

**In the
Supreme Court of the United States**

October Term, 1997

**Randall Ricci,
*Petitioner,***

v.

Village of Arlington Heights, a Municipal Corporation, *Respondent.*

On Writ of *Certiorari to the United States Court of Appeals for the Seventh Circuit*

**Brief *Amicus Curiae* of the American Civil Liberties Union and the
ACLU of Illinois in Support of Petitioner**

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INTEREST OF *AMICUS CURIAE*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of these principles, the ACLU has appeared before this Court in numerous Fourth Amendment cases, both as direct counsel and as *amicus curiae*. *The ACLU of Illinois is one of its statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU and its members.*

STATEMENT OF THE CASE

Illinois law authorizes peace officers to arrest a person without a warrant whenever the officer "has reasonable grounds to believe that the person is committing or has committed an offense." 725 Ill. Comp. Stat. 5/107-2(1) (c) (1993).² Pursuant to this authority, the Village of Arlington Heights adopted a policy of arresting anyone suspected of violating the provisions of the municipal code, allegedly to allow processing and paperwork to be conducted in the police station. *Ricci v. Arlington Heights, Ill.*, 116 F.3d 288, 289 (7th Cir. 1997).

On April 19, 1994, Detective Andrew Whowell and Officer Jerome Lehnert of the Arlington Heights Police Department arrested petitioner Randall Ricci for operating a business without a license, a violation of Arlington Heights Code of 14-3002 that is punishable only by a fine. Ricci's business, Rudeway Enterprises, conducted advertising and raised funds for an Illinois labor union, the Combined Counties Police Association. Whowell and Lehnert asserted that they had received complaints from some targets of Ricci's campaign, investigated and discovered that there was an outstanding arrest warrant against one of Ricci's employees, and also that no license had been issued for the business. 116 F.3d at 289.

This information was never presented to a magistrate and no arrest warrant was ever issued against Ricci. Acting on their own, the officers nevertheless entered Ricci's business premises, arrested his employee, and searched Ricci's business papers for evidence to put him out of business.³ During the course of these activities, they asked Ricci if he had a license to operate the business. When he confirmed that he did not, Ricci was taken into custody and transported to the Arlington Heights police station where he was locked in an interview room for approximately one hour while the officers completed an arrest sheet and a complaint. Ricci was then released on a recognizance bond. While he was in custody, his wife obtained the requisite business license and, when his case came to court, the charge was dismissed.

Ricci then brought an action under 42 U.S.C. §1983, alleging that the Village of Arlington Heights and the two arresting officers had violated his Fourth Amendment rights. The district court denied defendants' motion for summary judgment on Ricci's claim that he had been subjected to an unconstitutional search of his business papers, finding that the complaint stated a triable claim,⁴ but granted summary judgment to defendants on the claim of illegal arrest, reasoning that this Court had not yet held that a non-forcible arrest outside of the home might be unreasonable even if based on probable cause. 904 F.Supp. at 832. The Seventh Circuit affirmed this decision, holding the arrest valid because it was based on probable cause and conducted pursuant to the authority of an Illinois statute. 116 F.3d 288.

SUMMARY OF ARGUMENT

1. The Fourth Amendment prohibits custodial arrest for fine-only offenses in the absence of exigent circumstances. The Seventh Circuit is incorrect in asserting that any arrest may be regarded as reasonable as long as it is based on probable cause and authorized by a statute. 116 F.3d at 290. This Court has in the past found statutes purporting to authorize arrests to violate the Fourth Amendment. *See, e.g., Payton v. New York*, 445 U.S. 573 (1980). *What is "reasonable" under the Fourth Amendment must be determined by a balancing test, weighing the relative intrusion against the state's legitimate needs. United States v. Place*, 462 U.S. 696, 703 (1983); *Tennessee v. Garner*, 471 U.S. 1 (1985).

Custodial arrest is highly intrusive, carrying with it the right to search a suspect and his or her vehicle incident to the arrest, to use some degree of necessary force to effect the arrest, to transport the suspect to the police station, to handcuff, book and fingerprint the suspect, to detain the suspect for a period of time (presumably up

to 48 hours) before presenting the suspect to a magistrate, and to maintain a record of the arrest even if the charges are ultimately not proved.

On the other side of the balance, the state ordinarily has no real need to take an individual into custody for a fine-only offense. The common law authorized custodial arrests for breaches of the peace, not for what are essentially civil, regulatory offenses. The laws of most states, unlike the Illinois statute in question, limit the authority of the police to arrest for such minor, essentially civil offenses as violations of a municipal code's licensing rules, often requiring use of a summons procedure where there are no exigent circumstances.

The legislature's choice not to impose any jail time for a code violation is the best indication of the state's level of interest in taking custody of individuals who violate such prohibitions. *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In other areas of constitutional interpretation, the Court has deferred to the legislature's classification of offenses as fine-only or not. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Baldwin v. New York*, 399 U.S. 66 (1970). Taking an individual into custody for an offense for which no jail time is provided amounts to an unauthorized punishment, cf. *Bearden v. Georgia*, 461 U.S. 660, 667-68 (1983); *Tate v. Short*, 401 U.S. 395 (1971), to be imposed at the whim of the police, when the legislature has already determined such punishment to be disproportionate to the offense.

Prohibiting custodial arrest for fine-only offenses in the absence of exigent circumstances would provide a clear, convenient and understandable bright-line rule for courts and police to follow, respecting a line created by the legislature, rather than subjecting each individual arrest to after-the-fact scrutiny by the courts. There is no occasion in this case to decide what exigent circumstances might justify a custodial arrest for a fine-only offense. Petitioner Ricci's arrest must be considered unreasonable because the police made absolutely no claim of any particular need to arrest him; they claimed that municipal policy was to routinely arrest everyone who violated municipal code provisions, primarily for reasons of their own administrative convenience.

