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Recommended Citation

22 Roger Williams U. L. Rev. 263,286 (2017)

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Illegal Stops and the Exclusionary Rule: The Consequences of *Utah v. Strieff*

Emily J. Sack*

In December, 2006, an anonymous caller left a message on a police drug tip line saying that there was “narcotics activity” at a particular house in South Salt Lake City.¹ As a result of the tip, Officer Douglas Fackrell conducted “intermittent surveillance” of the home over the course of one week for a total of “approximately three hours.”² In that period, the officer observed “short term traffic” at the home, with visitors arriving and leaving again within a couple of minutes.³ Though the traffic was not “terribly frequent,” Officer Fackrell believed that it was more than typical for a residence, and was “frequent enough that it raised [his] suspicion.”⁴

Officer Fackrell observed Edward Strieff leave the house, though he had not seen Strieff’s arrival.⁵ The officer followed Strieff in an unmarked car, as Strieff walked down the street toward a convenience store.⁶ As he approached the store, Officer Fackrell ordered Strieff to stop in the parking lot.⁷ Strieff

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1. *State v. Strieff*, 357 P.3d 532, 536 (Utah 2015), *rev’d sub nom.* Utah v. Strieff, No. 14-1373, slip op. at 13 (U.S. June 20, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *State v. Strieff*, 286 P.3d 317, 320 (Utah Ct. App. 2012), *rev’d*, 357 P.3d 532 (Utah 2015), *rev’d sub nom.* Utah v. Strieff, No. 14-1373, slip op. at 13 (U.S. June 20, 2016).

7. *State v. Strieff*, 357 P.3d 532, 536 (Utah 2015), *rev’d sub nom.* Utah v. Strieff, No. 14-1373, slip op. at 13 (U.S. June 20, 2016).

complied and Officer Fackrell identified himself as a police officer.⁸ He explained that he had been watching the house because he believed it was a source of drug activity, and then asked Strieff what he was doing there.⁹ Officer Fackrell also requested Strieff's identification, which Strieff provided, and then relayed the information to police dispatch, asking them to check for outstanding warrants.¹⁰ When dispatch conveyed that Strieff had an outstanding "small traffic warrant," the officer arrested Strieff on the warrant and searched him incident to arrest.¹¹ The search uncovered a baggie of methamphetamine and drug paraphernalia in Strieff's pockets.¹²

Strieff was charged with unlawful possession of methamphetamine and drug paraphernalia; he moved to suppress the evidence, arguing that it was the fruit of an illegal stop.¹³ The State conceded that Officer Fackrell had stopped Strieff without reasonable articulable suspicion because he did not see Strieff enter the house, did not know how long he had been there, and knew nothing of him other than that he left the house.¹⁴ However, the State argued that the evidence should not be suppressed because the existence of the valid arrest warrant attenuated the connection between the illegal stop and the discovery of the evidence.¹⁵ The trial court denied the motion to suppress, and Strieff conditionally pled guilty to reduced charges, reserving his right to appeal the trial court's denial of the

8. *Id.*

9. *Id.* The record does not seem to indicate what, if anything, Strieff said in response. At the oral argument, addressing this point with Strieff's lawyer, Justice Alito noted, "Well, we really don't know very much about exactly what happened here, which is unfortunate [W]e don't even know what your client said." Transcript of Oral Argument at 44, *Utah v. Strieff*, No. 14-1373, slip op. (U.S. 2016). Strieff's lawyer followed:

[A] really important part of the officer's testimony was that he didn't remember what that answer was. So if my client had said, I went in there because there's someone who's ill and I've been visiting for, you know, 20 minutes, or . . . this is where my friend lives; that's why I was there, end of inquiry, and . . . the warrants check shouldn't have been run. A reasonably well-trained officer should know.

Id. at 45.

10. *Strieff*, 357 P.3d at 536.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 536–37.

15. *Id.* at 537.

motion.¹⁶ Utah’s intermediate court affirmed, but the Utah Supreme Court reversed, and the U.S. Supreme Court granted certiorari to “resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.”¹⁷ In a 5–3 opinion, the U.S. Supreme Court reversed, holding that the attenuation exception to the exclusionary rule applied to the case, and that the evidence here should not be suppressed because the discovery of a valid arrest warrant broke the causal chain between the illegal stop and the discovery of the drug evidence on *Strieff*.¹⁸

Strieff stands at the crossroads of two highly controversial criminal procedure issues—the scope of the exclusionary rule and the legitimacy of police stop-and-frisk protocols—and it is likely to have a significant impact in both areas. The Court took a further step in its continuing limitation of the exclusionary rule through a broad interpretation of its attenuation exception.¹⁹ Further, by holding that evidence obtained through an illegal stop will be admissible when the suspect has an outstanding arrest warrant, the Court granted the police broad discretion to stop first, and develop a legitimate basis for an arrest and search later.²⁰ The Court refused to acknowledge the major consequences of this decision for police-citizen relations—particularly in poor and minority areas—provoking an angry dissent by Justice Sotomayor, who explicitly linked the exclusionary rule doctrine and the

16. *Id.*

17. *Strieff*, slip op. at 6.

18. *Id.* at 13. Justice Thomas wrote the Court’s opinion, joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. *Id.* at 3. Justice Sotomayor wrote a dissenting opinion, which Justice Ginsburg joined in part. *Id.* Justice Kagan wrote a dissenting opinion, which Justice Ginsburg also joined. *Id.* *Utah v. Strieff* was argued just nine days after the death of Justice Scalia, on the first day of oral arguments since his death. See Andrea Garland, *Utah at the United States Supreme Court Without Scalia*, 29 UTAH B.J. (2d ser.)10, 10 (May–June 2016). As it turned out, Justice Scalia’s vote would not have changed the outcome in the case. However, given his opinion in *Hudson v. Michigan*, 547 U.S. 586 (2006), see *infra* text accompanying notes 43–49, we can speculate that his presence may have moved the Court even further in limiting the exclusionary rule. See Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/>.

