Suspicionless Policing

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Abstract

The tragic death of Elijah McClain—a twenty-three-year-old, slightly built, unarmed African American male who was walking home along a sidewalk when he was accosted by three Aurora, Colorado police officers—epitomizes the problems with policing that have become a prominent topic of national conversation. Embedded within far too many police organizations is a culture that promotes aggressive investigative behaviors and a disregard for individual liberties. Incentivized by a Supreme Court that has, over the course of several decades, empowered the police with expansive powers, law enforcement organizations have often tested—and crossed—the constitutional limits of their investigative authorities. And too often it is people of color, and African Americans in particular, who bear the brunt of these practices. Through a review of the Supreme Court's stop and frisk precedents and an examination of police practices in various contexts, this Article examines this phenomenon and explains why aggressive police practices, such as those observed in the McClain case, are unlikely to abate in the years to come.

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Introduction

He was only twenty-three years old.[1] A self-described introvert, he was also a vegetarian, a massage therapist, and a self-taught violinist and guitarist who would use his musical talents to soothe stray animals.[2] Among those who knew him, he had a reputation for being gentle and kind. One person commented that he had a "child-like spirit."[3] Another described him as "the sweetest, purest person I have ever met."[4] And another said, "I don't even think he would set a mouse trap if there was a rodent problem."[5]

He was Elijah McClain. During his lifetime, McClain was never a household name.[6] Even the tragic circumstances of his death failed to generate meaningful national attention until the killing of George Floyd reignited a national debate on the issue of race and policing.[7] McClain was seemingly the very antithesis of a threatening individual at five foot, six inches and 140 pounds.[8] Yet on August 24, 2019 McClain, who like Floyd was African American, lost his life after three Aurora, Colorado police officers—Nathan Woodyard, Jason Rosenblatt, and Randy Roedema—accosted McClain while he was returning home from a convenience store.[9]

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1 Claire Lampen, *What We Know About the Killing of Elijah McClain*, N.Y. MAG.: THE CUT (Feb. 22, 2021), https://www.thecut.com/2021/02/the-killing-of-elijah-mcclain-everything-we-know.html [https://perma.cc/2TTF-37S6]; Lucy Tompkins, *Here's What You Need to Know About Elijah McClain's Death*, N.Y. TIMES (Feb. 23, 2021) https://www.nytimes.com/article/who-was-elijah-mcclain.html [https://perma.cc/4F4B-34UX]; Amir Vera, *Elijah McClain Was a Massage Therapist Who 'Wanted to Heal' Others, His Mother Says*, CNN (June 30, 2020, 3:05 AM), https://www.cnn.com/2020/06/30/us/elijah-mcclain-profile/index.html [https://perma.cc/TVU6-N6FT].

2 Lampen, *supra* note 1; Tompkins, *supra* note 1; Vera, *supra* note 1.

3 Lampen, *supra* note 1 (quoting one of McClain's friends and former massage clients, April Young).

4 *Id.* (quoting another of McClain's friends and former clients, Marna Arnett).

5 Alexander Nazaryan, *'I'm Just Different': The Family of Elijah McClain, a 23-Year-Old Black Man Killed by Colorado Cops Almost a Year Ago, Is Still Waiting for Justice*, YAHOO! NEWS (June 27, 2020), https://news.yahoo.com/im-just-different-the-family-of-elijah-mc-clain-a-23-yearold-black-man-killed-by-colorado-cops-090048258.html [https://perma.cc/JEQ7-HF94].

6 *See* Alex Burness, *Elijah McCain Is Becoming a Household Name. His Mother Is Hurt that It's Taken So Long*, DENVER POST (June 27, 2020, 9:07 AM), https://www.denverpost.com/2020/06/27/elijah-mcclain-sheneen-aurora-police-colorado/ [https://perma.cc/VA8T-BJCC].

7 *See* Tompkins, *supra* note 1 (explaining that George Floyd's death sparked a review across the nation of "older" cases involving police-involved killings); Colleen Slevin, *A Year After Elijah McClain's Death, Activists Want Charges*, ASSOCIATED PRESS (Aug. 24, 2020), https://apnews.com/article/a9624d527a8790c7b9c75199e475b384 [https://perma.cc/DP8G-GARB] (noting that many people were not aware of McClain's case until the renewed attention on racial injustice following Floyd's death).

8 Tompkins, *supra* note 1.

9 *Id.*

On August 24, 2019 at approximately 10:30 p.m. an individual called 911 and reported that while he was walking he observed an individual, later determined to be Elijah McClain, who looked "sketchy."[10] The 911 caller added, however, that "he might be a good person or a bad person."[11] The caller stated that as their pathways crossed he noticed that McClain was wearing a mask and had put his hands in the air.[12] The caller did not report any criminal activity, stated that he did not observe any weapons, and indicated that he was not in any danger.[13]

After making a purchase at a local convenience store, McClain was walking in the direction of his residence when Officers Woodyard, Rosenblatt, and Roedema approached him and ordered him to stop.[14] At the time, McClain had been wearing a ski mask, which he reportedly wore because his anemia made him particularly susceptible to being cold.[15] McClain eventually stopped, but insisted that he had a right to continue to his home.[16] An officer then attempted to physically restrain him, which McClain resisted to some extent.[17] During the confrontation, McClain at one point uttered, "I am an introvert. Please respect the boundaries that I am speaking. . . . Leave me

10 Ella Torres, *Special Prosecutor Will Investigate 2019 Death of 23-Year-Old Elijah McClain While in Custody*, ABC NEWS (June 26, 2020, 2:53 PM), https://abcnews.go.com/US/public-pressure-mounts-revisit-2019-death-elijah-mcclain/story?id=71401918 [https://perma.cc/W5PJ-SF4W].

11 *Id.*

12 *See* Kelley Griffin & Hayley Sanchez, *Thousands Call for Justice for Elijah McClain in a Day of Music and Marching*, CPR NEWS (June 27, 2020), https://www.cpr.org/2020/06/27/music-and-marches-to-honor-elijah-mcclain-and-call-for-reforms/ [https://perma.cc/Z7DK-CXG9]; Slevin, *supra* note 7.

13 Aurora Police, *911 Dispatch Call Regarding Elijah McClain*, YOUTUBE (Nov. 22, 2019), https://www.youtube.com/watch?v=PDD3mvNP2QQ (last visited Aug. 23, 2021).

14 Lampen, *supra* note 1; Tompkins, *supra* note 1.

15 Lampen, *supra* note 1; Michael Ruiz, *Parents of Elijah McClain, Black Man Who Died After Colorado Officers Put Him in Chokehold, Sues Cops and First Responders*, FOX NEWS (Aug. 11, 2020), https://www.foxnews.com/us/elijah-mcclain-family-colorado-chokehold-sues-cops [https://perma.cc/T4JN-2REU].

16 *See* Aurora Police, *Body Worn Camera Regarding the In-Custody Death of Elijah McClain*, YOUTUBE (Nov. 22, 2019), https://www.youtube.com/watch?v=Q5NcyePEOJ8 (last visited Aug. 23, 2021) (recording how McClain, when he was being detained, told officers that he was not doing anything wrong and that "I'm going home"); *see also* Knez Walker, Candace Smith, Ignacio Torres, Deborah Kim, Allie Yang & Anthony Rivas, *What Happened to Elijah McClain? Protests Help Bring New Attention to His Death*, ABC NEWS (June 30, 2020, 7:25 PM), https://abcnews.go.com/US/happened-elijah-mcclain-protests-bring-attention-death/story?id=71523476 [https://perma.cc/892K-FTFJ] (reporting that McClain told officers "I'm going home").

17 *See* Lampen, *supra* note 1.

alone."[18] He also made several pleas to be freed (which were ignored by the officers), vomited, and indicated that he was unable to breathe.[19] McClain was ultimately forced to the ground.[20]

Eventually, McClain was put "in a carotid hold," a procedure which temporarily disrupts blood flow to the brain by applying pressure to the side of the neck.[21] Aurora Fire Rescue and Falck Ambulance staff were eventually summoned to the scene[22] and a paramedic-administered Ketamine drug was injected into him while the officers held McClain to the ground.[23] While en route to the hospital, McClain went into cardiac arrest.[24] Six days after the incident, McClain was declared brain dead and removed from life support.[25] According to his family, McClain was "covered in bruises."[26]

In November 2019, approximately three months after the incident, a decision was announced by the Adams County District Attorney that no charges would be filed against the officers.[27] In response to public pressure, however, an independent investigation of the events surrounding McClain's death was launched.[28] In June 2020, Colorado Governor Jared Polis appointed Colorado Attorney General Phil Weiser to investigate the case and authorized him to bring

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18 Aurora Police, *supra* note 16; *accord* Walker et al., *supra* note 16; Dakin Andone, *Elijah McClain Died After a Police Encounter Almost 1 Year Ago. Here's What Happened Since*, CNN (Aug. 24, 2020), https://www.msn.com/en-us/news/us/elijah-mcclain-died-after-a-police-encounter-almost-1-year-ago-here-s-what-happened-since/ar-BB18iPr4?li=BBorjTa [https://perma.cc/X4AQ-VQXX].

19 *See* Ruiz, *supra* note 15. At one point during the confrontation, an officer accused McClain of attempting to reach for another officer's gun, but "[t]he officer whose gun McClain allegedly reached for later can be heard in the body camera footage that he did not remember feeling McClain go for his gun." Torres, *supra* note 10.

20 *See* Andone, *supra* note 18.

21 Lampen, *supra* note 1.

22 KUSA Staff, *Man Goes into Cardiac Arrest Shortly After Struggle with Aurora Police*, 9NEWS (Aug. 29, 2019, 9:00 AM), https://www.9news.com/article/news/crime/man-goes-into-cardiac-arrest-shortly-after-struggle-with-aurora-police/73-2730d30f-185f-4474-81e9-f65a3937b0d7 [https://perma.cc/84JH-5TWS].

23 Torres, *supra* note 10 (stating that Ketamine is a drug "used by medical practitioners and veterinarians as an anesthetic," and it was administered "with the goal of 'rapid tranquilization in order to minimize time struggling'").

24 Lampen, *supra* note 1.

25 *See* Lampen *supra* note 1; Tim Stelloh, *Federal Authorities Reviewing Police Use of Chokehold, Death of Elijah McClain*, NBC NEWS (June 30, 2020, 9:55 PM), https://www.nbcnews.com/news/us-news/federal-authorities-reviewing-police-use-chokehold-death-elijah-mcclain-n1232624 [https://perma.cc/DS9P-6SUD].