2. Even if custodial arrest for a fine-only offense in these circumstances were not considered to be *per se* unreasonable, the officers should have obtained an arrest warrant before arresting petitioner. The common law permitted officers to arrest without a warrant for breaches of the peace committed within their presence. See, e.g., 1 James F. Stephen, *A History of the Criminal Law of England* 193 (London, MacMillan 1883). Most state statutes continue to restrict the power to arrest, usually requiring arrest warrants for misdemeanors committed outside the officer's presence, except in extenuating circumstances. In *United States v. Watson*, 423 U.S. 411 (1976), the Court held that the Fourth Amendment incorporates the common law on warrantless arrests for felonies and, in dicta, stated that the requirement of an arrest warrant would also be excused for misdemeanors committed in the presence of the officer. The "presence" requirement of *Watson* should be interpreted to embrace the common law's traditional rule limiting warrantless misdemeanor arrests to breaches of the peace. The Seventh Circuit's formalistic view that a suspect's admission satisfies the presence requirement, 116 F.3d at 289, misses the point of the warrant requirement.

While the existence of probable cause may not have been doubtful in Ricci's case, it will be in others. In the absence of a warrant requirement, it is too easy for the police to use the blanket authority Illinois law confers to arrest for even the most trivial offense, with its concomitant power to search people and their cars, as license to trawl. Because the Court decided not to examine the subjective motivations of the police in using their search and seizure powers, in *Whren v. United States*, 517 U.S. , 116 S.Ct. 1769 (1996), objective limitations on the power to arrest are essential, as the common law has long recognized.

ARGUMENT

I. CUSTODIAL ARREST FOR A FINE-ONLY OFFENSE, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, IS AN UNREASONABLE SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The Intrusiveness Of A Custodial Arrest Outweighs The State's Interests In Conducting Such Arrests For Fine- Only Offenses

When petitioner Ricci was transported to the police station, he was not only seized within the meaning of the Fourth Amendment, he was arrested. See *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). Because this Court has always recognized that custodial arrest is the gravest intrusion on an individual's liberty and privacy, it has strictly observed the requirement that any arrest must be based on probable cause, *id.* at 208. The Court

has also found arrests to be unreasonable, even when based on probable cause, in a variety of cases, sometimes requiring arrest warrants as a precondition to a valid arrest. See *Payton v. New York*, 445 U.S. 573; *Welsh v. Wisconsin*, 466 U.S. 740 (warrant for home arrest required for misdemeanors as well as felonies); see also *Steagald v. United States*, 451 U.S. 204 (1981), and sometimes imposing limitations on the method of arrest, see *Tennessee v. Garner*, 471 U.S. 1 (limitation on use of deadly force in arrest); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (knock-and-announce limitation on execution of warrants).

As the district court below observed, this Court has not yet addressed the general question of what limitations the Fourth Amendment imposes on the power to arrest for minor offenses, 904 F.Supp. at 832, although some individual Justices have expressed concern about the need to limit the power to arrest under such circumstances. See *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973)(Stewart, J., concurring)("a persuasive claim might have been made . . . that the custodial arrest of petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments"); *Robbins v. California*, 453 U.S. 420, 450 n.11 (1981)(Stevens, J., dissenting); cf. *Maryland v. Macon*, 472 U.S. 463, 471 (1985)("We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials").⁵

The "key principle" of the Fourth Amendment's guarantee of reasonableness is "the balancing of competing interests," *Tennessee v. Garner*, 471 U.S. at 8, citing *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981). In numerous cases, this Court has followed the admonition that, to determine the constitutionality of a seizure, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. at 703; see also *Tennessee v. Garner*, 471 U.S. at 8; *Winston v. Lee*, 470 U.S. 753, 760 (1982); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-62 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-84 (1975); *Payton v. New York*, 445 U.S. at 603 (Blackmun, J., concurring). As these cases show, the Court has often preferred to examine the balance of such factors on a categorical basis, rather than on a case-by-case basis, particularly where it is possible to articulate a general rule which will then be subject to appropriate exceptions where exigent circumstances exist. In *Payton*, for example, the Court created a general rule, and examined the scope of the permissible exceptions in the subsequent case of *Welsh v. Wisconsin*, 466 U.S. 740. See also *Wilson v. Arkansas*, 514 U.S. 927 (general rule with exception developed in *Richards v. Wisconsin*, 520 U.S. , 117 S.Ct. 1416 (1997)).⁶ Thus, the appropriate inquiry focuses not only on what happened to petitioner Ricci, but on the interests generally or potentially at stake during any custodial arrest for a fine-only offense.

The Court has treated arrest as a bright-line category with many consequences. Incident to any lawful arrest, the Court has held that police, with no additional showing, have the power to conduct a full search of the individual being arrested, including containers on their person, *United States v. Robinson*, 414 U.S. 218, 221-22 (1973), even for minor offenses and where there is no evidentiary purpose, *Gustafson v. Florida*, 414 U.S. 260 (driving without a license), and to search the passenger compartment, including containers, of an arrestee's vehicle, see *New York v. Belton*, 453 U.S. 454 (1981). The arrestee may be publicly humiliated by being led away by the police, and then frightened by being transported to the stationhouse, possibly in handcuffs, where he or she may be booked and fingerprinted, and then detained without seeing a magistrate possibly for up to 48 hours. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Petitioner Ricci was held for only one hour; others less fortunate could be held for longer, particularly if they are unable to secure bail or post a demanded bond.⁷ In addition to the serious intrusion on the arrestee's liberty and dignity, an arrest can continue to compromise privacy interests. Even in cases resulting in acquittal or dismissal, arrest records may be maintained and disseminated, further damaging the individual's reputation. See *Paul v. Davis*, 424 U.S. 693 (1976); Donald L. Doernberg & Donald H. Zeigler, "Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems," 55 N.Y.U. L.Rev. 110, 1114 (1980).