19. See *Strieff*, slip op. at 10.

20. See *id.* at 9 (Sotomayor, J., dissenting).

impact of police misconduct on the street for our citizens.²¹

I. THE EXCLUSIONARY RULE, ATTENUATION DOCTRINE AND THE
RULE'S PURPOSE

To understand the developments in *Strieff*, it first is important to explore briefly the trajectory of the exclusionary rule since its recognition by the Court early in the twentieth century. In *Weeks v. United States*, in discussing the use of evidence obtained illegally by the police, the Supreme Court said:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.²²

The Court thus held that evidence obtained from an unconstitutional search or seizure in a federal case must be excluded from use in a criminal trial.²³ It extended the exclusionary rule to the states in *Mapp v. Ohio*, holding that:

[I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.²⁴

21. *See id.* at 12.

22. 232 U.S. 383, 393 (1914).

23. *Id.* at 398.

24. 367 U.S. 643, 655–56 (1961). In *Wolf v. Colorado*, the Court held that the Fourth Amendment applied to the states through the Due Process Clause, but declined to find that the exclusionary rule must also be applied to state prosecutions. 338 U.S. 25, 27–29 (1949). The *Mapp* Court overruled

The Court subsequently held that the scope of the exclusionary rule extended not only to evidence obtained as a direct result of a Fourth Amendment violation, but also evidence that is derived from its illegality, the “fruit of the poisonous tree.”²⁵

The *Mapp* Court repeatedly referenced the Constitution as the basis for the exclusionary rule, indicating that it considered this remedy to be constitutionally required.²⁶ For example, in discussing *Weeks*, the Court in *Mapp* referred to the exclusionary rule as a “clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to ‘a form of words.’”²⁷ The Court referred to its “holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments,”²⁸ and discussed the “constitutional exclusionary doctrine.”²⁹

However, in the years after *Mapp*, the Court began to disavow the constitutional basis for the rule, instead referring to it as a “judicially created remedy.”³⁰ Though the Fourth Amendment protects against unreasonable searches and seizures, the Constitution “contains no provision expressly precluding the use of evidence obtained in violation of its commands.”³¹ If suppression is just a “judicially created rule,”³² rather than a constitutional requirement, then the courts have greater discretion to limit its application. This change in characterization was part of the process by which the Court limited the scope of the rule, and began to recognize several exceptions to its application. Three of these exceptions concern the causal relationship between the constitutional violation and the evidence obtained—the

that portion of *Wolf* to hold that the states must adhere to the exclusionary rule to suppress illegally obtained evidence. 367 U.S. at 654–55.

25. See *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963); see also *Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

26. 367 U.S. at 648.

27. *Id.* (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

28. *Mapp*, 367 U.S. at 657.

29. *Id.* at 659.

30. See *United States v. Calandra*, 414 U.S. 338, 348 (1974).

31. *Arizona v. Evans*, 514 U.S. 1, 10 (1995).

32. *Herring v. United States*, 555 U.S. 135, 139–40 (2009).

independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine.³³ Under the independent source doctrine, evidence obtained in an unlawful search may be admitted if it also was acquired lawfully from a separate, independent source.³⁴ The inevitable discovery doctrine permits admission of illegally obtained evidence if it inevitably *would have been discovered* lawfully.³⁵ Under the attenuation doctrine, illegally obtained evidence may be admitted when the connection between the constitutional violation and the evidence is broken by an intervening circumstance, thus “dissipat[ing] the taint.”³⁶ Though the evidence may not have been discovered but for illegal police conduct, the question for attenuation is whether the evidence “has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”³⁷

Just as the Court’s characterization of the source of the rule changed over time, it also began to narrow the identified purposes for the rule. Like the change in source, this narrowing of purpose also had the effect of limiting the rule’s scope and application. In *Mapp*, the Court made clear that there were multiple purposes for the exclusionary rule. The Court identified deterrence of police misconduct as one important reason.³⁸ If the evidence obtained from an illegal search or seizure were not admissible, this would jeopardize convictions; therefore, wanting to avoid this outcome, police would refrain from illegal conduct.³⁹ However, the Court also noted that the exclusionary rule was required because of “the

33. *Utah v. Strieff*, No. 14-1373, slip op. at 4 (U.S. June 20, 2016) (citations omitted).

34. *Murray v. United States*, 487 U.S. 533, 537 (1988) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)); see *Segura v. United States*, 468 U.S. 796, 805 (1984) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)); *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

35. *Nix*, 467 U.S. at 432, 443–44 (emphasis added).

36. *Wong Sun*, 371 U.S. at 491 (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

37. *Id.* at 487–88 (quoting MAGUIRE, EVIDENCE OF GUILT 221 (1959)). Though not discussed in the Court’s opinion in *Utah v. Strieff*, in prior opinions the Court has repeatedly stated that the prosecution has the burden of proving the admissibility of the evidence. *Brown v. Illinois*, 422 U.S. 590, 604 (1975); see *Kaupp v. Texas*, 538 U.S. 626, 633 (2003).

38. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

39. *Id.* at 648 (quoting *Silverthorne Lumber Co.*, 251 U.S. at 392).

imperative of judicial integrity.”⁴⁰ As the Court put it in *Wong Sun v. United States*, suppression of illegally obtained evidence protected Fourth Amendment rights both by deterring lawless conduct by officers, and by “closing the doors of the . . . courts to any use of evidence unconstitutionally obtained.”⁴¹ Reliance upon such illegally obtained evidence would taint the judicial process, by condoning the exploitation of constitutional violations.