26 Lampen, *supra* note 1.

27 *Id.*

28 *See* Andone, *supra* note 18.

charges if the facts were supportive.[29] In his executive order, Governor Polis acknowledged the declination decision reached by Adams County, but he stated that the McClain incident is "a tragic and complex case that warrants close attention."[30] Polis further noted the critical importance of public confidence in the criminal justice process, and stated that this was particularly true in incidents resulting in deaths during police-citizen encounters.[31]

Less than a month after the issuance of the Executive Order, Vanessa Wilson, the interim chief of the Aurora Police Department, fired three officers, including Officer Rosenblatt who was directly involved in the McClain incident.[32] The firing was in response to photographs taken by three Aurora Police Department officers not directly involved in the incident who were "grinning and mocking the death of . . . McClain."[33] The photographs were taken in October 2019 near a memorial that had been established to honor McClain.[34] The photographs were sent to Rosenblatt who responded "haha" via text.[35]

In addition to Weiser's investigation, pursuant to a city council resolution in July of 2020, the city of Aurora hired Jonathan Smith—who previously investigated Michael Brown's death in Ferguson, Missouri—to lead a three-person team in an independent investigation of McClain's arrest and the actions of those involved, including both police and paramedics.[36] The investigation report, which was published on February 22, 2021, found that the officers did not have reasonable suspicion to stop or frisk McClain, that when Emergency Medical Ser-

29 *Id.*

30 Colo. Exec. Order No. D-2020-115, at 1 (June 25, 2020), https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20115—-Designating%20State%27s%20Prosecutor.pdf [https://perma.cc/3M77-5WGL].

31 *See id.* at 1–2.

32 Maria Cramer, *3 Officers Fired Over Photos Taken Near Elijah McClain Memorial*, N.Y. TIMES (July 4, 2020), https://www.nytimes.com/2020/07/04/us/Elijah-McClain-aurora-police-officers.html [https://perma.cc/967X-MFJC].

33 *Id.*

34 *Id.*

35 *Id.* One of the three officers resigned shortly after the other officers were fired. *Id.*

36 *See* Esteban L. Hernandez, *Attorney Leading Aurora's Independent Elijah McClain Investigation Sees a Chance for "Genuine Conversations" About Policing*, DENVERITE (Aug. 13, 2020, 5:00 AM), https://denverite.com/2020/08/13/attorney-leading-auroras-independent-elijah-mcclain-sees-a-chance-for-genuine-conversations-about-policing/ [https://perma.cc/4MAD-KMVA]; *see also* Larry Buchanan, Ford Fessenden, K.K. Rebecca Lai, Haeyoun Park, Alicia Parlapiano, Archie Tse, Tim Wallace, Derek Watkins & Karen Yourish, *What Happened in Ferguson?*, N.Y. Times (Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [https://perma.cc/36AA-KUCP] (discussing the death of Michael Brown, an unarmed Black teenager, who was shot and killed on August 9, 2014, by Officer Darren Wilson in Ferguson, Missouri, a suburb of St. Louis).

vices personnel administered Ketamine, it was not clear that the resistance McClain had demonstrated warranted sedation, and that the dosage administered was based on a "grossly inaccurate and inflated estimate" of McClain's size.[37]

On September 1, 2021, Attorney General Weiser announced that an indictment had been returned against the three Aurora Police Department officers—Officers Woodyard, Rosenblatt, and Roedema—as well as two paramedics.[38] Charges of manslaughter and criminally negligent homicide were returned against all five defendants, and they also now face assault offenses.[39]

The McClain episode epitomizes much of what is wrong with policing today. Three officers upon their arrival—with a dubious justification—immediately stopped an unarmed, young African American male who was simply walking along a sidewalk.[40] Even the 911 call that instigated the chain of events reported little, if anything, more than a person walking along a sidewalk wearing a mask and waving his arms in the air.[41] And even if somehow the initial stop could be constitutionally justified, any honest evaluation of the facts could not plausibly justify the ensuing aggression that ultimately cost this young man his life.[42] McClain's pleas for mercy were ignored.[43] There was barely an effort to listen.[44] Little, if any, meaningful attempt was made

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37 Jonathan Smith, Melissa Costello & Roberto Villaseñor, Investigation Report and Recommendations: City of Aurora, Colorado 7 (2021).

38 Jack Healy, *Three Officers and Two Paramedics Are Charged in Elijah McClain's Death*, N.Y. Times, (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/us/elijah-mcclain-officers-charged-colorado.html [https://perma.cc/73X7-E79V] (noting that the 32-count indictment was returned approximately two years after McClain's death).

39 *Id.*

40 *See supra* notes 14–15 and accompanying text; *see also* Smith et al., *supra* note 37, at 2–3.

41 *See supra* notes 11–13 and accompanying text; Seth Cohen, *Why Did They Die? Elijah McClain and America's Deadly Police Pandemic*, Forbes (June 25, 2020, 5:22 PM), https://www.forbes.com/sites/sethcohen/2020/06/25/elijah-mcclain-and-americas-deadly-police-pandemic/?sh=167c3bbe340f [https://perma.cc/QJL5-6PVQ] ("A 911 call reported a suspicious man in a ski mask waving his hands, but also acknowledged the man was unarmed and had not committed a crime.").

42 *See* Will Bunch, Opinion, *I Can't Stop Thinking About the Beauty of Elijah McClain, and the Banal Evil of the Cops Who Killed Him*, Phila. Inquirer (July 5, 2020), https://www.inquirer.com/opinion/commentary/elijah-mcclain-killing-three-aurora-police-officers-20200705.html [https://perma.cc/PFR2-S3R2] (asserting that the 911 caller stated that McClain "might be a good or bad person," "[b]ut the three officers who showed up—Nathan Woodyard, Jason Rosenblatt, and Randy Roedema—never stopped assuming that McClain was 'a bad person,'" and that the officers who ignored McClain's pleas for mercy were "morally deaf").

43 *See supra* notes 18–19 and accompanying text.

44 *See* Bunch, *supra* note 42 ("None of McClain's plaintive cries for mercy, nor the fact that he was indeed unarmed, seemed to register at all with [the] three [officers] . . . .").

by the officers to ascertain what this supposedly "suspicious" person might be up to.[45] In his hands was a bag containing iced tea.[46] And when the entire ordeal ended, and McClain was loaded into an ambulance, he was limp.[47]

Much has been written about the culture of policing.[48] It is a culture that too often encourages the flaunting of constitutional safeguards, promotes aggressive police tactics, and delegitimizes its victims' humanity. People of color, and particularly African Americans such as McClain, frequently bear the brunt of this reality. When assessing the contributing causes of this culture, the U.S. Supreme Court bears much of the responsibility.[49] A steady stream of precedent that has spanned decades has communicated to police departments from coast to coast that they enjoy vast investigative authority,

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45 *See id.*

46 Scott Wilson, *Elijah McClain's Death Reflects Failures of White, Suburban Police Departments*, WASH. POST (Sept. 2, 2020) https://www.washingtonpost.com/national/elijah-mcclains-death-reflects-failures-of-white-suburban-police-departments/2020/09/02/8750a726-e3e4-11ea-9dd2-95be2a2bef2e_story.html [https://perma.cc/3D5E-9NL2].

47 *See* Bunch, *supra* note 42.

48 *See, e.g.*, Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 852–60 (2014) (discussing stop and frisk in the context of police practices in New York City); Julian A. Cook, III, *Police Culture in the Twenty-First Century: A Critique of the President's Task Force's Final Report*, 91 NOTRE DAME L. REV. ONLINE 106 (2016) (examining President Barack Obama's policing task force and its recommendations for reforming police culture); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2004) (explaining that "particular features of police culture may contribute to police brutality and its imperviousness to legal solutions," and noting that "[i]n particular . . . the phenomenon of the 'double message[]' . . . allows police higher-ups to say one thing in formal policies, while perpetuating a very different message through on-the-ground organizational culture"); Robert W. Benson, *Changing Police Culture: The Sine Qua Non of Reform*, 34 LOY. L.A. L. REV. 681 (2001) (discussing machismo and militarism within the Los Angeles Police Department); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016) (arguing that police culture encourages violence against African Americans); Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 961 (2020) (presenting empirical evidence that "Black suspects are more than twice as likely to be killed by police than are suspects from other racial or ethnic groups"); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016) (arguing that officer perceptions of their duties as officers must change from a "warrior" mentality to a "guardian" mindset); Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 746 (2017) (noting that police unions have often "stymied efforts" to reform police practices); George Cronin & Marissa Boyers Bluestine, *Police, False Confessions, and a Framework for Change in the US*, CHAMPION, June 2020, at 44, 49 (arguing that "[i]n recognition of the role of U.S. police and their role in supporting the health and well-being of communities, efforts should begin now to raise the level of policing to the standards of the global community by legislating changes that move the police away from accusatorial tactics to information-gathering methods").

49 *See infra* Section I.C.

enormous discretion, and will often suffer little in terms of consequence when constitutional safeguards are violated.[50]

This Article does not attempt to address the entirety of Supreme Court jurisprudence that has contributed to this cultural phenomenon. Rather, this Article largely focuses on the stop and frisk context and the limited detentions and searches justified by the Supreme Court in the landmark *Terry v. Ohio*[51] decision.

This Article begins by examining *Terry*, law enforcement's frequent exploitation of its standards, and the adverse impact of these practices particularly upon people of color. Thereafter, the Article turns its attention to *Utah v. Strieff*,[52] a case decided by the Supreme Court only a few years ago. This Article explores in depth the hazardous and underappreciated consequences of this decision. In so doing, it explains why *Strieff* encourages law enforcement to engage in suspicionless policing practices and ultimately erodes the constitutional principles enunciated in *Terry*.

In this context, the Article further explores the recurrent use by police departments of investigative practices that are designed to test the limits of their constitutional authority. Citing examples in non-stop-and-frisk scenarios, it argues that police departments, incentivized by *Strieff* to disregard *Terry's* reasonable suspicion thresholds, will be inclined to engage in seizure and search practices that are more physically aggressive.

Finally, this Article addresses the culture of policing. It discusses how police environments shape officer behavior, how the Supreme Court has meaningfully influenced the culture of policing in this country, and how decades of unambiguous messaging from the Court have perpetuated the aggressive policing practices that have plagued this country for too long.

I. *Terry v. Ohio*: Implementation, Failures, and Erosion

In *Terry* the Supreme Court enunciated the principles that govern stop and frisk policing practices. When assessing the propriety of a *Terry* stop, the Court held that the Fourth Amendment requires a review for reasonableness.[53] Specifically, police officers "must be able to

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50 *See infra* Section I.C.

51 392 U.S. 1 (1968).

52 136 S. Ct. 2056 (2016).