The state certainly has an interest in assuring a defendant's presence at trial, but that interest can ordinarily be satisfied in fine-only cases by issuing a summons for a code violation.⁸ The less serious the offense, the less likely a defendant is to abscond. In petitioner's case, the police did not express any fear that he would evade apprehension, or that arrest was necessary in order to prevent him from continuing his violation. Petitioner's wife promptly obtained the required license and corrected the violation. Petitioner did not pose any danger to anyone's safety, or to anyone's property. It was not necessary to transport petitioner to the stationhouse so that forms could be filled out by the police.⁹ The record suggests that the police did not feel the need to have

petitioner submit to a full booking procedure, and only kept him for one hour. See 116 F.3d at 289. The state's legitimate interests in obtaining background and identification information, filling out forms, and assuring that petitioner would be present for trial could easily have been served through a summons procedure. The police did not do anything at the stationhouse that they could not have done at petitioner's place of business. There was simply no need for the arrest.

Conversely, an exigent circumstances exception is sufficient to deal with those cases where a state does have a legitimate reason to arrest an individual for a fine-only offense, either because the individual is threatening a breach of the peace, perhaps, or seems likely to abscond. See *Thomas R. Folk, "The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests,"* 48 U.Cin. L.Rev. 321 (1979)(arguing that custodial arrest for minor offenses should be confined to these situations). What exigent circumstances would justify a custodial arrest for a fine-only offense is not a question that arises in this case, however, because there was no claim of exigency with respect to petitioner Ricci's arrest and no basis for any such claim.

B. Common Law Tradition And The Consensus Of The States Support Prohibition Of Custodial Arrest For Fine-Only Offenses

This Court has often noted that the "Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925). This is not a case where logic must defer to history, for logic is supported by history. At common law, a summons procedure rather than custodial arrest was used for minor offenses not constituting a breach of the peace. See *Salken, supra*, at 258-59 and authorities cited therein. Warrantless arrest was authorized only for "misdemeanors" that constituted a breach of the peace and occurred in the officer's presence. See *Stephen, supra* (London, MacMillan 1883)("The common law did not authorise the arrest of persons guilty or suspected of misdemeanours, except in cases of an actual breach of the peace either by an affray or by violence to an individual"); 1 *Joseph Chitty, A Practical Treatise on the Criminal Law* 15 (1816) (Garland Publishing, Inc. 1978)("no person can, in general, be taken into custody without warrant, for a mere misdemeanour unattended with violence, as perjury or libel"); 4 *William Blackstone, Commentaries* *289; *Matthew Hale, Pleas of the Crown: A Methodical Summary* 92 (1678)(P. R. Glazebrook ed., Professional Books Ltd. 1972)("in case of any other breach of the peace, the Constable may imprison the party in the Stocks, in the Goal [sic], or in his House, till he can bring him before a Justice of the Peace"); *Edward C. Fisher, Laws of Arrest* 125 (1967); *Wayne R. LaFave, Arrest: The Decision to Take a Suspect into Custody* 17 (1965); *William A. Schroeder, "Warrantless Misdemeanor Arrests and the Fourth Amendment,"* 58 *Mo. L.Rev.* 771, 774-75 (1993).

The misdemeanors for which common law allowed custodial arrest were serious offenses, including assaults and other dangerous and disruptive acts, or public disturbances. See *Horace L. Wilgus, "Arrest Without a Warrant,"* 22 *Mich.L.Rev.* 541, 572-77 (1923-24)(listing offenses covered). As new offenses were created and the domain of the criminal law expanded, some statutes eroded the common law and extended the arrest authority to what Wilgus termed "public torts," *id.* at 576-77, and even to regulatory offenses like petitioner's failure to obtain a license. See *Edward C. Fisher, Laws of Arrest* 128 (1967); *Schroeder, supra*, at 775; *Sam B. Warner, "Uniform Arrest Act,"* 28 *Va.L.Rev.* 315, 331-36 (1942). It is these new regulatory and quasi-civil offenses, mostly unknown to the common law, like petitioner's infraction, that are likely to be punishable only by fine.¹⁰

Most contemporary statutes share the approach of the common law, seeking to limit custodial arrest for non-felonies to instances where there is an actual need to arrest. Several states have explicitly codified the common law requirement that warrantless arrests may only be conducted for misdemeanors occurring in the presence of the officer if they are breaches of the peace.¹¹ The vast majority of other states retain the presence requirement that Illinois has abandoned,¹² limiting exceptions to that requirement to situations where immediate arrest is deemed necessary.¹³ The ubiquitous presence requirement, read in light of the common law's concern about disturbances of the peace,¹⁴ tends to limit the custodial arrest power to public offenses (since officers will generally be making their observations in public), where the officer may determine that there is a need to remove the offender from the scene of the offense.

Moreover, even where these "presence" statutes do not specifically mention breach of the peace, they typically incorporate other constraints on the officer's discretion. Some permit warrantless arrests only for designated offenses committed outside the officer's presence, usually more serious misdemeanors entailing violence or a

threat of violence.¹⁵ Other state statutes prescribe more generalized criteria for determining whether an immediate arrest is necessary. For example, these statutes frequently require a reasonable belief that the suspect: (1) will not be apprehended unless immediately arrested, (2) may cause personal injury or property damage, (3) will destroy evidence, or (4) will persist in refusing to identify himself or herself and therefore cannot be issued a summons.¹⁶ While these statutes do impose some control on police discretion, they nevertheless vastly expand the authority conferred by common law, because the "offenses" or "misdemeanors" included cover a vast array of new quasi-civil matters. At least eight states' statutory schemes appear to have addressed this problem head-on, categorically prohibiting custodial arrests for fine-only offenses.¹⁷