However, in later cases, the Court began to drop the judicial integrity rationale, concentrating solely on the deterrence explanation for the exclusionary rule.⁴² In *Hudson v. Michigan*, writing for the majority, Justice Scalia explained the dependency of the exclusionary rule on deterrence.⁴³ Because the exclusionary rule has “substantial social costs,” it is applicable only where the benefits of deterrence outweigh these costs.⁴⁴ As the Court put it in *Davis v. United States*, “[t]he rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.”⁴⁵ As commentators have noted, this sole focus on deterrence has made it possible to limit the application of the exclusionary rule.⁴⁶ If exclusion is not likely to deter an officer’s behavior, under this theory there is no other plausible purpose for excluding the evidence involved. *Hudson*, the 2006 decision written by Justice Scalia, may indicate most clearly the use of the deterrence rationale to limit the application of the exclusionary rule, which he said “has always been our last resort, not our first

40. *Id.* at 659.

41. *Wong Sun*, 371 U.S. at 486; *see also Brown*, 422 U.S. at 599 (“These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court’s cases.”); *United States v. Calandra*, 414 U.S. 338, 357 (1973) (Brennan, J., dissenting) (asserting that judges should “avoid the taint of partnership in official lawlessness.”).

42. Donald A. Dripps, *Perspectives on the Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1899 (2016); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1574–75, 1606 (2015); George C. Thomas III, *Mapp v. Ohio: Doomed from the Beginning?*, 12 OHIO ST. J. CRIM. L. 289, 294–97 (2014) (citing *Calandra*, 414 U.S. at 347).

43. *Hudson v. Michigan*, 547 U.S. 586, 591, 594–97 (2006).

44. *Id.* at 591 (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

45. *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (citations omitted).

46. *See Ristroph, supra* note 42, at 1606–07; Thomas, *supra* note 42, at 291.

impulse.”⁴⁷ Justice Scalia argued that though deterrence is necessary for exclusion, it is not sufficient, since “the value of deterrence depends upon the strength of the incentive to commit the forbidden act.”⁴⁸ He said that we should not assume that exclusion in one context is “necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago.”⁴⁹

Though the *Strieff* Court did not completely abandon the exclusionary rule, it did continue to undermine it; though it claimed to be applying existing attenuation doctrine, its reasoning significantly broadened the exception.

II. THE APPLICABILITY OF THE ATTENUATION EXCEPTION

A threshold question for the Court was whether the attenuation exception to the exclusionary rule was even the appropriate doctrine to consider in this case. The trial court and Utah Court of Appeals had both upheld the admission of the evidence based on their interpretation of the attenuation exception to the exclusionary rule.⁵⁰ However, in reversing the lower courts, the Utah Supreme Court first held that the attenuation doctrine did not apply to this case, reasoning that the U.S. Supreme Court had applied the doctrine only where there were intervening circumstances “involving a defendant’s independent acts of free will.”⁵¹ Such independent acts would include a defendant’s voluntary confession or consent to a search.⁵² Unlike such acts, the discovery of an outstanding warrant is neither initiated by the defendant, nor an independent act. In addition, it is an entirely foreseeable event arising out of the stop or arrest, so it cannot be viewed as “sufficiently removed from the primary illegality.”⁵³ The Utah Supreme Court found that the inevitable discovery exception did apply to these facts,

47. *Hudson*, 547 U.S. at 591.

48. *Id.* at 596.

49. *Id.* at 597. Justice Scalia went on to explain the changed circumstances since *Mapp* which made the exclusionary rule less necessary, which included increased deterrence that comes from the development of civil remedies for citizens claiming violations by the police, as well as the increased professionalism of police forces. *Id.* at 597–99.

50. *State v. Strieff*, 357 P.3d 532, 536, 537 (Utah 2015).

51. *Id.* at 544–45.

52. *Id.* at 544.

53. *Id.* at 545.

but held that here the exception was not satisfied.⁵⁴ The Utah court said that the doctrine was implicated in the case, because it involved two parallel acts of police work—the stop which was a violation of the Fourth Amendment; and the execution of the outstanding warrant, which was lawful.⁵⁵ However, the doctrine requires that “the fruits of the lawful investigation would *inevitably* have come about regardless of the unlawful search and seizure.”⁵⁶ Though the arrest and search incident to arrest here were lawful, they were the result of the unlawful stop, and it would be “difficult at best” to show such inevitability because “we cannot know whether Strieff might ultimately have had this contraband in his possession on any future date on which he may have been arrested on the outstanding warrant.”⁵⁷

The U.S. Supreme Court rejected the reasoning of the Utah Court in quick order.⁵⁸ Writing for the majority, Justice Thomas rejected the view that the logic of prior Supreme Court cases relating to attenuation was limited to independent acts by the defendant.⁵⁹ Finding that the attenuation doctrine was the appropriate framework to consider whether the evidence should be excluded in this case, the Court applied three factors first identified in the attenuation case of *Brown v. Illinois*.⁶⁰ To consider whether or not the attenuation exception was satisfied, the Court looked to the “temporal proximity” between the unconstitutional conduct and the discovery of the evidence; “the presence of intervening circumstances;” and “the purpose and flagrancy of the official misconduct.”⁶¹

III. THE *BROWN* ATTENUATION ANALYSIS

A. *Warrants and the Meaning of Intervening Circumstances*

The Court conceded that the first factor, temporal proximity between the illegal conduct and the discovery of the evidence,

54. *Id.* at 544, 545.

55. *Id.* at 545.

56. *Id.*

57. *Id.* at 546.

58. Apparently the defendant also had not pressed this argument at the U.S. Supreme Court. *See* *Utah v. Strieff*, No. 14-1373, slip op. at 5 (U.S. June 20, 2016).

59. *Id.*

60. *Id.* at 5–6 (citing *Brown v. Illinois*, 422 U.S. 590, 603 (1975)).