53 *Terry*, 392 U.S. at 21–22. The Court reasoned, in part, that an officer's interest in performing a *Terry* stop is rooted in law enforcement's interest in crime prevention. *See id.* at 22 (stating that this law enforcement interest is the rationale underlying the principle that allows

point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[54] The Court added that, when assessing the facts presented, courts should employ an objective standard of review; namely, "would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[55]

Terry also held that the Fourth Amendment authorizes "limited," "strictly circumscribed," and "narrowly drawn" searches for weapons when probable cause is not present.[56] The Court stated that the issue in such circumstances is "whether a reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger."[57] The Court referenced this country's extensive history of armed violence and noted that annually many officers are killed and wounded in the performance of their duties by individuals who possess firearms and weapons.[58] The Court concluded that it would be unreasonable to deny a law enforcement officer, who justifiably suspects that an individual is armed and dangerous, the authority to take the necessary precautions to ascertain whether that person is in possession of a dangerous weapon and to neutralize a possible threat.[59]

Terry plainly indicates that law enforcement "hunches" do not justify *Terry* stops or frisks.[60] Rather, the Supreme Court set forth ex-

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police officers, in certain circumstances, to approach individuals in order to investigate possible criminal infractions, even when the officer lacks probable cause to effectuate an arrest).

54 *Id.* at 21.

55 *Id.* at 21–22 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

56 *Id.* at 25–27 (concluding that, although exigencies may justify weapons searches in the absence of probable cause, these searches must be limited to only what is necessary to discover weapons that may present a danger to law enforcement or the public). The Court stressed that the inherent risks that accompany the performance of law enforcement duties necessitate a constitutionally protected mechanism that allows officers to protect themselves and the public. *Id.* at 23–24. The Court explained that the constitutional principle allowing for limited weapons searches is rooted in an interest that extends beyond the government's interest in criminal investigations. *Id.* at 24–25. The Court elaborated that an officer must "assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," suggesting that a contrary rule would subject officers to "unnecessary risks in the performance of their duties." *Id.* at 23.

57 *Id.* at 27.

58 *See id.* at 23–24.

59 *See id.* at 24.

60 *See id.* at 22, 27 (noting that when determining the reasonableness of an officer's conduct, "due weight" should not be given to "his inchoate and unparticularized suspicion or 'hunch'").

plicit objective standards that must be satisfied for such intrusions to be constitutionally justifiable.[61] History, however, has unmistakably demonstrated that law enforcement has too often flaunted these thresholds and that people of color have been disproportionately impacted by such excesses.

Despite these realities, *Terry* has its vigorous supporters. These commentators argue, in part, that stop and frisk practices are justified given that these practices can effectively control or deter crime,[62] that crime rates in predominately minority communities help explain disturbing racial and ethnic enforcement data,[63] and that better recruitment and training of police officers can adequately address discriminatory implementation of these principles.[64] However, the bulk of academic commentary on the stop and frisk practices that the Court upheld in *Terry* has been critical.[65]

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61 *See id.* at 21–27 (finding an intrusion justified when (1) an officer observes suspicious behavior that indicates the presence of criminal activity, (2) an officer justifiably believes, based on reasonable inference, that the individuals engaged in suspicious behavior may be armed and pose a risk to the officer, and (3) the search is limited by the exigencies that justify the initial intrusion).

62 *See* David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 127–28 (2013) (discussing Professor Rosenthal's contention that stop and frisk effectively combats crime, and citing a meaningful decline in New York City's crime rate over an almost two decade period); Mike Callahan, *14 Things Cops Need to Know to Successfully Use 'Stop and Frisk,'* POLICE1 (May 27, 2016), https://www.police1.com/investigations/articles/14-things-cops-need-to-know-to-successfully-use-stop-and-frisk-uJtdXSDMzhLsnWia/ [https://perma.cc/26SX-RK72] ("Bad guys interested in maiming and killing their rivals are far less likely to carry firearms to further their illegal goals when they know for certain that police officers are likely to stop and frisk them.").

63 *See* Jesse Alejandro Cottrell, *'Stop and Frisk' May Be Working—But Is It Racist?*, ATLANTIC (Jan. 23, 2013), https://www.theatlantic.com/national/archive/2013/01/stop-and-frisk-may-be-working-but-is-it-racist/267417/ [https://perma.cc/7TJD-PZEH] ("Supporters of Stop and Frisk have responded to criticisms of these racial disparities by stating that the program operates most intensely in neighborhoods with high crime rates. According to these supporters, the higher prevalence of crime in black and Latino neighborhoods necessitates more police activity. The disproportionate number of stops of black and Latino males, they say, has less to do with their skin color than their location.").

64 *See* Paul Larkin, *Reviewing the Rationale for Stop-and-Frisk*, ATLANTIC (Mar. 24, 2014), https://www.theatlantic.com/national/archive/2014/03/reviewing-the-rationale-for-stop-and-frisk/284603/ [https://perma.cc/FG4T-2SK8] (arguing that stop and frisk is useful, not inherently discriminatory, and the oppressive impacts of the practice can be effectively addressed, in part, through ensuring diverse police departments and proper training).

65 *See, e.g.*, David Rudovsky & David A. Harris, Terry *Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L. J. 501, 505–06 (2018) (arguing that courts should employ empirical analysis and data to assist in their assessment of law enforcement stop and frisk practices); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1550 (2014) (stating that New York City's stop and frisk practice "was an inherently unconstitutional approach to crime fighting that probably 'worked' precisely because of the very aspects

There is ample empirical data that supports such skepticism. Consider the well-chronicled controversies—briefly reviewed below—that have plagued New York City over the past two decades. In *Daniels v. City of New York*,[66] a class action lawsuit brought in 1999, the plaintiffs argued that the New York City Police Department's ("NYPD") stop and frisk practices violated the Fourth and Fourteenth Amendments and that the plaintiffs had been selectively targeted on the basis of their race and national origin in violation of the Fourteenth Amendment's Equal Protection Clause.[67] In 2003, the parties reached a settlement—eventually approved by a federal district court—whereby the NYPD agreed (1) to adopt a written policy addressing racial and national origin profiling consistent with constitutional safeguards; (2) to undergo periodic audits of the NYPD's stop and frisk practices with the results of these audits to be shared with plaintiffs; and (3) to undertake training and education efforts regarding this policy.[68] It was further agreed that the settlement terms would expire on December 31, 2007.[69]

Citing noncompliance with the settlement terms, another action was filed in 2008 in federal district court challenging the constitutionality of the NYPD's stop and frisk practices.[70] In *Floyd v. City of New York*,[71] the plaintiffs—Black and Latino men—argued that "(1) they were stopped without a legal basis in violation of the Fourth Amendment, and (2) they were targeted for stops because of their race in violation of the Fourteenth Amendment."[72] The court ultimately

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that render it unconstitutional"); Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2399–400 (2017) (noting the consequences and widescale employment of stop and frisk practices in New York City, Philadelphia, and Chicago); Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57, 57 (2014) (arguing that "[s]top and frisk communicates to African-American men that they are objects of disdain by the state and that their citizenship is degraded"); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 178–79 (2015) (arguing that stop and frisk was programmatic in implementation, which "reveals the true costs of stop-and-frisk, because those who experience [Stop, Question, and Frisk]—primarily young men of color—experience it as a program and not as an individual incident").

66 198 F.R.D. 409 (S.D.N.Y. 2001).

67 *Id.* at 411.

68 *See Historic Cases:* Daniels, et. al. v. The City of New York, CTR. FOR CONST. RTS. (Oct. 1, 2012) [hereinafter *CCR Historic Cases*], https://ccrjustice.org/home/what-we-do/our-cases/daniels-et-al-v-city-new-york [https://perma.cc/LV5A-68D3]; *see also* Stipulation of Settlement at 5–14, *Daniels*, 198 F.R.D. 409 (No. 99 Civ. 1695).

69 *See CCR Historic Cases*, *supra* note 68.

70 *See id.*

71 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

72 *Id.* at 556.

found the NYPD liable, concluding that the City was deliberately indifferent to their unconstitutional conduct, that they engaged in racial profiling, and that there was overwhelming evidence of their unlawful conduct:

> Both statistical and anecdotal evidence showed that minorities are indeed treated differently than whites. For example, once a stop is made, blacks and Hispanics are more likely to be subjected to the use of force than whites, despite the fact that whites are more likely to be found with weapons or contraband. I also conclude that the City's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting "the right people" is racially discriminatory and therefore violates the United States Constitution.[73]

Several disturbing statistics were highlighted by the court in reaching its conclusion. Notably, the court observed that over an eight-year period—between January 2004 and June 2012—the NYPD made 4.4 million stops of individuals, over 80% of whom were Black or Hispanic.[74] In 52% of these instances, a protective frisk was performed.[75] Yet such frisks yielded a weapon in only 1.5% of the cases.[76] The arrest rate from these occurrences was a mere 6%, with 88% "result[ing] in no further law enforcement action."[77] And when force was employed, it was applied disproportionately against people of color. Specifically, force was applied in 23% of the stops of Black people, 24% of stops of Hispanic people, and 17% of the stops of White people.[78]

The New York experience has been well-chronicled and assessed.[79] Indeed, the prevalence of stop and frisk policing, and its at-

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73 *Id.* at 562.

74 *Id.* at 556.

75 *Id.* at 558.

76 *Id.*

77 *Id.* at 558–59.

78 *Id.*

79 *See, e.g.*, *A Dialogue with Hon. Shira A. Scheindlin*, 49 LOY. U. CHI. L.J. 677 (2018) (detailing an interview with Judge Scheindlin regarding the stop and frisk litigation that she oversaw as a federal judge); Rudovsky & Harris, *supra* note 65 (discussing competing viewpoints regarding stop and frisk practices in the context of *Floyd*); Bellin, *supra* note 65, at 1500 (analyzing an array of data and concluding that "a program of aggressive policing designed to deter unlawful gun carrying like that employed in New York City can be either effective or constitutional, but not both"); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1508 (2017) (discussing how stop

tendant problems has plagued police departments across the country.[80] In response, some have pondered whether stop and frisk should be abolished altogether.[81] Whatever the merits of this proposal, it is fanciful to believe that *Terry* seizures and searches might someday become a relic of the past. As the following Section of this Article demonstrates, *Terry* is not going anywhere. In fact, the Supreme Court has greased the wheels of this controversial policing practice.