These consistent attempts to circumscribe the arrest power bolster the conclusion that it is not reasonable within the meaning of the Fourth Amendment for a state to give vast and unchecked power to the police to arrest even for minor regulatory offenses. In fact, it was exactly such excessive delegations of authority that the Fourth Amendment was intended to prevent. It is by now familiar history that the framers' dismay at statutes granting general prerogatives to search and seize (like the writs of assistance) was one of the principal motivating factors, not only for the Revolution, but for the creation of the Fourth Amendment itself. *See Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution at 13-78 (1937) (events during the thirty years preceding the drafting of the Fourth Amendment inspired the framers to elevate the principle of "reasonableness" to one of constitutional significance); Payton v. New York, 445 U.S. at 583-85. "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." Delaware v. Prouse, 440 U.S. at 653-54. Thus, "standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the officer in the field be circumscribed, at least to some extent." Id. at 661. See also Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973); United States v. Martinez-Fuerte, 428 U.S. at 559; Camara v. Municipal Court, 387 U.S. 527, 532-33 (1967)(all relating the Fourth Amendment's guarantee of reasonableness to the imposition of standards to guide and control police discretion).*¹⁸

In the recent case of *Whren v. United States*, 116 S.Ct. 1769, the Court declined to examine whether detentions for traffic offenses were in fact pretexts to investigate suspected drug offenders, believing that it would be inappropriate as part of Fourth Amendment analysis to explore the subjective motivation of individual officers. The Court declared that it would, of course, be impermissible for officers to use their discretion to stop traffic offenders on the basis of an impermissible factor like race, *id.* at 1774, but relied on the Equal Protection Clause to provide protection against discrimination in that context. The holding in *Whren* underscores the need for objective limitations on the arrest power like those embodied in the common law and the vast majority of state statutes. If a legislature may authorize custodial arrest for any offense at all, then the potential for abuse of discretion is magnified exponentially. Every jaywalker, every person who allows a business or professional license to expire, could be subjected to a search incident to arrest; every illegal parker could be subjected to a search of his or her person and car. The temptation to the police to trawl for drug offenders would be overwhelming, and without the justification in *Whren* of the need to stop motorists to investigate moving or traffic violations that might in fact pose a danger to others.¹⁹

Requiring the police in the absence of exigent circumstances to issue citations for minor, regulatory offenses rather than allowing them the power to arrest and search every municipal code violator would prevent widespread and inevitable problems of arbitrary and discriminatory enforcement from developing. Wayne R. LaFare, "'Case-by-Case Adjudication' Versus 'Standardized Procedures': The *Robinson Dilemma*," 1974 *Sup.Ct.Rev.* 127, 158, 162 (the most straightforward and most efficient control "in an area with a high potential for abuse" is to limit the circumstances under which an arrest is permissible.)

C. Prohibiting Arrest For Fine-Only Offenses Is Consistent With General Principles Of Constitutional Interpretation

The courts could satisfy their responsibility to ensure that there are meaningful limits on police discretion to arrest by simply ruling that custodial arrest for minor offenses is allowed whenever the individual arrest is reasonable in light of all the facts -- a case-by-case approach that would include balancing the nature of the intrusion (including such facts as how many hours the suspect was actually held, whether handcuffs or shackles were used, whether the suspect was given food, etc.), and the state's interests, including an evaluation of the seriousness of the offense. On the other hand, ruling that it is generally unreasonable to arrest for a fine-only offense would allow the courts to avoid the unnecessary burden of evaluating each misdemeanor arrest

individually, while taking account of each state's decision about what offenses are serious. As the Court has previously held, a state's decision to classify an offense as civil is the "best indication of the state's interest in precipitating an arrest, and is one that can be easily identified." *Welsh v. Wisconsin*, 466 U.S. at 754. See generally *LaFave*, "Case-by-Case Adjudication," *supra*.

The Seventh Circuit mischaracterized petitioner's claim in suggesting that petitioner wished only to insert severity of the offense as a factor for the courts to balance. 116 F.3d at 291. Using the legislature's own decision about the range of permissible punishment as the basis for circumscribing the arrest power respects the legislature's autonomy in an appropriate manner.²⁰ In interpreting other provisions of the Bill of Rights, the Court has declined to create its own definition of seriousness, instead relying on the legislature's determination that an offense should be punished only by a fine as dispositive of constitutional protections attaching to that offense. The Court has held, for example, that an individual has a right to counsel under the Sixth and Fourteenth Amendments only in connection with offenses that subject the individual to incarceration, see *Argersinger v. Hamlin*, 407 U.S. 25; *Scott v. Illinois*, 440 U.S. 367 (1979). *The individual does not gain a right to counsel even if subjected to enormous fines, or other serious consequences not involving incarceration. See Argersinger*, 407 U.S. at 44 (Powell, J., concurring) (observing that penalties other than incarceration may also be serious). Similarly, the right to a jury trial under the Sixth and Fourteenth Amendments is contingent on the legislature's determination of the level of punishment appropriate upon conviction of an offense, *Baldwin v. New York*, 399 U.S. 66, not on what offenses the courts consider "serious," and not on whether the legislature characterizes its offenses as "felonies" or "misdemeanors."

The Court adopted this approach recognizing that it would be difficult to rely on whether particular offenses are labeled as "felonies" or "misdemeanors," because definitions of these terms vary greatly in different states. Likewise, what is a "misdemeanor" in one state is a "petty offense" or "violation" in another. What is a "crime" in one state is a civil matter in others. In this context as in others, therefore, it would not be feasible to adopt a rule based on the level of offense instead of the level of punishment.²¹

The fine-only distinction also serves the important function of preventing unauthorized and disproportionate punishment for an offense. Once a legislature has decided not to allow any possibility of incarceration upon conviction of an offense, it should be impermissible for an individual who is only suspected of committing that offense to be locked up, even for 48 hours or less, at least in the absence of exigent circumstances. "Most reports of misdemeanors will not produce a sentence of custody . . . so a custodial arrest becomes a substantial part of the punishment." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d at 441. See *Malcolm M. Feeley, The Process Is the Punishment* 46-47 (1979). *It is not only unreasonable under the Fourth Amendment, but a denial of due process to allow detention at the sole whim of the police for an offense that could not have led to incarceration upon conviction. Cf. Tate v. Short*, 401 U.S. 395; *Bearden v. Georgia*, 461 U.S. at 667-68 (if a state determines a fine to be the appropriate punishment for an offense, an individual may not be imprisoned for lacking the resources to pay); *Allen v. Burke*, No. 81-0040-A, slip op. at 4 (E.D. Va. June 4, 1981), *aff'd sub nom. Pulliam v. Allen*, 690 F.2d 376 (4th Cir.), *aff'd*, 104 S.Ct. 1970 (1984) (fundamental notions of fairness are offended "by subjecting a pretrial detainee, clothed in the presumption of innocence, to a greater punishment than he could receive after being found guilty, solely because of inability to pay a money bond").