61. *Id.* at 5–6. (quoting *Brown*, 422 U.S. at 603–04).

argued in favor of suppression, since the officer discovered the drugs just minutes after the illegal stop of the defendant.⁶²

The Court also did not spend much time on the second and more controversial factor, the presence of intervening circumstances, finding that it “strongly favors the State.”⁶³ Here, the warrant was valid; moreover, it predated the officer’s investigation and was entirely unrelated to the stop.⁶⁴ Once he knew of the warrant, the officer had an obligation to make the arrest; this was “independently compelled” by the pre-existing warrant, and after a lawful arrest, it clearly was lawful to perform a search incident to arrest.⁶⁵

However, both Justice Kagan and Justice Sotomayor explained in their dissents why this was not an appropriate application of the intervening circumstances factor in attenuation analysis; both argued that the warrant was not an independent intervening factor that dissipated the taint of the illegal stop.

Justice Sotomayor distinguished the circumstances in *Strieff* from the classic attenuation case of *Wong Sun v. United States*.⁶⁶ In *Wong Sun*, an individual, who days earlier had been illegally arrested, voluntarily returned to the police station to confess to a crime.⁶⁷ Though the illegal arrest was a “but for” cause of the confession, the police did not exploit the illegal action to obtain the confession, and the Court held that the confession could be admitted into evidence.⁶⁸ Referring to the Court’s opinion in *Wong Sun*, Justice Sotomayor stated, “[w]e reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction.”⁶⁹ The *Brown* factors distinguish evidence obtained through innocent means from that obtained by exploiting misconduct. Here, she argued, there was no intervening innocent conduct.⁷⁰ The officer stopped Strieff illegally and immediately

62. *Id.* at 6.

63. *Id.* at 6–7.

64. *Id.* at 7.

65. *Id.*

66. *Id.* at 3–4 (Sotomayor, J., dissenting) (citing *Wong Sun v. United States*, 371 U.S. 471, 491 (1963)).

67. *Wong Sun*, 371 U.S. at 491.

68. *Id.*

69. *Strieff*, slip op. at 4 (Sotomayor, J., dissenting).

70. *Id.* at 5.

checked for a warrant.⁷¹ Justice Sotomayor noted that the “discovery of [the] warrant was not some intervening surprise that [the officer] could not have anticipated;”⁷² she pointed out that Utah had over 180,000 misdemeanor warrants in its database and the county involved had a large backlog of outstanding warrants.⁷³ The officer’s,

sole reason for stopping Strieff, [the officer] acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house The warrant check . . . was not an “intervening circumstance” separating the stop from the search for drugs. It was part and parcel of the officer’s illegal “expedition for evidence in the hope that something might turn up.”⁷⁴

Justice Sotomayor concluded that the majority’s view that a warrant would “clean up whatever illegal conduct uncovered it” was a “remarkable proposition.”⁷⁵

Justice Kagan agreed with this view of intervening circumstances. She asserted that checking for warrants during stops was a routine procedure in Salt Lake City, and that the standard stop procedures were “partly designed to find outstanding warrants;”⁷⁶ “[a]nd find them they will, given the staggering number of such warrants on the books.”⁷⁷ As Justice Kagan noted, the attenuation doctrine embodies the concept of proximate cause. The question is whether there is an intervening circumstance that breaks the causal chain between the illegality and the evidence.⁷⁸ She explained that in proximate cause analysis, “a circumstance is intervening only when it is unforeseeable.”⁷⁹ Given the numbers of outstanding warrants and the routine procedure of the police to conduct checks when stopping individuals, the officer’s discovery of the warrant here

71. *Id.* at 4.

72. *Id.*

73. *Id.*

74. *Id.* at 5 (quoting *Brown v. Illinois*, 422 U.S. 590, 606 (1975)).

75. *Id.* at 5–6.

76. *Id.* at 5 (Kagan, J., dissenting).

77. *Id.* Justice Kagan also cites examples from other jurisdictions with large numbers of outstanding warrants. *Id.*

78. *Id.* at 4.

79. *Id.*

was “eminently foreseeable.”⁸⁰ She elaborated:

So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person’s identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.⁸¹

Though both dissenting opinions appeared to agree with the majority that the attenuation doctrine was applicable to the facts of this case, they interpreted the “intervening circumstance” far differently from the Court. While they did not go as far as the Utah Supreme Court in finding that this circumstance had to be an act of the defendant’s free will,⁸² they did agree that the evidence must be obtained in a way that was not exploitive of the illegality that preceded it.⁸³ This view is consistent with the Court’s prior understanding of the three related exclusionary rule exceptions: the independent source doctrine allows evidence to be admitted because the police did not exploit the initial illegality but obtained it from a lawful, independent source; the inevitable discovery doctrine allows evidence to be admitted because the police did not exploit the initial illegality but inevitably would have obtained it from a lawful independent source; and the attenuation doctrine allows evidence to be admitted because the police did not exploit the initial illegality but derived the evidence through an independent intervening circumstance that therefore dissipated the taint of the illegal conduct. This makes sense when one considers that the Court has focused on deterrence as the sole rationale for the exclusionary rule. If the police are not exploiting the illegal conduct to obtain evidence, there is no deterrence purpose for excluding this evidence. To put it conversely, the exclusion of evidence will deter the police from committing illegal acts, if they are exploiting this illegality to obtain the evidence.

The *Strieff* Court, consistent with earlier cases, made clear that deterrence of police misconduct was the sole purpose of the exclusionary rule. As the Court stated, “[t]he exclusionary rule

80. *Id.*

81. *Id.* at 5.

82. *Id.* at 3.

83. *Id.* at 1.

exists to deter police misconduct.”⁸⁴ Therefore, even under the Court’s rationale for the exclusionary rule, the admissibility of the evidence in this case does not fit into the attenuation exception and does not make sense. By grouping this kind of intervening circumstance into the attenuation exception, the Court has measurably expanded the doctrine. Further, it has become unhinged from the rationale that supported it.