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and frisk practices "erod[e] the probable cause standard on which Fourth Amendment law has historically rested, [and] the constitutionalization of stop-and-question enables police officers to target African Americans with little to no justification"); Tracey Meares, *This Land is My Land?*, 130 HARV. L. REV. 1877, 1892–93 (2017) (reviewing RISA GOLUBOFF, VAGRANT NATION (2016)) ("When one reads or hears the words 'stop and frisk' today, one likely thinks of policing in New York City. . . . [F]or several years between 2003 and 2011, the number of police stops of individuals . . . increased from 160,851 in 2003 to a peak of 685,724 in 2011."); Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in* Terry *Stops in Street Policing*, 82 U. CHI. L. REV. 51, 86 (2015) (commenting that—as police stops in New York City increased sharply from less than 100,000 in 1998 to more than 685,000 in 2011—law enforcement shifted away from articulating specific grounds to justify individual stops and instead employed "convenient and stylized narratives" or "scripts" purposefully constructed by the police and "tailored and invoked to fit the cosmetic or epidemiological circumstances of a stop").

80 *See, e.g.*, Huq, *supra* note 65, at 2398–99 (discussing in detail the extensive employment of stop and frisk practices in several major cities, including New York, Chicago, and Philadelphia); Josh Saul, *America Has a Stop-and-Frisk Problem. Just Look at Philadelphia*, NEWSWEEK MAG. (May 18, 2016, 6:00 AM) https://www.newsweek.com/2016/06/10/stop-and-frisk-philadelphia-crisis-reform-police-460951.html [https://perma.cc/D7C3-AWH7] (discussing stop and frisk practices in Philadelphia, as well as Newark, Cleveland, and Ferguson, among other cities). Given the concentration of this practice in minority communities, and its regularity, Professor Aziz Z. Huq opined that the practice "likely became the modal form of police-citizen contact for many urban residents." *Id.* at 2398. Professor Huq noted the following statistics detailing the extent of the practice: Chicago—250,000 stops between May and August 2014 ("which translates into 93.6 stops per 1000 inhabitants"); Philadelphia—215,000 to 253,000 people stopped per year since 2009; Baltimore—approximately 412,000 people stopped in 2014; New York—in excess of 685,700 stops in 2011, and approximately five million stops effectuated from 2004 and 2013. *Id.* at 2398–99.

81 *See, e.g.*, Daniel Bergner, *Is Stop-and-Frisk Worth It?*, ATLANTIC (Apr. 2014), https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644/ [https://perma.cc/93PU-DFE3] (discussing the pros and cons of stop and frisk practices); Rudy Chinchilla, *You Could Decide Whether Philly Bans Controversial Police Stop and Frisks*, NBC10 PHILA. (June 12, 2020, 5:48 PM), https://www.nbcphiladelphia.com/news/local/you-could-decide-whether-philly-bans-controversial-police-stop-and-frisks/2431602/ [https://perma.cc/T4EA-ERWF] (noting that members of the Philadelphia City Council expressed their support to allow the voting public to decide whether to amend the city's charter to ban stop and frisk police practices).

A. *Utah v. Strieff and the Undermining of the Reasonable Suspicion Standard*

In 2016, the Supreme Court decided *Utah v. Strieff*.[82] The South Salt Lake City police received an anonymous tip stating that there was drug activity taking place at a certain residence.[83] In response, Officer Douglas Fackrell "conducted intermittent surveillance of the home" and observed individuals enter the residence and depart a few minutes thereafter.[84] On one occasion, Fackrell observed respondent Edward Strieff depart the residence.[85] Fackrell effectuated a stop on Strieff and requested Strieff's identification.[86] After Strieff produced a Utah state-issued identification card, Fackrell contacted a police dispatcher who informed him that Strieff had an outstanding warrant for a traffic incident.[87] Fackrell, in turn, arrested Strieff, searched him incident to his arrest, and recovered methamphetamine and drug paraphernalia.[88]

Strieff was charged with unlawful possession of methamphetamine and drug paraphernalia.[89] He moved to have the evidence suppressed, arguing that it was the byproduct of his unlawful stop.[90] The government conceded that the initial stop was unlawful, but maintained that the evidence was admissible because the "warrant attenuated the connection between the unlawful stop and the discovery of the contraband."[91] The trial court accepted the government's argument and denied the motion.[92] Strieff later entered a conditional guilty plea, reserving the right to contest the suppression issue.[93]

By a 5-3 margin, the Supreme Court held that the evidence seized by Fackrell was admissible, reasoning that the arrest warrant attenuated the taint from the unlawful stop.[94] The Court assessed the case

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82 136 S. Ct. 2056 (2016).

83 *Strieff*, 136 S. Ct. at 2059.

84 *Id.* The Court indicated that the surveillance of the home lasted "about a week" and that the officer observed visitors who remained in the house for a brief period. *Id.* These actions alone "raise[d] his suspicion that the occupants were dealing drugs." *Id.*

85 *Id.* at 2060.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* (noting that "Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia").

94 *Id.* at 2064. The Court granted certiorari to address divergent results rendered by the lower courts regarding the application of the attenuating circumstances exception in situations

pursuant to three criteria referenced in *Brown v. Illinois*.[95] The Court found that the first factor—"temporal proximity between the initially unlawful stop and the search"—favored Strieff given the brief interval between his seizure and the recovery of the evidence.[96] However, the Court determined that the last two factors—intervening circumstances and the purpose and flagrancy of the officer's actions—favored the state.[97] According to the Court, Strieff's outstanding arrest warrant was an intervening circumstance that authorized Strieff's arrest, as well as the subsequent search of his person incident to his arrest.[98] Finally, the Court found that Fackrell's actions were neither purposeful nor flagrant.[99] According to the Court, Fackrell's actions were

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where an individual has been unconstitutionally detained and a valid arrest warrant was subsequently discovered. *Id.* at 2060.

95 422 U.S. 590, 603–04 (1975). Elaborating upon the three *Brown* factors, the Court explained that it must initially assess "temporal proximity," meaning the time between the officer's unconstitutional actions and the discovery of evidence. *Strieff*, 136 S. Ct. at 2062 (quoting *Brown*, 422 U.S. at 603). Next, the Court addressed whether an "intervening circumstance[]" sufficiently broke the causal connection. *Id.* (quoting *Brown*, 422 U.S. at 603–04) Finally, it assessed the "purpose and flagrancy of the officer's misconduct," which the Court noted was "'particularly' significant." *Id.* (quoting *Brown*, 422 U.S. at 604).

96 *Strieff*, 136 S. Ct. at 2062. Regarding temporal proximity, the Court explained that its precedents instruct that a finding of attenuation is disfavored unless "substantial time" exists between the constitutional breach and the discovery of the evidence. *Id.* (quoting Kaupp v. Texas, 538 U.S. 626, 633 (2003) (per curiam)). This was not the situation in *Strieff*, where the contraband recovered was obtained minutes after the officer's unconstitutional stop. *Id.* Like in *Brown*, where the Court suppressed statements obtained "less than two hours" after the defendant's unconstitutional arrest, the Court found that the brief time span in *Strieff* "counsels in favor of suppression." *Id.* (citing *Brown*, 422 U.S. at 604).

97 *Id.* at 2062–63.

98 *Id.* The Court reasoned that the validity of the arrest warrant, which was issued prior to the officer's unconstitutional detention of Strieff, was an event distinctive from the stop. *Id.* at 2062. Noting that "[a] warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions," the Court stated that the discovery of the warrant obligated the officer to arrest Strieff. *Id.* (quoting United States v. Leon, 468 U.S. 897, 920 n.21 (1984)). Accordingly, the Court concluded that the officer's arrest of Strieff was "a ministerial act" that the officer was required to perform, which, in turn, justified the officer's subsequent search of Strieff's person incident to his arrest. *Id.* at 2063.

99 *Id.* at 2063. Professor Orin Kerr addressed an aspect of *Strieff* that has been overlooked, underappreciated, and is critical for defense attorneys to be cognizant of when defending clients who have been unconstitutionally detained but have been criminally charged based on evidence seized incident to their arrest on account of an outstanding arrest warrant. Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), https://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/ [https://perma.cc/8VUU-7UUW]. The Court's assessment of the third *Brown* element—the purpose and flagrancy of the officer's conduct—was partly the focus of Kerr's commentary. *Id.* Specifically, Kerr correctly observed that the *Strieff* majority appeared to sidestep or glance over the government's burden of proof with respect to this element. *Id.* The *Strieff* majority's approach was curious on at least two levels. First, it elevated the status of the

three factors to a place loftier than they were in *Brown*. *See id.* (stating that *Brown* employed a test akin to totality of the circumstances and did not restrict its attenuation analysis to a set of criteria). Then, the Court proceeded with a misguided analysis of the third prong that disregards long-standing precedent regarding burden allocation. *See id.* It is well established that the government bears the burden to demonstrate that warrantless stops and searches are justified. *See* Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) (stating that it is presumptively unreasonable to conduct a search or seizure within a home in the absence of a warrant). And it is the government's burden to demonstrate that an exception to the exclusionary rule applies to a given situation. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (stating that the government bears the burden to justify a warrantless entry into a house); Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (stating that searches performed in the absence of a warrant are presumptively unreasonable and that those seeking an exemption bear the burden of showing that "the exigencies of the situation made [a warrantless search] imperative" (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))). Even *Brown* acknowledged this basic principle. *See Brown*, 422 U.S. at 604 (noting that "the burden of showing admissibility rests, of course, on the prosecution").

Thus, for attenuating circumstances to justify admissibility, it follows that the government bears the burden with respect to *each* of the three *Brown* elements, not a select one or two. Regarding the third element, there is scant evidence to suggest that the government met its burden. As noted by Professor Kerr, the government presented "no evidence" regarding purpose or flagrancy, and the majority's conclusion that the officer's actions were nothing more than negligent conduct that "was based on 'good-faith mistakes,'" is not supported by the limited record created by the prosecution. Kerr, *supra* (quoting *Strieff*, 136 S. Ct. at 2063). Rather, Kerr contends that the officer's "generic statement" regarding his motive in seizing Strieff—namely, to ascertain what was occurring in the residence that he recently departed—does not "meet the government's burden of showing good faith." *Id.*

The significance of this burden allocation issue should be noted by criminal litigators, especially the defense bar, as well as judges. *See* Bridget Krause & Deja Vishny, *Moving to Suppress After* Utah v. Strieff, CHAMPION, August 2017, at 57 (providing guidance to criminal defense attorneys regarding motions to suppress in *Strieff* scenarios, and emphasizing attorney focus upon the third *Brown* factor: the purpose and flagrancy of the officer's actions); Rebecca Laitman, *Fourth Amendment Flagrancy: What It Is, and What It Is Not*, 45 FORDHAM URB. L.J. 799 (2018) (discussing various judicial approaches to determining flagrancy). Given the government's burden to justify its warrantless interventions, as well as the applicability of exceptions to the exclusionary rule, it would be prudent for defense attorneys to press courts to hold the government to its burdens. Thus, in *Strieff* scenarios, this means voicing positions (and objections, if necessary) that require the government to set forth sufficient evidence of good faith conduct. It is not inconceivable that the government's burden regarding this third element might be bypassed—perhaps unintentionally—by the litigants and the courts. Professor Kerr also appears to foresee this possibility, noting that courts may "presume" good faith on the part of government, thus obligating the defense to present evidence to the contrary. *See* Kerr, *supra*. Giving credence to this speculation, Justice Sotomayor in her dissent made the following observation:

> The majority does not suggest what makes this case "isolated" from these and countless other examples. *Nor does it offer guidance for how a defendant can prove that his arrest was the result of "widespread" misconduct.* Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff's position.