"[I]f a restriction or condition is not reasonably related to a legitimate goal . . . a court permissibly may infer that the purpose of the governmental action is punishment," *Bell v. Wolfish*, 441 U.S. 520, 539 (1979), and "under the Due Process Clause, a detainee must not be punished prior to an adjudication of guilt in accordance with due process of law," *id.* at 535. *Because custodial arrest is not necessary to serve the state's legitimate interest in the ordinary fine-only offense, it functions as punishment.*

II. WARRANTLESS ARRESTS FOR MINOR OFFENSES, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES, ARE UNREASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT

A. The Common Law And This Court's Prior Case Law Require Arrest Warrants For Misdemeanor Arrests Absent Certain Exigent Circumstances

At common law, as described above, warrantless arrests for misdemeanors were permitted only for breaches of the peace committed within the officer's presence.²² See pp.11-12, *supra*. As one leading commentator has explained: "In such cases the arrest had to be made not so much for the purpose of bringing the offender to

justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the fact or immediately after its commission." Stephen, supra, at 193. The breach of peace requirement identified one type of exigency -- there was an immediate need to stop the offender from disturbing the peace -- while the presence requirement also served the additional function of assuring that officers only arrested suspects on the basis of reliable information See Gramenos, 797 F.2d at 441 (presence requirement reduces the likelihood of mistaken arrests).

Where there is no exigency, there is no need to dispense with the warrant requirement, as the common law recognized. This Court has consistently interpreted the Fourth Amendment's requirement of reasonableness as incorporating a preference for warrants. In Justice Jackson's classic statement,

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948).

There was no reason why the officers in this case could not have obtained a warrant. They knew before they went to petitioner's place of business that he was operating without a license; it can scarcely be claimed that this was an emergency or hot pursuit. The officers did not get a warrant because Illinois law, and their police department policy, had decreed that a warrant was unnecessary. But the legislature cannot forgive the warrant requirement any more than it can make a final decision about what arrests are reasonable. *See, e.g., Payton v. New York.*

In *United States v. Watson, 423 U.S. 411*, the Court held that the Fourth Amendment incorporates common law rules pertaining to warrantless arrest. Under *Watson*, felony arrests may be made without a warrant and without a particularized showing of exigent circumstances, even if the felony is not committed within the officer's presence, because of a conjunction of factors: (1) the common law had consistently allowed warrantless arrests for felonies; (2) virtually all of the states, in addition to Congress, allowed warrantless arrests for felonies; and (3) exigency could reasonably be presumed to exist in almost every case of felony arrest, thus justifying what is in effect a conclusive presumption of exigency. *Id.* at 418-22. Because the stakes are so high, there is a significant danger that the suspected felon will try to escape, possibly with injury to the officer or someone else. The nature of the crime for which the person is being arrested, often a serious crime of violence, feeds the assumption that it might be dangerous to leave the person at large while seeking a magistrate's review. Thus, the Court recognized a general exception to the warrant requirement not based on a showing of exigent circumstances.

Understanding that the balance of interests in misdemeanor cases is different, the *Watson Court*, in dicta, also stated that warrantless arrests are permitted for misdemeanors committed within the "presence" of the officer, describing this as the "ancient common law rule." *Id.* at 418.²³ The Court was right to conclude that exigency cannot be presumed in misdemeanor arrests. First, because the stakes are far lower, there is less temptation to "elude justice by absconding," see *Chitty, supra*, at 14. There is also less justification for suspecting that an offender who has been running a business without a license will pose a danger to the officer or to the public. In short, there is no reason not to require the officer seeking to arrest for a misdemeanor to first obtain an arrest warrant in the ordinary case.

In *Payton*, the Court found a different balance when considering whether the Fourth Amendment requires arresting officers to obtain a warrant prior to an arrest at home: the common law was supportive, although somewhat ambiguous, and the states were divided (only 15 required arrest warrants for home arrests). 445 U.S. at 590-600. In this case, as in *Watson*, there is greater agreement among the common law and the states than there was in *Payton*. But unlike *Watson*, this consensus favors maintaining the warrant requirement rather than creating additional exceptions.

B. Petitioner's Offense Does Not Fall Within An Exception To The Warrant Requirement

The Seventh Circuit ruled below that even if common law requirements were incorporated into the Fourth Amendment, petitioner's arrest should be considered constitutional because his offense was committed within

the officers' "presence," 116 F.3d at 289. The Seventh Circuit's formalistic definition of presence fails to read the Court's *Watson dicta in the context of its common law origins. The presence requirement is in part a guarantee of reliability, because the officer must rely on personal rather than second-hand observations. It is also an embodiment of the common law's concept of exigency -- something happens in the presence of the officer, who then judges whether there is a need to remove the offender from the scene, even if the offense is minor, perhaps to allow a cooling off period, or perhaps to prevent further disruption.*²⁴