B. *Purpose, Flagrancy, and Good Faith*

Justice Thomas spent the most time on the third factor in the *Brown* analysis: whether the officer’s conduct was purposeful and flagrant.⁸⁵ This is critical to the majority because without such behavior, there is no possible deterrence of police misconduct to be achieved by exclusion of the evidence, and therefore no purpose for doing so.⁸⁶

The Court found that Officer Fackrell’s conduct in this case was not purposeful and flagrant.⁸⁷ Justice Thomas stated that the officer was “at most negligent” and made two “good-faith mistakes” in stopping the defendant.⁸⁸ First, he did not know how long Strieff had been at the house, and so he did not have a sufficient reason to conclude that Strieff was a short-term visitor who may have been involved in a drug deal. Second, because he did not have that reason, he “should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so.”⁸⁹ Further, the “mistaken” stop was followed by lawful conduct—the arrest based on the warrant and the search incident to arrest.⁹⁰

Justice Thomas’ use of the phrase good faith is noteworthy; in the context of the exclusionary rule, these words connote the “good

84. *Id.* at 8.

85. *Id.*

86. *Id.* (“The third factor of the attenuation doctrine reflects that [deterrence] rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.”); see also *Herring v. United States*, 555 U.S. 135, 144 (2009) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

faith exception” developed in *United States v. Leon*.⁹¹ There, the officers had relied on a warrant issued by a magistrate, which was later determined to be invalid.⁹² The Court ruled that because the officers had reasonably relied in good faith on this warrant, the evidence that the warrant-based search had uncovered should not be excluded.⁹³ Since the officers did not and reasonably could not have known that the warrant would turn out to be invalid, their behavior was “in good faith.”⁹⁴ But here, Justice Thomas equated a negligent mistake with good faith. The point of *Leon* was that the police themselves did not engage in any unreasonable behavior; under the Court’s reasoning in that case, there would therefore be nothing to deter.⁹⁵ But such is not the case here; by definition, the concededly illegal stop was unreasonable and Officer Fackrell’s failure to recognize that was not a “good faith exception” as used in exclusionary rule doctrine.

Further, Justice Sotomayor took issue with the majority’s characterization of the officer’s illegal conduct as simply negligent, and in good faith in a more general meaning of the term. She argued instead that his unlawful conduct was deliberate and purposeful because his “sole purpose was to fish for evidence.”⁹⁶ In her dissent, Justice Kagan also pointed out that “far from a Barney Fife-type mishap, Fackrell’s seizure of Strieff was a calculated decision, taken with so little justification that the State

91. *United States v. Leon*, 468 U.S. 897, 913, 922 (1984).

92. *Id.* at 903.

93. *Id.* at 922.

94. *Id.* at 919–21 (“[W]here the officer’s conduct is objectively reasonable, ‘excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances’ . . . This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter.”) (quoting *Stone v. Powell*, 428 U.S. 465, 539–40 (1976) (White, J., dissenting)).

95. *See id.*

96. *Utah v. Strieff*, No. 14-1373, slip op. at 7 (U.S. June 20, 2016) (Sotomayor, J., dissenting). Justice Sotomayor also argued that even assuming this conduct could be considered negligent, negligence can be deterred by the exclusionary rule, and in fact may be “most in need of the education” gained through exclusion of illegally obtained evidence. *Id.* Therefore, counter to the Court’s argument, there is real deterrence to be gained by excluding the evidence in these circumstances even if we accepted the Justice Thomas’ characterization of the officer’s behavior.

has never tried to defend its legality.”⁹⁷ Officer Fackrell’s own testimony at the suppression hearing made clear that the stop had an investigatory purpose; he said it was to find out what was going on in the house and what Strieff was doing there, and he admitted that he had no basis for the stop other than the fact that Strieff was exiting the house in question.⁹⁸

Justice Thomas countered that the officer was actually stopping Strieff to find out what was happening inside a house where he legitimately suspected drug activity, and so this was not a “suspicionless fishing expedition.”⁹⁹ Justice Thomas seemed to assume therefore that the illegal conduct did not meet the purposeful and flagrant standard.

There are several problems with this assumption. First, Justice Thomas conflated the suspicion the officers may have had about the home with that necessary to detain Strieff. A stop requires *individualized* reasonable suspicion that the person detained is committing a crime.¹⁰⁰ Even assuming that the officer did have reasonable suspicion that drug activity was transpiring in the home, he still required separate reasonable suspicion to believe that Strieff was involved in that activity. The officer could have tried to ask Strieff to provide information consensually as he apparently did upon his initial contact. However, he could not detain him under the Fourth Amendment, as all concede he did when he immediately asked for and retained Strieff’s identification in order to conduct the warrant check, unless he had the required reasonable suspicion about Strieff himself. This the officer clearly did not have. As the State conceded, the officer did not know how long Strieff had been in the home, did not know who he was, and Strieff had done nothing suspicious upon exiting the home and walking toward a nearby convenience store.¹⁰¹ As Justice Sotomayor put it, “[t]he officer did not suspect that Strieff had done anything wrong. Strieff just happened to be the first person to leave a house that the officer thought might contain

97. *Id.* at 3 (Kagan, J., dissenting).

98. *Id.* See *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (finding the illegal arrest at issue purposeful because it was “investigatory”). As *Brown* stated, “[t]he detectives embarked upon this expedition for evidence in the hope that something might turn up.” *Id.*

99. *Strieff*, slip op. at 9.

100. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (emphasis added).

101. *State v. Strieff*, 357 P.3d 532, 536–37 (Utah 2015).

‘drug activity.’”¹⁰² Even assuming the officer was looking only for information about the home, because the officer had no knowledge of the length or reason for Strieff’s visit and he obviously lacked the necessary suspicion, the detention was in fact a “suspicionless fishing expedition.”

