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Before Eric Garner, a lady in Texas didn't fasten her seat belt

The death of Eric Garner resulting from selling untaxed cigarettes on Staten Island has rightfully spawned an enormous amount of attention from the media and the general public. Fingers of blame have been pointed in a variety of directions: toward the police, the grand jury, prosecutors and the city of New York.

But I want to focus on another institution that bears some responsibility: the U.S. Supreme Court. And that is because the arrest of Eric Garner may not have occurred but for a 2001 decision that ranks as one of the worst of the last 50 years.

In 1997, Gail Atwater was driving her two small children in a pickup truck in Lago Vista, Texas. None of them had a seat belt. A police officer noticed the seat belt violations and pulled her over.

Recognizing Atwater as someone he had previously (and mistakenly) pulled over for such a violation, he yelled "We've met before" and "You're going to jail." Although the seat belt violation was punishable by fine only, the officer arrested and handcuffed her, placed her in the squad car and drove her to the station. (During the stop, a friend of Atwater's happened upon the scene and took charge of the two "frightened, upset and crying" children.)

At the station, the police made Atwater remove her shoes and empty her pockets. They then took her mug shot and placed her in a jail cell. An hour later, she was taken before a magistrate before she posted bond. She subsequently pleaded no contest to the misdemeanor seat belt violations and paid a \$50 fine. Atwater then filed suit under the Civil Rights Act, 42 U.S.C. Section 1983, alleging that her arrest was unconstitutional.

The Supreme Court granted cert to decide whether a warrant-

less arrest for a minor criminal offense — here a misdemeanor seat belt violation punishable only by a fine — is reasonable under the Fourth Amendment. In a 5-4 decision, the court found such an arrest to be proper under the Fourth Amendment. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

Interestingly, the court conceded that "If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail." But the court held that in the area of the Fourth Amendment, it preferred to provide police with bright-line rules rather than procedures that required sensitive, case-by-case determinations.

The court also found the "jailable vs. fine only" distinction unworkable for several reasons. First, the police officer may not know what the punishment is for the crime supporting the arrest.

Second, an officer may not know if an arrestee is a recidivist, which could turn a fine-only offense into one mandating imprisonment.

Third, where conduct could implicate more than one criminal offense, an officer should not be made to anticipate whether the prosecutor will choose the fine-only offense or the one allowing

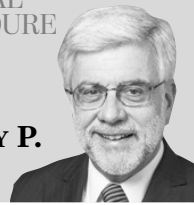
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jail time. For these and other reasons, the court held that an arrest supported by probable cause for any offense would not violate the Fourth Amendment.

Justice Sandra Day O'Connor filed a strong dissent on behalf of four justices. She wrote that an arrest for a minor offense "defies any sense of proportionality" and is thus unreasonable under the

CRIMINAL PROCEDURE

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Fourth Amendment.

She focused on the "obvious toll on an individual's liberty and privacy" that accompanies any arrest, including a full search of the arrestee's person and detention up to 48 hours before appearance before a magistrate. Granting the police this "unbounded discretion carries with it grave potential for abuse," especially since police could enforce the law by simply issuing a citation. She contended the court's decision "cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness."

And this brings us to Eric Garner. New York City has the second highest combined federal, city, county and state cigarette taxes in the country: \$6.86 a pack. Consequently, there is a demand for cigarettes sold on the black market.

In response, the city mandates that "No persons shall distribute a tobacco product for commercial purposes at less than the basic cost ... to members of the general public in public places." (Administrative Code of the City of New York, Section 17-176 (b)). A violation of this provision is a misdemeanor. The first offense is punishable by a civil penalty of not more than \$500 and not more than \$1,000 for the

second and each subsequent violation.

Garner was selling "loosies" — individual cigarettes — on Staten Island. A brand-name cigarette apparently goes for about 75 cents on the street. No one questions that New York has the right to make avoidance of the tax an offense.

But for a non-violent offense punishable by a fine — which New York City itself characterizes as a "civil penalty" — why an arrest instead of a citation? Wouldn't a citation have been easier for the police officers, not to mention Mr. Garner?

The majority in *Atwater* discounted the problem of arrests for minor offenses by noting that there was no evidence that the country was "confronting anything like an epidemic of unnecessary minor-offense arrests." O'Connor disputed this conclusion by noting that "the relatively small number of published cases dealing with such arrests proves little and should provide little solace."

Indeed, in New York City alone during the decade following *Atwater*, there was a 25 percent increase in the number of misdemeanor arrests made by police. During that same period, there was almost no increase in felony arrests. (See "Trends in Misdemeanor Arrests in New York," a report prepared by John Jay College of Criminal Justice, presented to the Citizens Crime Commission on Oct. 28, 2014.)

The Supreme Court made a mistake by equating felonies with the most minor offenses in the area of arrests. And the irony is that instead of helping police, the decision has increased the situations where not only arrestees but the police themselves are in harm's way.

The Garner incident should result in the re-examination of a number of issues in the criminal justice system. Hopefully, one result will be a fresh look at the *Atwater* decision.