Petitioner's warrantless arrest did not serve any purpose known to the common law. To argue that not having a license for a business is an offense that occurs within the officer's "presence" seems metaphysical. This is not the type of offense the common law had in mind when it created rules for breaches of the peace. To argue that this offense occurred within the officers' "presence" because petitioner admitted that he had no license, *id. at 289, misses the point of the warrant requirement. The officers knew, before going to petitioner's place of business, that he had no license; they could have gone instead to obtain an arrest warrant if there had really been any good reason to take him into custody. Even in cases where there is an abundance of probable cause, it is axiomatic that a warrant is still necessary. See, e.g., Johnson v. United States, 333 U.S. 10.*

Furthermore, even if the existence of probable cause was not questionable in petitioner's case, it will be in other cases; even if there were no legal questions posed as to whether petitioner's conduct actually violated a particular ordinance, such questions will arise in other cases. As Justice Jackson pointed out, it is the magistrate and not the officer in the field who should be making these judgments where at all possible. If an admission is sufficient to create an exception to the warrant requirement, then the police will be encouraged to avoid the magistrate, and go instead to the suspect to see if they can extract an admission of wrongdoing.

In most cases, custodial arrest is simply not justified for a minor, regulatory offense. In cases where there are truly exigent circumstances -- potential harm, defiance of legal process, *e.g. -- the police will not be required to obtain an arrest warrant. If they wish to arrest a petty offender in a case where there are no exigent circumstances -- perhaps to make an example of him, or perhaps because they do not like him or the nature of his business -- the necessity of submitting their case to a magistrate may help to ensure that they do not deprive people of their liberty, privacy and dignity too lightly.*

Enlisting neutral and detached magistrates to screen searches or arrests is the traditional Fourth Amendment method of providing objective limits to police discretion. Court-imposed rules, whether rules of reason or bright-line rules like the fine-only limitation, are another. A third alternative is for the courts to insist that the legislatures provide meaningful guidelines and criteria to limit police discretion, as this Court has done in cases concerning inventory searches of impounded automobiles. *See Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367, 375 (1987); South Dakota v. Opperman, 428 U.S. 364, 369, 372, 379 (1976).*

Because the Illinois statute is unusual in its utter failure to provide guidelines or criteria for the exercise of the arrest power, even the latter approach would be an improvement. It is clear, however, which of these approaches would be most effective. Because the potential for abuse of discretion in this area is so vast, the Court should interpret the Fourth Amendment, consistent with its history, as prohibiting custodial arrests for fine-only offenses in the absence of exigent circumstances. At the very least, the Court should require peace officers to obtain an arrest warrant prior to arresting an individual for any offense not denominated a felony, in the absence of exigent circumstances. If the Court does not impose adequate objective limitations on the power to arrest, the standardless Illinois statute will undoubtedly engender even greater harm than the indignity suffered by petitioner Ricci.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

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NOTES

1Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.*

2Although the Illinois statute on its face appears to authorize custodial arrest only for criminal "offenses," the Illinois Supreme Court has interpreted this term broadly to include violation of a municipal ordinance, even though such ordinances are tried and reviewed as civil proceedings. *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359, 363 (1950).

3The district court deemed this fact admitted, *Ricci v. Village of Arlington Heights, Ill.*, 904 F.Supp. 828, 830 n.2 (N.D. Ill. 1995).

4904 F.Supp. at 831. The Village subsequently settled this claim; Ricci dropped his claim that there had been no probable cause for his arrest. *See Ricci v. Arlington Heights, Ill.*, 116 F.3d at 289.

5The Court has left this question open for so long that treatise writers have taken to asserting, only on the basis of the Court's inaction, that the requirements of the common law, like the requirement that an arrest be conducted only for an offense committed within the officer's presence, are not part of the Fourth Amendment. *See, e.g., Wayne R. LaFare, Search and Seizure §5.1(c) at 23 (3d ed. 1996); Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990).

Even if they do not simply assume this to be true, some of the lower courts, like the district court below, have preferred to await the Supreme Court's lead rather than engaging in thorough analysis of what the Fourth Amendment requires. *See, e.g., Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982).

6The Seventh Circuit quoted *dicta* from *Whren v. United States*, 116 S. Ct. at 1776, disavowing the need to engage in any balancing analysis in cases where an arrest is based on probable cause. 116 F.3d at 291. *Treating that dicta as dispositive in this case would be to assume a decision on an important open question without ever directly addressing it. The Court used to declare that it had never "invalidated an arrest based on probable cause because the officers failed to secure a warrant," Gerstein v. Pugh*, 420 U.S. 103, 113 (1975), and that probable cause was thus the only requirement for a valid arrest. *See also Chimel v. California*, 395 U.S. 752 (1969). Nevertheless, the Court in *Payton* and subsequent cases found an arrest warrant to be required in some circumstances.

7This practice would have particularly severe and potentially unconstitutional consequences for poor people. *See Tate v. Short*, 401 U.S. 395; *see pp.21-22, infra.*

8See *ALI Model Code of Pre-Arrest Procedures* §120.2 (1975); Barbara C. Salken, "The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses," 62 *Temple L.Rev.* 221, 266-69 (1989).

9As Judge Easterbrook has observed: "If the police choose to perform time-consuming tasks after an arrest, perhaps they must do so on their own time rather than the suspect's, issuing a citation rather than keeping the suspect locked up in the interim." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 437 (7th Cir. 1986).

10See Francis H. Bohlen, "Arrest With and Without a Warrant," 75 *U. Pa. L.Rev.* 485, 491 (1927)(finding "appalling" the notion that the traditional common law power to arrest for breaches of the peace might be expanded to municipal ordinance violations).