Second, it seems highly implausible that the police officer only wanted information about the home and did not view Strieff himself as a potential suspect. The two beliefs are connected; clearly he thought Strieff might have information about drug activity because he thought that Strieff may have been a short-stay visitor who was a drug purchaser. Most important, the immediate warrant check belies Justice Thomas’s assumption that the officer was interested only in obtaining information from Strieff about the home. Clearly the warrant check would enable the officer to investigate Strieff as a suspect himself and determine whether he had a basis to detain or arrest him. Though Justice Thomas characterized this check as a “negligibly burdensome” safety precaution,¹⁰³ there is no basis for this belief, either factually or legally. There was no reason for the officer to fear for his safety.¹⁰⁴ Strieff merely had walked from the house to the convenience store, and he readily complied when the officer ordered him to stop.¹⁰⁵ Further, it is hornbook law that an officer cannot justify a further Fourth Amendment intrusion based on his fear of the defendant, when he had no basis to approach the defendant in the first place.¹⁰⁶ In her dissent, Justice Sotomayor commented that, “[s]urely we would not allow officers to warrant-

102. *Strieff*, slip op. at 1 (Sotomayor, J., dissenting).

103. *Id.* at 8 (quoting *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015)).

104. In her dissent, Justice Sotomayor pointed out that the officer, by his own account, did not fear Strieff. *Strieff*, slip op. at. 6 (Sotomayor, J., dissenting).

105. *See Strieff*, 357 P.3d at 536–37.

106. *See* WAYNE R. LAFAVE, ET AL., 2 CRIM. PROC. § 3.8(e) (4th ed. 2015) (“In determining the lawfulness of a frisk, two matters are to be considered: (i) whether the officer was rightly in the presence of the party frisked so as to be endangered if that person was armed; and (ii) whether the officer had a sufficient degree of suspicion that the party frisked was armed and dangerous. As to the first, Justice Harlan helpfully commented in his separate *Terry* opinion that if ‘a policeman has a right . . . to disarm a person for his own protection, he must first have a right not to avoid him but to be in his presence.’ Thus a mere bulge in a pedestrian’s pocket, insufficient to justify a stopping for investigation, would not be a basis for a frisk by a passing officer.”).

check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else.”¹⁰⁷ This was a purposeful investigative detention blatantly without any reasonable suspicion.¹⁰⁸

Nevertheless, according to the Court, the conduct of the officer also was not purposeful or flagrant because it did not indicate “any systemic or recurrent police misconduct.”¹⁰⁹ This echoes language in *Herring v. United States*, where the Court held the exclusionary rule did not apply to evidence obtained in an illegal arrest which was due to an error in a police database, since it was “the result of isolated negligence,” rather than a systemic problem.¹¹⁰

Justice Sotomayor took particular issue with the majority’s view that the illegal conduct in this case was only an isolated occurrence; “[r]espectfully, nothing about this case is isolated.”¹¹¹ She pointed out that there are over 7.8 million outstanding warrants in this country, mostly for minor offenses such as failure to pay a traffic fine, a missed court appearance, or curfew or alcohol violations for probationers.¹¹² Justice Sotomayor provided the example of Ferguson, Missouri, where 16,000 people out of a total population of 21,000 had outstanding warrants against

107. *Utah v. Strieff*, No. 14-1373, slip op. at 16 (U.S. June 20, 2016) (Sotomayor, J., dissenting).

108. *See id.*, at 12 (Sotomayor, J., dissenting) (noting that an officer violates the Fourth Amendment when he detains an individual to check his license without any evidence that the person is engaged in crime, and “deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing”).

109. *Strieff*, slip op. at 8.

110. *Herring v. United States*, 555 U.S. 135, 137 (2009). In another context, Justice Kennedy had pointed out the importance of systemic violations to the application of the exclusionary rule. In *Hudson v. Michigan*, he concurred in the decision not to suppress evidence obtained after a violation of the constitutional knock and announce rule. 547 U.S. 586, 602-04 (Kennedy J., concurring in part and concurring in the judgment) (“Today’s decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or the voice to mount an effective protest, there would be reason for grave concern.”). Apparently, in this case, Justice Kennedy, who joined the majority opinion, agreed that there was no systemic violation, despite the concerns raised by Justices Kagan and Sotomayor in their dissents. *See supra* notes 77-81 and *infra* notes 111-19, and accompanying text.

111. *Strieff*, slip op. at 7 (Sotomayor, J., dissenting).

112. *Id.*

them.¹¹³ She pointed out that police can and do stop people without cause by using these outstanding warrants.¹¹⁴ Citing U.S. Justice Department investigations, she noted that in the St. Louis metropolitan area, officers routinely stop people for no reason other than an officer's desire to check for pending warrants.¹¹⁵ In Newark, New Jersey, officers stopped 52,335 pedestrians within a four-year period, and ran warrant checks on 39,308 of them.¹¹⁶ The Justice Department analysis of the stops where warrant checks were performed found that approximately 93% of them "would have been considered unsupported by articulated reasonable suspicion."¹¹⁷ And, though most officers may not set out to violate the law, "this does not mean that these stops are 'isolated instance[s] of negligence.'"¹¹⁸ Justice Sotomayor contended that many of these illegal stops are actually the result of institutionalized training procedures, which teach police to "stop and question first, develop reasonable suspicion later."¹¹⁹

Justice Thomas ultimately had to concede that the stop was a violation of the Fourth Amendment, but he argued that this did not mean it rose to the level of being flagrant; "[f]or the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure."¹²⁰ While that statement is accurate, it doesn't answer the arguments made by the dissenting justices that the stop that occurred here involved more than the "mere absence of proper cause."¹²¹ The majority opinion never takes on the real implications of the type of unconstitutional stop at issue here; it was a purposeful investigatory detention without any legal basis, and part of a pattern of police misconduct—i.e., a flagrant violation. Justice

113. *Id.* at 8.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 8-9 (quoting U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT, 8, 19, n. 7 (2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf).