Strieff, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) (emphasis added).

Justice Sotomayor does not appear to be making a proclamation about burden allocation. Her comment was more informally expressed. Of course, it is not the defendant's burden to

"at most negligent,"[100] reasoning that the record did not support the conclusion that the "unlawful stop was part of any systemic or recurrent police misconduct."[101]

Justices Sotomayor, Kagan, and Ginsburg dissented.[102] In her dissent, Justice Sotomayor flatly rejected the majority's assessment of the latter two *Brown* factors.[103] Justice Sotomayor forcefully contended that the discovery of the outstanding warrant was not an intervening event and that Officer Fackrell's actions were neither negligent nor isolated.[104] Justice Sotomayor insisted that the officer's "sole purpose was to fish for evidence."[105] She pressed that "[o]utstanding warrants are surprisingly common" and implied that such awareness is preva-

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make this showing. Yet this casual misstatement highlights the potential for error at the district court level. And, with *Strieff* as precedent, such a misallocation could prove to be consequential.

100 *Streiff*, 136 S. Ct. at 2063. The majority concluded that the mistakes committed by Officer Fackrell were made in good faith. *Id.* The Court reasoned that because the officer had no basis to know how long Strieff had been present within the suspected drug house prior to his departure, the officer lacked sufficient foundation "to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction." *Id.* Next, the Court concluded that the officer erred when he demanded to speak with Strieff as opposed to simply inquiring whether the two men might engage in a conversation. *Id.* Noting that the officer simply sought "to 'find out what was going on [in] the house,'" the Court commented that the law did not prohibit him from approaching Strieff and requesting a conversation. *Id.* (alteration in original) (quoting Appendix at 17, *Strieff*, 136 S. Ct. 2056 (No. 14–1373)). The Court found that this "error[] in judgment" was neither "purposeful [n]or flagrant" and did not infringe Strieff's Fourth Amendment protections. *Id.* In conclusion, the Court found that the officer's unlawful conduct began and ended with his unlawful stop of Strieff. *Id.* Everything else was permissible, including the officer's decision to check for the existence of outstanding warrants, which the Court characterized as "a 'negligibly burdensome precautio[n]' for officer safety," and the subsequent search of Strieff's person, which was deemed to be a permissible search incident to his arrest. *Id.* (alteration in original) (quoting Rodriguez v. United States, 575 U.S. 348, 356 (2015)).

101 *Id.*

102 Justices Sotomayor and Kagan wrote separate dissents. *Id.* at 2064–71 (Sotomayor, J., dissenting); *Id.* at 2071–74 (Kagan, J., dissenting). Justice Ginsburg joined Justice Sotomayor's dissent in part, *id.* at 2064 (Sotomayor, J., dissenting), and Justice Kagan's in its entirety, *id.* at 2071 (Kagan, J., dissenting).

103 *Id.* at 2064–69 (Sotomayor, J., dissenting).

104 *See id.* at 2066–69.

105 *Id.* at 2067. Justice Sotomayor strongly contested the majority's characterization of the officer's actions as mistakes made in good faith and as negligent. *See id.* at 2067–68. Even accepting this view, Justice Sotomayor argued that the exclusion remedy retains its value. *See id.* at 2068. She pressed:

> Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior."

Id. (citation omitted) (quoting United States v. Johnson, 457 U.S. 537, 561 (1982)).

lent in the law enforcement community.[106] Justice Sotomayor cited nationwide investigations by the Department of Justice that demonstrate "how these astounding numbers of warrants can be used by police to stop people without cause."[107]

In their respective dissents, Justices Sotomayor and Kagan frequently warned of the consequences of the Court's decision.[108] Justice Sotomayor stated that *Strieff* involved a "*suspicionless* stop"[109] and that the majority decision "allows the police to stop you on the street,

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106 *Id.* at 2068. Justice Sotomayor commented:

> Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.
>
> Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant.

Id. (citation omitted). She expressed her belief that most officers perform their duties in good faith. *Id.* at 2069. She stressed that this fact, however, does not alter her conclusion regarding the commonness of the conduct at issue in *Strieff*. *See id.* Such practices, she commented, are often "the product of institutionalized training procedures." *Id.* She noted that "[t]he New York City Police Department long trained officers to, in the words of a District Judge, 'stop and question first, develop reasonable suspicion later.'" *Id.* (quoting Ligon v. City of New York, 925 F. Supp. 2d 478, 538 (S.D.N.Y. 2013)). Justice Sotomayor also referenced *State v. Topanotes*, 76 P.3d 1159 (Utah 2003), a case decided by the Utah Supreme Court that "described as '"routine procedure" or "common practice"' the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion." *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) (quoting *Topanotes*, 76 P.3d at 1160).

107 *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting). Justice Sotomayor cited Justice Department statistics that illuminate the "astounding numbers of warrants" across the country and how they can be employed by the police to detain people without suspicion. *Id.* She noted that in New Orleans, officers in a single year effectuated approximately 60,000 arrests, "of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets." *Id.* (quoting U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 29 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [https://perma.cc/4NKE-8VTC]). She also stated that in the greater St. Louis metropolitan area, residents were "routinely" stopped by law enforcement "for no reason other than 'an officer's desire to check whether the subject had a municipal arrest warrant pending.'" *Id.* (quoting U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 11, 17 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/AV4J-YUVR]). Justice Sotomayor also referenced Newark, New Jersey, where in a four-year span 52,235 individuals were stopped by law enforcement, and 39,308 of them were checked for outstanding warrants. *Id.* She stated that a Justice Department review determined that "approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion." *Id.* at 2069 (quoting U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9 n.7 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/76AA-3THA]).

108 *Id.* at 2064–71 (Sotomayor, J., dissenting); *Id.* at 2071–74 (Kagan, J., dissenting).

109 *Id.* at 2070 (Sotomayor, J., dissenting).

demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."[110] Justice Sotomayor forecasted that *Strieff* would discourage officer compliance with Fourth Amendment safeguards, explaining that a rule that restricts the admissibility of evidence to that which is lawfully obtained encourages law enforcement entities to respect Fourth Amendment safeguards.[111]

Echoing Justice Sotomayor's sentiments, Justice Kagan commented that the central purpose underlying the exclusionary rule is to deter unconstitutional police conduct.[112] Justice Kagan argued that the *Strieff* majority undercuts this objective, and encourages the unconstitutional conduct undertaken by Fackrell.[113] She explained that officers who lack sufficient justification to seize an individual are now incentivized to disregard constitutional safeguards and effectuate a stop, given their awareness of the commonality of outstanding arrest warrants and the admissibility of evidence recovered from such individuals.[114] Justice Kagan added that an officer who is cognizant that such evidence would be inadmissible would be less likely to engage in such practices.[115]

Many are skeptical of the correlation between evidence exclusion and police behavior.[116] Nevertheless, the perspectives of Justices

110 *Id.* at 2064. Justice Sotomayor cautioned not to "be soothed by the [majority] opinion's technical language." *Id.* She added that, pursuant to *Strieff*, the government could admit evidence at trial that was recovered subsequent to an unconstitutional detention if the officer learned that the detainee had an outstanding warrant for failure to pay a fine prior to the search but after the illegal stop. *Id.*

111 *See id.* at 2065–66.

112 *Id.* at 2071 (Kagan, J., dissenting) (arguing that the exclusionary rule disincentivizes law enforcement from disregarding Fourth Amendment safeguards).

113 *Id.* at 2073.

114 *Id.* at 2071.

115 *Id.* at 2071–72.

116 *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 442 (1999) (vigorously disputing that the exclusionary rule deters unconstitutional police behavior, arguing that the "rule has become a venerated symbol of the liberal agenda," that the rule "is a fraud," and that "[i]t is not an effective way of preventing police misconduct, nor is it mandated by the Constitution except in a narrow subset of cases"); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 603, 610 (2011) (contending that the incentives underlying the exclusionary rule and law enforcement behavior are not congruous, and arguing, in part, that supervisors have comparatively greater influence over daily officer behavior); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821 (2002) (discussing various arguments against the exclusionary penalty).

Sotomayor and Kagan—to which I also subscribe[117]—are reflective of what I suspect are the views of most academics.[118] But it may also be instructive to consider this question from a different vantage point: namely, whether or not *Strieff* actually *encourages* officers to respect constitutional safeguards. To this, I suspect that even the most ardent critics of the exclusionary rule would be hard pressed to make a claim that is objectively persuasive.

It is simply preposterous to suggest that *Strieff*—a case that provides law enforcement with a pathway to evade a constitutional responsibility—somehow fosters officer compliance with that very obligation. Thus, the rosiest characterization of *Strieff* is that it is somehow incentive-neutral, i.e., that it neither incentivizes officers to violate nor comply with constitutional safeguards. However, even this generous characterization is strained, counterintuitive, and divorced from the reality of policing practices in this country. The following Section avoids such mental gymnastics; instead, it examines the true and unfortunate impacts of *Strieff* and its real-life ramifications.

B. Utah v. Strieff *and Its Lasting Ramifications*

The views expressed by Justices Sotomayor and Kagan capture *Strieff*'s most crucial, central truth: it disincentivizes constitutional compliance.[119] Justice Sotomayor, writing only for herself, explained in notable—and at times vivid—detail how people of color, in particular, will bear the impact of *Strieff*.[120] But she also emphasized that the ramifications will be felt by all Americans.[121] Justice Sotomayor stated that *Strieff* communicates to "everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time," and

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117 *See* Julian A. Cook, III, *The Wrong Decision at the Wrong Time:* Utah v. Strieff *in the Era of Aggressive Policing*, 70 SMU L. REV. 293 (2017).

118 *See, e.g.*, Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 348 (2013) (noting that all but one of the academic participants at an exclusionary rule symposium share a perspective that the rule should be retained); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 525 (2013) (commenting that there is "widespread support" for the contention that evidence exclusion "offers some meaningful deterrence of unreasonable search and seizure because of the political costs of exclusion").

119 *See Strieff*, 136 S. Ct. 2056, 2064–71 (2016) (Sotomayor, J., dissenting); *Id.* at 2071–74 (Kagan, J., dissenting).