11See *Miss. Code Ann.* §99-3-7(1) (Supp. 1997); *W. Va. Code* §62-10-6 (1997)(limitation on constables, not sheriffs). Some statutes limit the right to arrest to "public offenses" committed within the officer's presence, see *Ala. Code* §15-10-3(a)(1) (1995)("public offense" or "breach of the peace"); *Ark. Code Ann.* §16-81-106(b)(2) (Michie Supp. 1997); *Cal. Penal Code* §836(a)(1) (West Supp. 1998); *Idaho Code Ann.* §19-603(1) (1997); *Iowa Code Ann.* §804.7(1) (West 1994); *Minn. Stat. Ann.* §629.34(c)(1) (West 1983); *N.D. Cent. Code* §29-06-15(1)(a) (Supp. 1997); *Okla. Stat. Ann. tit. 22, §196(1)* (West Supp. 1998); *S.D. Codified Laws* §23A-3-2 (Michie 1988); *Tenn. Code Ann.* §40-7-103 (Supp. 1996)("public offense" or "breach of the peace"); *Utah Code Ann.* §77-7-2(1) (1995).

12See statutes cited in nn.15-16, *infra*. Other than Illinois, only Hawaii, *Haw. Rev. Stat.* §803-5 (1993), Rhode Island, *R.I. Gen. Laws* §12-7-3 (1994), and Wisconsin, *Wis. Stat. Ann.* §968.07(d) (West 1996), have statutes wholly eliminating the presence requirement. Rhode Island limits warrantless arrests in another manner -- by requiring the officer to have reasonable grounds to believe the person cannot be arrested later, or may cause injury or property damage, *R.I. Gen. Laws, id.* Wisconsin apparently excludes municipal code violations, which are not considered to be "crimes," see *Wis. Stat. Ann.* §66.12(1)(a) (West Supp. 1997); *Wis. Stat. Ann.* §939.12 (West 1996); *State ex rel. Prentice v. County Ct., Milwaukee Cty.*, 70 *Wis.2d* 230, 234 *N.W.2d* 283, 288-89; (1975). Hawaii, with its unique history, did not share the common law tradition of the other states.

Several other states invoke the presence requirement and then seem to eviscerate it through blanket exceptions, see *Ariz. Rev. Stat. Ann.* §13-3883(2), (4) (West Supp. 1997); *La. Code Crim. Proc. Ann. art. 213(1), (3)* (West 1991); *Mo. Ann. Stat.* §544.216 (West Supp. 1998).

13See nn.15-16, *infra*.

14The presence requirement must be defined in light of the common law's additional concern about limiting arrests for offenses that do not breach the peace. See p.26, *infra*.

15See *Ala. Code* §15-10-3 (1995); *Alaska Stat.* §12.25.030(a) (Michie 1996); *Ark. Code Ann.* §16-81-106(b)(2) (Michie Supp. 1997); *Cal. Penal Code* §836(c)-(d) (West Supp. 1998); *Del. Code Ann. tit. 11, §1904(a)(4)-(6)* (1995); *Fla. Stat. Ann.* §901.15(6)-(8) (West Supp. 1998); *Ga. Code Ann.* §17-4-20(a) (1997); *Idaho Code Ann.* §19-603(6) (1997); *Ind. Code Ann.* §35-33-1-1(a)(3), (5) (Michie 1994); *Kan. Stat. Ann.* §22-2401(c)(2)(C) (1995); *Ky. Rev. Stat. Ann.* §431.005(1)(e), (2)(a) (Michie Supp. 1996); *Me. Rev. Stat. Ann. tit. 17-A, §15(1)(A)-(B)* (West Supp. 1997); *Mass. Ann. Laws ch. 276, §28* (West Supp. 1997); *Mich. Comp. Laws Ann.* §764.15(1)(m) (West 1982); *Minn. Stat. Ann.* §629.34(1)(c)(5) (West Supp. 1998); *Miss. Code Ann.* §99-3-7(3) (Supp. 1997); *Neb. Rev. Stat.* §29-404.02(3) (1995); *Nev. Rev. Stat. Ann.* §171.124(b) (Michie 1997); *N.H. Rev. Stat. Ann.* §594.10(1)(b) (Supp. 1997); *N.M. Stat. Ann.* §31-1-7(A) (Michie Supp. 1996); *N.Y. Crim. Proc. Law* §140.10(b) (McKinney Supp. 1997)(misdemeanors, not offenses); *N.C. Gen. Stat.* §15A-401(d) (1997); *N.D. Cent. Code* §29-06-15(e), (g) (Supp. 1997); *Ohio Rev. Code Ann.* §2935.03(B)(1) (Anderson Supp. 1996); *Okla. Stat. Ann. tit. 22, §196(6)* (West Supp. 1998); *Or. Rev. Stat.* §133.310(3) (1995); *S.D. Codified Laws* §23A-3-2.1 (Michie Supp. 1997); *Tex. Crim. P. Code Ann.* §14.03(2)-(4) (West Supp. 1998); *Vt. R. Crim. P. 3(a)(2)(C)* (Supp. 1997); *Va. Code Ann.* §19.2-81 (Michie Supp. 1997); *Wash. Rev. Code Ann.* §10.31.100(1)-(2) (West Supp. 1998), or for dangerous traffic violations, like driving while intoxicated or reckless driving, see *Mich. Comp. Laws Ann.* §764.15(1)(h)-(i) (West Supp. 1997); *N.J. Stat. Ann.* §39:5-25 (West 1990); *N.D. Cent. Code* §29-06-15(1)(f) (Supp. 1997); *Okla. Stat. Ann. tit. 22, §196(5)* (West Supp. 1998); *Or. Rev. Stat.* §133.310(1)(d)-(g) (1995); *Tenn. Code Ann.* §40-7-103(6) (Supp. 1996); *Wash. Rev. Code Ann.* §10.31.100(3)-(4) (West Supp. 1998).

16See, e.g., Del. Code Ann. tit. 11, §1904(a)(2) (1995); Kan. Stat. Ann. §22-2401(c)(2)(A)-(C) (1995); Me. Rev. Stat. Ann. tit. 17-A §15(1)(a)(5)-(8) (West Supp. 1997); Mont. Code Ann. §46-6-311(1) (1997); Neb. Rev. Stat. §29-404.02(2) (1995); N.H. Rev. Stat. Ann. §594.10(1)(c) (1986); N.C. Gen. Stat. §15A-401(b)(2)(b) (1997); R.I. Gen. Laws §12-7-3 (1994); Utah Code Ann. §77-7-2(3) (1995); Vt. R. Crim. P. 3(a)(3)-(4) (Supp. 1997); Wyo. Stat. Ann. §7-2-102(b)(iii) (Michie 1996); see ALI Model Code of Pre-Arrest Procedure §120.1 (1975).