118. *Id.* at 9 (Sotomayor, J., dissenting) (quoting majority opinion at 8).

119. *Id.* (Sotomayor, J., dissenting) (quoting *Ligon v. New York*, 925 F. Supp. 2d 478, 537-38 (S.D.N.Y.) *stay granted on other grounds*, 736 F.3d 118 (2d Cir. 2013)) (discussing New York City Police Department training).

120. *Id.* at 8.

121. *Id.*

Thomas simply found that “[n]either the officer’s purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.”¹²²

Weighing all the factors, the Court held that the evidence was admissible because its discovery was sufficiently attenuated from the illegal stop by the arrest warrant.¹²³ Although the temporal proximity factor was in favor of the defendant, it was outweighed by the other two factors. The arrest warrant was an intervening circumstance that was “wholly independent” from the illegal stop, “compelling” Officer Fackrell to arrest Strieff.¹²⁴ And, the Court found it “especially significant” that the officer’s misconduct did not “reflect flagrantly unlawful police misconduct.”¹²⁵

IV. THE CONSEQUENCES OF FAILING TO EXCLUDE THE EVIDENCE

In her strenuous dissent, Justice Sotomayor immediately made clear the substantial implications of the Court’s decision. Addressing the audience directly, she began her dissent:

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer’s violation of your Fourth Amendment rights. Do not be soothed by the opinion’s technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.¹²⁶

The Court gave only minimal consideration to Justice Sotomayor’s concerns. In a paragraph near the end of his opinion, Justice Thomas stated that it is “unlikely” that police will engage in dragnet searches if the exclusionary rule is not applied in the situation raised by this case.¹²⁷ Such conduct would expose the police to civil lawsuits, and further, the “purpose and flagrancy”

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1.

127. *Strieff*, slip op. at 10.

prong of attenuation doctrine would act as a limitation; “[w]ere evidence of a dragnet search presented here, the application of the *Brown* factors could be different.”¹²⁸

But as Justice Kagan pointed out in her dissent, the majority’s opinion created what she termed “unfortunate incentives” for the police, and “practically invites them to do what Fackrell did here.”¹²⁹ Though her tone differed from that of Justice Sotomayor, Justice Kagan agreed that the Court has not considered the implications of its ruling, which are counter to the precise goal of the exclusionary rule it espouses. Justice Kagan appeared to agree with the majority that deterrence is the purpose of the rule.¹³⁰ Noting that a rule excluding the evidence obtained in circumstances like this would achieve exactly this result, she pointed out that the majority’s decision will have the opposite result. As long as the detained individual is one of the many millions of people with an outstanding arrest warrant, any evidence uncovered in an illegal stop is now “fair game for use in a criminal prosecution.”¹³¹ Therefore, the officer’s incentive to violate the Fourth Amendment increases, since there is now a potential advantage to stopping without reasonable suspicion—“exactly the temptation the exclusionary rule is supposed to remove.”¹³²

But Justice Sotomayor went further. In a part of her dissent not joined by Justice Ginsburg, Justice Sotomayor made a direct and explicit link between illegal stops, the failure to exclude evidence obtained from them, and relations between the police and the community.

In a comprehensive critique, Justice Sotomayor first provided a litany of all the lawful powers that “this Court has given officers . . . to probe and examine” people.¹³³ An officer can stop an individual “for whatever reason he wants—so long as he can point to a pretextual justification after the fact.”¹³⁴ That justification may factor in your ethnicity,¹³⁵ where you live,¹³⁶

128. *Id.*

129. *Id.* at 6 (Kagan, J., dissenting).

130. *Id.* at 1 (“The exclusionary rule serves a crucial function—to deter unconstitutional police conduct.”).

131. *Id.*

132. *Id.* at 6.

133. *Id.* at 10 (Sotomayor, J., dissenting).

134. *Id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996)).

135. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87

what you were wearing,¹³⁷ and how you behaved.¹³⁸ The officer does not even have to know what law you may have violated, if he later can justify the stop based on “any possible infraction—even one that is minor, unrelated, or ambiguous.”¹³⁹ Further, the officer may ask you for your “consent” to search without telling you that you have a right to refuse.¹⁴⁰ If he thinks you might be dangerous, he can frisk you,¹⁴¹ and if you have violated even a minor crime such as driving without your seatbelt, he can handcuff you and take you to jail.¹⁴² At the jail, the officer can fingerprint you, swab DNA, and make you shower with a delousing agent.¹⁴³ Your arrest record will provide you with the “civil death” of discrimination by employers and landlords.¹⁴⁴

After this powerful rendition of the consequences of a lawful stop, Justice Sotomayor pointed out that this case involved a “*suspicionless* stop, one in which the officer initiated this chain of events without justification.”¹⁴⁵ And, Justice Sotomayor noted, it is people of color that are disproportionately impacted by these types of illegal stops.¹⁴⁶

(1975)).

136. *Id.* (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)).

137. *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 4–5 (1989)).

138. *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

139. *Id.* (citing *Devenpeck v. Alford*, 543 U.S. 146, 154–55 (2004); *Heien v. North Carolina*, 135 S. Ct. 530 (2014)).

140. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991)). The quotations around consent are Justice Sotomayor’s.

141. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

142. *Id.* at 11 (citing *Atwater v. Lago Vista*, 532 U.S. 318, 323–24 (2001)).

143. *Id.* (citing *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1514 (2012)); *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013)).

144. *Id.* (citing Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1805 (2012)).