120 *Id.* at 2070 (Sotomayor, J., dissenting) ("The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny." (citation omitted)).

121 *See id.*

"that your body is subject to invasion while courts excuse the violation of your rights."[122]

The implications of *Strieff* are quite pronounced and extend beyond the well-reasoned points presented in its dissents.[123] In *Terry*, the Court declared that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[124] In this statement, *Terry* identified two methods by which a seizure could take place: first, when an officer exerts physical force, and second, through a demonstration of authority.[125] In *California v. Hodari D.*,[126] the Supreme Court elaborated upon this definition.[127] The Court held that a seizure occurs when the officer either makes a showing of authority to which the suspect submits[128] or physically touches a suspect with an intent to seize.[129] Whether a seizure has occurred is assessed pursuant to an objective standard.[130]

Justice Sotomayor is correct that *Strieff* encourages suspicionless policing practices.[131] More plainly—and vividly—*Strieff* incentivizes *physical confrontation* and *physical contact* by the police with individuals whom they have no constitutionally justifiable basis to physically confront and touch. In this day of heightened distrust between the police and the largely minority communities that they often serve,

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122 *Id.*

123 For an additional academic perspective on *Strieff*, see Guy Padula, Utah v. Strieff*: Lemonade Stands and Dragnet Policing*, 120 W. VA. L. REV. 469, 474–75 (2017), which recounts how law enforcement strategies that invoke racial profiling are intentional and the ways that Fourth Amendment protections have been "eviscerated." See also Emily J. Sack, *Illegal Stops and the Exclusionary Rule: The Consequences of* Utah v. Strieff, 22 ROGER WILLIAMS U. L. REV. 263, 286 (2017), which argues that "the routine stops and warrant checks that happen all over this country multiple times each day[] make[] [the holding in *Strieff*] particularly significant." For a critique of *Strieff*'s majority opinion for its misplaced societal priorities, see Case Comment, Utah v. Strieff, 130 HARV. L. REV. 337 (2016).

124 Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

125 *See id.*

126 499 U.S. 621 (1991).

127 *See id.* at 626–28; *see also* Thomas K. Clancy, Dir., Nat'l Ctr. for Just. & the Rule of L., Presentation to Montana Courts of Limited Jurisdiction: Structure of Search and Seizure Analysis (Apr. 28, 2009) (providing overview of Fourth Amendment search and seizure principles).

128 *See Hodari D.*, 499 U.S. at 626 ("It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure. . . . An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.").

129 *See id.* ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.").

130 *See id.* at 627–28 (noting precedent that provides that a seizure occurs when all of the circumstances suggest to a reasonable person that he was not free to leave).

131 Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

Strieff thus ups the ante for constitutionally unjustifiable police-instigated physical confrontations.[132]

Strieff is thus far more consequential than a case about a police-citizen encounter where an exclusionary remedy was not imposed. *Strieff*'s lasting impact, in fact, has little to do with its contribution to the landscape of the attenuating circumstances doctrine. Rather, *Strieff*'s legacy is to effectively water down *Terry*'s constitutional threshold for Fourth Amendment detentions. The Court did not expressly say so, but the incentive-laden *Strieff* decision undermines the explicit constitutional prerequisites delineated in *Terry* for the seizures of individuals. *Terry*'s reasonable suspicion mandates have been in existence since 1968, and police departments, including those guilty of systematically violating its standards, are, and have been, fully cognizant of the case's thresholds. *Strieff*, however, relaxes these constitutional mandates, unmistakably communicating to the police that further flaunting of *Terry* will be tolerated and encouraged. Fully cognizant of the prevalence of outstanding warrants, law enforcement officers across the country have little incentive not to take advantage of the enhanced investigative freedoms afforded them by *Strieff*.

I expressed thoughts that are instructive to this dilemma in an essay I published in the *Notre Dame Law Review Online*. In that piece, I assessed recommendations proffered by a task force established by President Barack Obama designed to improve policing practices and improve community relationships.[133] I argued that the array of reform proposals set forth by the task force were "laudable objectives" and "are reasoned approaches to the issue of police malfeasance."[134] But I cautioned that the well-intentioned proposals were destined for failure given counter-influences emanating from the Supreme Court.[135] In particular, I referenced the Supreme Court's exclusionary rule jurisprudence which has been persistently undercut in the post-Warren Court era.[136] With such messaging, I argued that even

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132 *See* Krause & Vishny, *supra* note 99, at 57 (discussing that the police in Ferguson, Missouri, a city of approximately 21,000 residents, obtained almost 33,000 arrest warrants—primarily for driving infractions—in 2013, issued tickets to the majority of the community to raise revenue, and had "16,000 open arrest warrants" in 2015, which reveals, "[u]nder the rationale of *Strieff*, virtually the entire population of the city could be arrested and searched at any time"); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1588 (2019) (expressing disbelief that the majority in *Strieff* failed to mention the subject of race when it issued its decision).

133 Cook, *supra* note 48, at 107.

134 *Id.* at 109.

135 *See id.* at 109–13.

136 *Id.*

well-intentioned police departments will find it difficult to implement and sustain meaningful positive reforms absent legislative or judicial mandates that require strategic change.[137] Police departments are cognizant of their investigative authorities and absent such mandates they are not going to voluntarily relinquish such powers.[138]

When the Supreme Court issues decisions that impact law enforcement, police departments listen. And when the Court's pronouncements enhance law enforcement's investigative authorities, officers will often press the outer limits of their newly granted authorities. Consider, for example, police officer behavior in the context of automobile searches incident to an arrest. In *New York v. Belton*,[139] the Supreme Court upheld a search of a jacket in the passenger compartment of an automobile as a valid search incident to arrest.[140] In reaching its conclusion, the Court emphasized the dual rationales underlying such searches enunciated in *Chimel v. California*:[141] (1) the ability of the suspect to retrieve evidence and (2) officer safety searches.[142] Yet the Court recognized the difficulty of developing a "workable" application of the *Chimel* principles in the context of automobile searches subsequent to an arrest.[143] The Court commented that items within the passenger compartment of an automobile are "generally" within reach of an arrestee, but added that such scenarios are not "inevitabl[e]."[144] In the end, the Court announced what it termed a "workable rule"; namely, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a

137 *Id.* at 111–12. The recommendations set forth by the task force (e.g., embracing a guardian mindset, or increasing law enforcement policy and practice transparency) are worthy objectives, but are ultimately hamstrung by the lack of incentives on the part of law enforcement to adopt and maintain such reforms. *See id.*

138 *Id.* at 112.

139 453 U.S. 454 (1981).

140 *Id.* at 460. *Belton* involved a vehicular stop for speeding. *Id.* at 455. During the course of the stop, the officer "smelled burnt marihuana" and observed an envelope within the vehicle marked "Supergold." *Id.* at 455–56. The occupants of the vehicle were arrested, and a search of the vehicle incident to an arrest uncovered a jacket that belonged to Belton and contained cocaine. *Id.* at 456. The Court held that after a custodial arrest of an automobile occupant, an officer may perform a contemporaneous search of the automobile's passenger compartment and examine the contents of containers found therein. *Id.* at 462–63.

141 395 U.S. 752 (1969).

142 *See Belton*, 453 U.S. at 460; *Chimel*, 395 U.S. at 763 (holding that incident to an arrest officers may search the immediate grab area of the arrestee).

143 *See Belton*, 453 U.S. at 460.

144 *Id.* ("[A]rticles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (alteration in original) (quoting *Chimel*, 395 U.S. at 763)).

contemporaneous incident of that arrest, search the passenger compartment of that automobile."[145]

In his dissent, Justice Brennan seemed to interpret the majority opinion as creating a bright-line rule allowing a passenger compartment search irrespective of the presence of either *Chimel* rationale.[146] But Justice Brennan's interpretation was not universally held, as evidenced by the circuit split on the issue.[147] However, his view was the predominant perspective and, as a result, *Belton* was commonly understood by officers and the courts as creating a bright-line constitutional principle.[148] Yet as stated by the Court in *Arizona v. Gant*,[149] the predominant interpretation of *Belton* "untether[s] the rule from the justifications underlying the *Chimel* exception—a result *clearly incompatible* with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.'"[150]

Admittedly, ambiguities attended the *Belton* decision. Even *Gant* was decided by a 5-4 majority.[151] What is unambiguous, however, is the police behavior in the aftermath of *Belton*. Vehicular passenger compartment searches, even in the absence of the *Chimel* dangers, were commonplace in the years between *Belton* and *Gant*.[152] Police

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145 *Id.* (footnote omitted).

146 *See id.* at 466 (Brennan, J., dissenting) (explaining that "the Court today disregards these principles, and instead adopts a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car").

147 *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 342 n.2 (2009) (citing various circuit court cases reaching divergent conclusions).

148 *See id.* at 342.

149 556 U.S. 332 (2009).

150 *Id.* at 343 (emphasis added) (quoting *Belton*, 453 U.S. at 460 n.3). In *Gant*, the Court circumscribed the instances when vehicular searches incident to arrest were permissible. *Id.* at 351. It held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.*

151 Justice Stevens wrote the majority opinion and was joined by Justices Scalia, Thomas, Souter, and Ginsburg. Justices Alito, Roberts, Breyer, and Kennedy dissented.

152 *See, e.g.*, Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in the judgment) (explaining that examples "are legion"). *Gant* involved the stop of a vehicle on account of Gant driving on a suspended license. *Gant*, 556 U.S. at 335. Gant was arrested and secured in the back of a police car. *Id.* at 336. Thereafter, officers searched Gant's car and discovered cocaine. *Id.* Referencing the dual rationales underlying the holding in *Chimel*, the Court found that the search of Gant's vehicle was not authorized given that Gant was secured at the time of the search and was unable to access items within his vehicle. *Id.* at 344. The Court held that *Chimel* authorizes a search in instances where the arrestee is unsecured and has access to the vehicle's interior, and when there is a reasonable probability that evidence pertinent to the offense of arrest can be found inside the vehicle. *Id.* at 342–43.

restraint was seemingly not the norm. In *Thornton v. United States*,[153] the Court upheld a search of a vehicle incident to arrest despite the fact that the defendant was secured in a police vehicle.[154] Justice Scalia commented in his concurrence that "[t]he popularity of the practice is not hard to fathom," and asked rhetorically "[i]f *Belton entitles* an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any [*Chimel*] danger[s], what rational officer would not take [advantage of] those measures?"[155] He also described the number of instances involving "this precise factual scenario" as "legion"[156] and "frequently recurring."[157] The majority in *Gant* stated that in the almost three decades since *Belton* "rarely" are items within the interior of a vehicle within the reach of the arrestee.[158] And in her concurrence in *Thornton*, Justice O'Connor stated that the vehicular searches upheld by the lower courts in the name of *Belton* amounted to police entitlements.[159]

Consider also law enforcement conduct in the context of *Miranda* warnings. In *Missouri v. Seibert*,[160] the Supreme Court considered the constitutionality of a police department practice in Rolla, Missouri whereby officers would purposefully interrogate an individual in violation of *Miranda* and obtain a confession, then provide *Miranda* warnings and interrogate the individual a second time in anticipation that the person would repeat the incriminating statements.[161] The case centered around the death of a child whose mother—Patrice Seibert—had been arrested in connection with the child's death and was being interrogated by the police.[162] After her arrest, Seibert was transported to a police station and questioned by an officer without *Miranda* warnings.[163] After confessing to the killing of her son, she was

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153 541 U.S. 615 (2004).