Some statutes require both particularly dangerous offenses and risk of flight, injury, etc., see D.C. Code Ann. §23-581(a)(1)(C) & (2) (1996); Md. Code Ann. art. 27 §594B(e) & (f) (1996).

17See Ala. Code §15-10-3 (1995); Ala. Code §13A-1-2(1)-(3) (1995); Alaska Stat. §§12.25.030(1) & 11.81.900(b)(9), (b)(58) (Michie 1996); Del. Code Ann. tit. 11, §§1903(a) & 233(c), 4207 (1995); Ky. Rev. Stat. Ann. §§431.005(d) & 431.060(2)-(3) (Michie 1985); Me. Rev. Stat. Ann. tit. 17-A, §15(1)(B) (West Supp. 1997), & Me. Rev. Stat. Ann. tit. 17-A, §4-B(3) (West 1983); Pa. R. Crim. P. 101(2)(a),(c) (West 1997); 18 Pa. Cons. Stat. Ann. §106(b)(8) (West 1983); R.I. Gen. Laws §§12-7-3 & 11-1-2 (1994); S.D. Codified Laws §§23A-3-2(1) & 22-6-7 (Michie 1988). Only a handful of state statutes explicitly authorize custodial arrest for violation of a municipal ordinance, see Fla. Stat. Ann. §901.15(1) (West 1996); Mich. Comp. Laws Ann. §764.15(1)(a) (West Supp. 1997); Mo. Ann. Stat. §544.216 (West Supp. 1998); Ohio Rev. Code Ann. §2935.03(A) (Anderson Supp. 1996); others seem to allow for this possibility, see, e.g., N.C. Gen. Stat. §§15A-401(b)(2)(b) & 14-4(a) (1997); while others appear to disallow custodial arrest for ordinance violations, see Ind. Code Ann. §34-4-32-2 (Michie 1986)(allowing brief detention, not arrest). For most states, it is impossible to determine on the basis of the state statutes alone whether custodial arrest would be permitted for fine-only offenses, or for municipal code violations generally.

18In their depositions, the Arlington Heights officers claimed that it was Village policy to arrest offenders as a matter of routine, in order to process them at the stationhouse, Brief for Appellant at 12-13. If there were a mandatory policy to arrest all offenders, discretion would seem to be curtailed. However, the check on individual officers' discretion is illusory, because officers still have the power to decide to warn rather than arrest an offender. Furthermore, a policy subjecting all offenders, no matter how petty the offense, to mandatory arrest would be unreasonable overreaching under the Fourth Amendment because there would be no possible claim of necessity for every arrest.

19Whren involved the power to stop, not arrest. However, moving violations frequently do entail the possible imposition of jail time. See, e.g., 625 Ill. Comp. Stat. 5/11-501(c) (1993)(driving under the influence of alcohol).

20The Seventh Circuit was far too deferential to the state legislatures in declaring that any arrest based on probable cause is reasonable if the legislature of the jurisdiction in question has authorized it. 116 F.3d at 290. Legislatures do not have final power to decree that an arrest is reasonable (see Payton, Welsh and Michigan v. DeFillippo, 443 U.S. 31 (1979), for a few of the instances where the Court has invalidated state statutes purporting to authorize arrests), any more than they have the power to declare that a search or seizure is unreasonable within the meaning of the Fourth Amendment. See, e.g., Oliver v. United States, 466 U.S. 170 (1984), where the Court upheld a search as reasonable even though it was conducted in violation of state law.

21This Court has previously held that a state legislature's own description of its statutes as being "criminal" or "civil" is not dispositive, see Austin v. United States, 509 U.S. 602 (1993); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), so attempting to define arrest authority on the basis of whether a state denominates an offense as "criminal" would also be unavailing.

22The Seventh Circuit held that petitioner had waived an argument under the Fourth Amendment's Warrant Clause in this case by not having raised it in his brief, 116 F.3d at 291-92. Because petitioner's warrant and reasonableness arguments were intertwined in his brief to the Seventh Circuit, Brief for Appellant at 9, as they are in the first question on which this Court granted certiorari ("*Does the Fourth Amendment's Reasonableness Clause incorporate common-law rule prohibiting warrantless arrests in misdemeanor cases that do not breach the peace?*"), amici are addressing this point in the event the Court reaches the issue.

23It would seem, by negative implication, that arrest warrants are constitutionally necessary at least for offenses committed outside the presence of the officer. But, some readers of *Watson* seem to agree with the dissenters that "the Court, in the guise of 'constitutionalizing' the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone

whom they believe has committed any sort of crime at all." *State v. Surdyka*, 492 F.2d 368 (4th Cir. 1974). This is an inaccurate reading of *Watson*.

[24](#)As described in nn.15-16, *supra*, almost all states' statutes retain the "presence" requirement but, like the *Watson dicta*, do not explicitly mention the common law's breach of the peace requirement. As one court observed: "These common-law exceptions to the general rule were based on the principle that the ordinary right of exemption from arrest, except upon warrant, should yield to public necessity As long as exceptions additional to those fixed by the common-law fall fairly within the principle from which the common-law exceptions arose, they are not subject to constitutional objection." *State v. Byrd*, 72 S.C. 104, 51 S.E. 542, 544 (1905).

How and why articulation of the breach of peace requirement disappeared from statements of the common law in this Court's case law and in so many state statutes is a story that has yet to be told in full. See *Bohlen, supra*, and sources cited at p.12, *supra*, for a partial account of this history.

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