity to gain the trust of those who question the legitimacy of these institutions—which historically have disproportionately impacted the poor and persons of color. The alternative is for local governments to continue to cling to the past. They will find themselves dragged into the twenty-first century and met by opposition from activists, advocates, and attorneys calling for an end to the uncivil practice of civil arrest. And all the while, police will continue to violate the rights of people in America on a daily basis.

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100. See also *Not Much New in 'New' Supreme Court Rules for Muni Courts*, ST. LOUIS AM. (Sept. 29, 2016), [http://www.stlamerican.com/news/political\\_eye/not-much-new-in-new-supreme-court-rules-for-muni/article\\_106f7216-85f3-11e6-b3fb-8389e25f2409.html](http://www.stlamerican.com/news/political_eye/not-much-new-in-new-supreme-court-rules-for-muni/article_106f7216-85f3-11e6-b3fb-8389e25f2409.html) (calling out Missouri Supreme Court's standards as "insufficient" reforms).