154 *Id.* at 622–24. Moments after exiting his car, Thornton was approached by an officer who inquired about an issue involving the vehicle's license tags. *Id.* at 618. During the encounter, Thornton reached into his pockets and produced some illegal narcotics. *Id.* He was then placed under arrest and secured inside the police vehicle. *Id.* The officer then searched Thornton's vehicle incident to the arrest and uncovered a handgun under the driver's seat. *Id.*

155 *See id.* at 628 (Scalia, J., concurring in the judgment).

156 *Id.* Scalia also noted that the United States admitted to the prevalence of the police practice of securing an arrestee in a police vehicle prior to performing a search of the passenger compartment. *Id.*

157 *Id.* at 626.

158 Arizona v. Gant, 556 U.S. 332, 350 (2009).

159 *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part).

160 542 U.S. 600 (2004).

161 *See id.* at 604–05, 609–10.

162 *Id.* at 604–05.

163 *Id.*

given a twenty-minute break before being provided with *Miranda* warnings for the first time.[164] She then reiterated her confession.[165]

The procedure followed by the officer in *Seibert* was not impromptu.[166] Rather, it was an established police protocol, one that was "promoted not only by his own department, but by a national police training organization and other departments in which he had worked."[167] The Court noted the "popularity" of the practice and cited cases across several districts where this "question-first" strategy had been employed.[168] Notably, the State of Missouri argued before the Supreme Court that the interrogation protocol was authorized pursuant to *Oregon v. Elstad*,[169] a case decided by the Court almost two decades earlier. In *Elstad*, officers arrived at the residence of an eighteen-year-old male, Michael Elstad, who was a suspect in a recent burglary.[170] After placing him under arrest in his home, police questioned Elstad regarding the burglary, and Elstad made some incriminating remarks.[171] Shortly thereafter, the police transported Elstad to

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164 *Id.* at 604–05. The Court described the interrogation in the following manner:

> [T]he police awakened Seibert at 3 a.m. at a hospital where Darian was being treated for burns. In arresting her, Officer Kevin Clinton followed instructions from Rolla, Missouri, Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating "Donald was also to die in his sleep." After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20–minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning with "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" and confronted her with her prewarning statements . . . .

Id. at 604–05 (citations omitted).

165 *Id.* at 605.

166 *See id.* at 609.

167 *Id.* at 609.

168 *Id.* at 611 & n.3 (citing cases from the Ninth, Eighth, and First Circuits as well as the D.C. Court of Appeals).

169 470 U.S. 298 (1985).

170 *See id.* at 300 (noting that artwork totaling $150,000 was stolen from a home in Salem, Oregon).

171 *Id.* at 300–01. The Court stated that two police officers went to Elstad's residence with a warrant for his arrest. *Id.* at 300. When the officers arrived, Elstad's mother answered the door and took the officers to her son's room. *Id.* After getting dressed, Elstad accompanied the officers to the living room. *Id.* While one of the officers was with Elstad's mother in the kitchen, the second officer was with Elstad in the living room. *Id.* at 300–01. Regarding the living room conversation, the officer testified to the following exchange with Elstad:

> I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea

the police station.[172] About an hour later, police provided Elstad a *Miranda* warning, and he confessed to the crime.[173]

The Court declined to suppress the post-*Miranda* statements.[174] The Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[175] The Court reasoned that an individual such as Elstad, who is deprived of his *Miranda* warnings, is still capable of later waiving his *Miranda* rights and providing a voluntary confession.[176]

In *Siebert*, however, the Court rejected the government's similar argument, concluding that this practice was unconstitutional.[177] For purposes of this Article, what is particularly notable is the State's apparent reliance upon *Elstad* and the case's arguable factual similarity to that in *Siebert*.[178] As in *Elstad*, the practice at issue in *Siebert* involved interrogation in the absence of *Miranda* warnings, followed by a confession, followed by the provision of the requisite warnings that

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> why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, "Yes, I was there."

Id. at 301 (quoting Appendix at 19–20, *Elstad*, 470 U.S. 298 (No. 83-773)).

172 *Id.*

173 *Id.*

174 *See id.* at 312.

175 *Id.* at 318.

176 *See id*. at 317–18. The Court recognized that custodial statements obtained in violation of *Miranda* are excludable at trial in the State's case-in-chief. *Id.* at 317. The Court emphasized that it was adhering to that principle and that an officer's "good faith" does not excuse an officer's duty to comply with this principle. *Id.* But the Court declared that it should not be presumed that a second inculpatory statement is necessarily tainted by the initial statement that was obtained in violation of *Miranda*. *Id.* at 317–18. The Court explained that a second statement can be found to be voluntarily provided and thus admissible at trial because as the Court stated:

> [T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

Id. at 318 (footnote omitted).

177 *See* Missouri v. Seibert, 542 U.S. 600, 604 (2004).

178 *See id.* at 614–15.

produced a second confession. Justice Souter commented on the prevalence of the interrogation practice:

> [T]he reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble.[179]

As noted, the interrogation methodology employed by the Rolla Police Department was the byproduct of a national training institute and practices employed by other law enforcement entities.[180] Justice Souter observed that the Police Law Institute's *Illinois Police Law Manual* instructed that the two-step interrogation methodology was permissible.[181] Specifically, the manual provided, "[a]t any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court."[182] Thus, the two-step approach was designed with a specific purpose: to successfully obtain confessions while minimizing the impact of *Miranda* warnings.[183]

The above-described *Belton* and *Miranda* histories are informative with respect to law enforcement investigative practices and tendencies. In each instance, law enforcement entities, cognizant of Supreme Court precedent, tested the outer limits of their constitutional authorizations. Police officers sought maximum investigative advantage in each instance and developed and implemented strategies designed to achieve those objectives. The same investigative approach was and continues to be undertaken in the context of *Terry* stops and

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179 *Id.* at 613. The Court did not have information indicating the extent of the practice but noted that the interrogation methodology was employed by other police departments as well. *Id.* at 609.

180 *See supra* notes 167–68 and accompanying text.

181 *Seibert*, 542 U.S. at 610–11.

182 *Id.* (quoting POLICE L. INST., ILLINOIS POLICE LAW MANUAL 83 (Jan. 2001–Dec. 2003)).

183 *See* Locke Houston, Comment, Miranda*-in-the-Middle: Why Justice Kennedy's Subjective Intent of the Officer Test in* Missouri v. Seibert *Is Binding and Good Public Policy*, 82 MISS. L.J. 1129, 1131 (2013) ("In *Seibert*, police officials found the loophole that the *Elstad* decision left behind, and officers nationwide developed procedural protocol that adopted manipulative strategies that deliberately violated the *Miranda* requirement."); Kyron Huigens, *Custodial Compulsion*, 99 B.U. L. REV. 523, 578 (2019) ("*Elstad*'s rule encouraged police to take an unlawful and inadmissible confession purposely in order to cause the suspect to lower his guard and give a second, lawful, and admissible confession.").

frisks. In *Terry*, the Court announced a new law enforcement prerogative that authorized the temporary detention and frisking of individuals based upon the satisfaction of a reasonable suspicion threshold.[184] Satisfaction of these standards, the Court reasoned, complied with the Fourth Amendment reasonableness requirement.[185] But far too often police departments have tested and exceeded these boundaries. Fully cognizant of *Terry*'s long-standing constitutional mandates, individual officers and law enforcement departments have disregarded these limitations with disturbing frequency.[186]

In the midst of this disturbing history, the Supreme Court rendered its decision in *Strieff*. That decision—which effectively dispensed with *Terry* standards altogether in the context of outstanding warrants[187]—will do nothing to halt or even mitigate the *Terry* abuses and will almost certainly exacerbate the problem.[188] It is fanciful to believe that law enforcement entities that flaunted *Terry*'s explicit constitutional standards with glaring frequency will forgo the opportunity to engage in the same conduct when the Supreme Court has granted a constitutional pass to do so. Many law enforcement departments have acted to implement positive reforms and should be commended for their efforts.[189] But it will be exceedingly difficult to

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184 Terry v. Ohio, 392 U.S. 1, 22–27 (1968).

185 *Id.* at 20–31.

186 *See, e.g.*, Emily Badger, *The Lasting Effects of Stop-and-Frisk in Bloomberg's New York*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/03/02/upshot/stop-and-frisk-bloomberg.html [https://perma.cc/M8SU-3G3S] (describing stop and frisk practices in New York City, stating that the practice infrequently led to arrests or the recovery of weapons, and explaining that Black and Hispanic individuals were disproportionately impacted by the practice); Ashley Southall & Michael Gold, *Why 'Stop-and-Frisk' Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Feb. 19, 2020) https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html [https://perma.cc/N4QE-Z6VV] (noting that in New York City there were 685,724 stops in 2011, and that during Mayor Michael Bloomberg's three terms, the police recorded 5,081,689 stops); Associated Press, *Milwaukee to Pay $3.4 Million to Settle 'Stop-and-Frisk' Lawsuit*, NBC NEWS (July 10, 2018, 5:14 PM), https://www.nbcnews.com/news/us-news/milwaukee-pay-3-4-million-settle-stop-frisk-lawsuit-n890351 [https://perma.cc/5UDB-SKPB] (noting that Milwaukee police officers made in excess of "350,000 traffic and pedestrian stops from 2010 to 2017 for which they have no record explaining probable cause for the interaction"); *CPD Agrees to 'Stop-and-Frisk' Reforms, Avoids ACLU Lawsuit*, ABC 7 CHI. (Aug. 7, 2015), https://abc7chicago.com/chicago-police-cpd-stop-and-frisk-stop-and-frisk/909740/ [https://perma.cc/7XNR-NAXR] (stating that during an approximate four-month period in 2014, Chicago police officers made over 250,000 stops that did not culminate in an arrest, and that almost seventy-five percent of the detainees were Black).

187 *See* Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

188 *See id.* at 2065–66 (Sotomayor, J., dissenting); *Id.* at 2073–74 (Kagan, J., dissenting).