145. *Id.* (emphasis in original). Though her focus in this dissent is on illegal police conduct, her comprehensive review of the massive legal powers of law enforcement suggests that she may believe that the Court’s criminal procedure jurisprudence has gone too far in supporting state intervention and control over individual rights.

146. *Id.* at 12. In his foundational 1974 article on the Fourth Amendment, Professor Anthony Amsterdam presciently commented that “[t]he pressures upon policemen to use the stop-and-frisk power as a device for exploratory evidence searches in [urban areas] are intense. Police can justify virtually any exercise of the power because these are the ‘high-crime’ areas where all young males, at least, are suspect.” Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 438 (1974).

In strong language, she explained how the Court's ruling in this case legitimized this type of illegal conduct and told all individuals that "your body is subject to invasion while courts excuse the violation of your rights. It implied that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued."¹⁴⁷ Justice Sotomayor's view of the Court's complicity in this violation is consistent with the different vision of the purpose of the exclusionary rule that she expressed earlier in the dissent. After noting the rule's deterrence purpose, she said, "[i]t also keeps courts from being 'made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.'"¹⁴⁸ When courts admit illegally obtained evidence, "they reward 'manifest neglect if not an open defiance of the prohibitions of the Constitution.'"¹⁴⁹ By reviving the early judicial integrity rationale for the exclusionary rule, Justice Sotomayor made clear that it is not only police, but also the judiciary that is responsible for this denigration of citizens' rights.

Justice Sotomayor's position speaks to her obvious concern for the state of police-community relations in this country. Both in her dissent and at the oral argument in the case, she invoked the example of Ferguson, Missouri, the site of protests and unrest in 2014 after the fatal shooting of Michael Brown, an eighteen-year-old African-American, by a white police officer.¹⁵⁰ At the oral

Professor Amsterdam had co-authored with the NAACP Legal Defense Fund and the ACLU an amicus brief in *Terry v. Ohio*, which had argued that the Court should utilize the probable cause standard for stop and frisks. See Tracey Maclin, *Anthony Amsterdam's Perspectives on the Fourth Amendment, and What it Teaches About the Good and the Bad in Rodriguez v. United States*, 100 MINN. L. REV. 1939, 1941–42, n.9 (2016) (discussing Amsterdam's brief) (citing Brief for NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113672)). Professor Maclin further discusses recent litigation in New York, in which a federal judge found that the New York City Police Department's stop and frisk practices violated the rights of blacks and Hispanics. *Id.* at 1939, 1942, n.13 (citing *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)).

147. *Strieff*, slip op. at 12 (Sotomayor, J., dissenting).

148. *Id.* at 3 (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

149. *Id.* (quoting *Weeks v. United States*, 232 U.S. 393, 394 (1914)).

150. *Id.* at 8 (discussing the outstanding numbers of warrants in Ferguson); Transcript of Oral Argument at 6, *Utah v. Strieff*, No. 14-1373, slip op. (U.S. 2016) ("If you have a town like Ferguson, where 80 percent of the residents have minor traffic warrants out, there may be a very good incentive for just standing on the street corner in Ferguson and asking every

argument, addressing the attorney for the State, she said:

Don't you think it's enough of a deterrence to say to a police officer in this situation, you should have reasonable suspicion? You know the Fourth Amendment requires it. So before you do an intrusive act demanding identification, you do what you're permitted to do, which is just to ask the person whether they'll talk to you. *Don't you think that would improve the relationship between the public and the police? Wouldn't that be the appropriate encouragement we would give, if we don't let police do these things in questionable situations?*¹⁵¹

For Justice Sotomayor, the concern of what may follow from the Court's decision is very real. At one point in the oral argument, she noted that the brief of either the State or the amicus brief of the Justice Department had said, "the public will stop this if they don't like police stopping you with no cause."¹⁵² On a somewhat ominous note, she then commented, "I think the public may end up stopping things but in a way the police are not going to like."¹⁵³

In her dissent, Justice Sotomayor explained that the illegal conduct harms not just its immediate victims, but all of us. The people targeted by police are the "canaries in the coal mine," telling us that illegal police stops "corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but."¹⁵⁴

CONCLUSION

In *Utah v. Strieff*, the Court dealt a further blow to the exclusionary rule. It professed to be applying existing attenuation doctrine. However, its finding that an outstanding warrant discovered through exploitation of an illegal stop serves as an

citizen, give me your ID; let me see your name. And let me hope, because I have an 80 percent chance that you're going to have a warrant.").

151. Transcript of Oral Argument at 8-9, *Utah v. Strieff*, No. 14-1373, slip op. (U.S. 2016) (emphasis added).

152. *Id.* at 20.

153. *Id.*

154. *Strieff*, slip op. at 12 (Sotomayor, J., dissenting) (citing L. GUINIER & G. TORRES, *THE MINER'S CANARY* 274-78 (2002)). Justice Sotomayor closed her dissent with the words "I dissent," omitting the traditional "respectfully." *Id.* at 12.

“intervening circumstance” which can dissipate the taint of unconstitutional police conduct signals a new and broad reading of the attenuation exception.¹⁵⁵ The Court’s characterization of deliberate police misconduct as “good faith negligence” and thus not “purposeful and flagrant” illegality further demonstrates its willingness to expand the exception and constrict the application of the exclusionary rule.¹⁵⁶ The Court did not eliminate the exclusionary rule entirely, but its decision in *Utah v. Strieff* may indicate that it is dying a slow death of attrition.

But it is Justice Sotomayor’s dissent that remains most in the mind after reading *Utah v. Strieff*. She understands that the context of this case, the routine stops and warrant checks that happen all over this country multiple times each day, makes the Court’s limitations on the exclusionary rule particularly significant. She insists on grounding Fourth Amendment law in the realities of public experience, and calls upon us to recognize the impact that police overreaching and judicial condonation of that conduct has on our citizenry.

155. *See id.* at 6.

156. *See id.* at 8, 9.