189 *See* David Leonhardt, *Where Police Reform Has Worked*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/05/briefing/george-floyd-buffalo-coronavirus-your-friday-brief-

maintain positive reforms when Supreme Court precedent strongly encourages officers to disregard constitutional safeguards.[190]

With full awareness of *Strieff* and its relaxation of *Terry*'s reasonable suspicion standards, no one should be surprised by an uptick in seizures in the absence of any suspicion. And when coupled with an awareness of the plethora of outstanding warrants,[191] officers and police departments fully comprehend the risks and rewards attendant to engaging in such practices.[192] Whether acting individually or as part of a collective entity spurred by culture and/or protocol, the investigative rewards are too great and the individual and departmental costs are too few to culminate in an improved policing environment.

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ing.html [https://perma.cc/5WBV-R92H] (discussing positive reforms in police departments in Los Angeles, San Francisco, Baltimore, Chicago, Phoenix, and Philadelphia).

190 *See* Cook, *supra* note 48, at 111–12 ("[G]oodwill alone will produce little measurable benefit unless accompanied by legislative or judicial mandates that penalize police misdeeds. The police are not going to relinquish investigative authority granted by the Supreme Court through voluntary election."). For a discussion of the positive impact that judicial oversight has upon law enforcement stop and frisk practices, see Becca James, *Stop and Frisk in 4 Cities: The Importance of Open Police Data*, SUNLIGHT FOUND. (Mar. 3, 2015, 9:00 AM), https://sunlightfoundation.com/2015/03/02/stop-and-frisk-in-4-cities-the-importance-of-open-police-data-2/ [https://perma.cc/XH8H-RYKV]. In New York, Philadelphia, and Los Angeles, for instance, "court-mandated data collection and review helped hold police departments accountable for officer actions and ultimately reduced unlawful stop and frisk practices." *Id.* But "with the absence of an external body mandating the collection of this data, the priority for data collection can fall by the wayside." *Id.*

191 *See Strieff*, 136 S. Ct. at 2068–69 (Sotomayor, J., dissenting) ("The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the 'staggering' numbers of warrants, 'drawers and drawers' full, that many cities issue for traffic violations and ordinance infractions." (citation omitted) (quoting DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47, 55 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/AV4J-YUVR])); *see also* Katherine A. Macfarlane, *Predicting* Utah v. Streiff*'s Civil Rights Impact*, 126 YALE L.J.F. 139, 147 (2016) (predicting that *Strieff* "will likely result in numerous suspicionless stops made solely to run warrant checks").

192 *See* Gene Demby, *An Immune System*, NPR: CODE SWITCH (July 8, 2020 12:06 AM), https://www.npr.org/2020/06/12/876212065/an-immune-system [https://perma.cc/8X76-QKMG] (discussing qualified immunity and police department resistance to reform); Jaime Ehrlich, *The Question Before the Supreme Court Is Who Polices the Police*, CNN (June 3, 2020, 5:12 PM), https://www.cnn.com/2020/06/03/politics/supreme-court-qualified-immunity-police-accountability-george-floyd/index.html [https://perma.cc/B8B3-WMZ2] (noting Professor Joanna Schwartz's view that qualified immunity signals to law enforcement that they will not suffer consequences when they violate the constitution); *see also* Macfarlane, *supra* note 191, at 147 (noting that stops motivated by officer interest in performing a warrant check are "common," that people of color are disproportionately impacted by this practice, and that victims will be without meaningful civil or criminal remedies).

C. *Police Culture, People of Color, and the Erosion of* Terry

The lessons from this nation's experience with stop and frisk demonstrate that people of color will be most disadvantaged by *Strieff*'s loosening of *Terry*'s constitutional safeguards.[193] Arguably, *Strieff* generated more attention in the media and elsewhere for Justice Sotomayor's dissent than for its majority decision.[194] Justice Sotomayor not only engaged in an extensive legal critique of the majority's assessment of the three criteria delineated in *Brown*,[195] but she also got deeply personal.[196] She delved at length into the implications of *Strieff* for people of color.[197]

On the one hand, when narrowly constricted to its factual four corners, *Strieff* was a case that had nothing to do with race or ethnicity. Strieff, a White male, made no allegation that his race or ethnicity contributed to the officer's decision to seize his person.[198] The majority opinion in *Strieff* is similarly devoid of any reference to race or

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193 *See, e.g.*, Southall & Gold, *supra* note 186 (reporting that Black and Hispanic New Yorkers were more likely to be stopped and frisked despite the fact that White New Yorkers "were twice as likely to be found with a gun," and that in 2009 Black and Hispanic New Yorkers were nine times more likely to be stopped than White New Yorkers); Jeffery Robinson, *ACLU: 'Stop and Frisk' Creates Endless Cycle of Violence*, TIME (Sept. 23, 2016, 9:58 AM), https://time.com/4504985/aclu-donald-trump-stop-and-frisk/ [https://perma.cc/8Q92-2J5J] (noting that the American Civil Liberties Union has found racial disparities in stop and frisk practices in New York, Newark, Chicago, Boston, and Philadelphia).

194 *See* Robert Barnes, *Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence from Illegal Stops*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html [https://perma.cc/B2CE-VEP4] (stating that "the low-profile case more likely will be remembered for a fierce and personal dissent from Justice Sonia Sotomayor, who said the decision would exacerbate illegal stops of minorities"); Matt Ford, *Justice Sotomayor's Ringing Dissent*, ATLANTIC (June 20, 2016) https://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ [https://perma.cc/QL9Y-E55R] (recognizing Justice Sotomayor's "thundering dissent," and commenting that it was "extraordinary for its breadth and intensity"); Ronald Tyler, Utah v. Strieff*: A Bad Decision on Policing with a Gripping Dissent by Justice Sotomayor*, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (July 5, 2016), https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor/ [https://perma.cc/T37A-FGK5] (noting Justice Sotomayor's "powerful dissent," and adding that she "conducts a suitably careful and intelligent analysis, but does so in a voice that speaks not only to the legally trained, but also to the ordinary people who are most impacted by the Court's Fourth Amendment jurisprudence").

195 *See Strieff*, 136 S. Ct. at 2064–69 (Sotomayor, J., dissenting); *see also supra* notes 95–97 and accompanying text.

196 *See Strieff*, 136 S. Ct. at 2069–71 (Sotomayor, J., dissenting).

197 *Id.*

198 *See id.* at 2070.

ethnicity.[199] Yet, as Justice Sotomayor correctly observes, *Strieff* had everything to do with race and ethnicity.

The policing of people of color is at the heart of the *Strieff* decision. *Strieff*—a case involving a suspicionless stop in violation of *Terry*'s reasonable suspicion standard—simply cannot be divorced from the broader historical and present-day context of racial injustice in which it was decided.[200] In this vein, Justice Sotomayor also interjected her thoughts indirectly about the culture of policing and the Court's influence upon it.[201] She commented that the Court's precedents have empowered law enforcement with substantial authority to "probe and examine" individuals, and that the Court's forgiveness of officer missteps only incentivizes a repeat of such constitutional infractions.[202] Such grants of broad investigative powers, Justice Sotomayor stressed, encourage arbitrary and demeaning law enforcement practices.[203]

Since the close of the Warren Court, there has been a steady stream of Supreme Court jurisprudence that has enhanced law enforcement's investigative authority, reinforced these principles, and communicated to the police that the Court will forgive police officers' constitutional missteps along the way.[204] Consider, for example, the Court's jurisprudence regarding what constitutes a seizure within the

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199 *See* Yankah, *supra* note 132, at 1588, 1594 (noting that amidst the Black Lives Matter movement, which advocates for police reform and a national conversation about race and policing, the majority opinion in *Strieff* avoided the subject altogether).

200 *See Strieff*, 136 S. Ct. at 2065, 2070 (Sotomayor, J., dissenting).

201 *See id.* at 2065–69.

202 *Id.* at 2069 ("I would add that unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.").

203 *Id.*; *see also* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 82 (arguing, in part, that Supreme Court jurisprudence has promoted racially unjust police practices).

204 Professor Devon Carbado draws a linkage between the Court's Fourth Amendment jurisprudence and aggressive police practices against people of color. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 128–29 (2017). He argues that the Court's precedent "effectively 'pushes' police officers to target African Americans and 'pulls' African Americans into contact with the police." *Id.* at 129. Professor Allegra McLeod seemingly concurs: commenting about "the Supreme Court's complicity in police violence," Professor McLeod writes that the "Court's constitutional criminal procedure doctrine sanctions much of the policing activity" that has led to the deaths of several African American victims. Allegra M. McLeod, *Police Violence, Constitutional Complicity, and Another Vantage*, 2016 SUP. CT. REV. 157, 159, 161.

meaning of the Fourth Amendment. *Florida v. Royer*[205] and *Florida v. Bostick*[206] are instructive. In *Royer*, the Court held that an officer does not run afoul of the Fourth Amendment by simply approaching an individual in a public space, identifying herself, posing some questions, or inquiring whether that person would be willing to answer some questions.[207] The Court explained that in such circumstances, there has been no constitutional infringement given the absence of a seizure within the meaning of the Fourth Amendment.[208] Whereas *Royer* addressed the propriety of a police-individual encounter in an airport,[209] *Bostick* addressed the constitutionality of a law enforcement investigation while aboard a parked bus.[210] In upholding the actions of the officers, the Court in *Bostick* affirmed law enforcement's prerogative to approach an individual without suspicion, and to pose questions, even within the confines of a bus.[211] The police, therefore, are empowered to approach individuals with little or no suspicion without implicating the Fourth Amendment.

Certainly, there is some merit to such allowances. The demands of policing and community safety necessitate, at least in some instances, certain investigative freedoms to approach individuals without risking constitutional infractions. The propriety of the breadth of this authority, however, is another question altogether. Such a conversation is necessarily complex. But among the critical questions that remain is who gets selected to be approached? The Court has provided some answers.

In *Whren v. United States*,[212] the Court held that a traffic stop is reasonable within the meaning of the Fourth Amendment so long as probable cause exists to support the stop.[213] The defendants con-

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205 460 U.S. 491 (1983).

206 501 U.S. 429 (1991).

207 *See Royer*, 460 U.S. at 497.

208 *Id.* at 498.

209 *Id.* at 493–97.

210 *Bostick*, 501 U.S. at 431–33. Justice O'Connor, writing for the majority, linked the cases as follows:

> We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

Id. at 431.

211 *Id.* at 434–35.

212 517 U.S. 806 (1996).

213 *See id.* at 819.

tended that the purported basis for their stop (to provide a warning regarding a traffic violation) was pretextual and urged the adoption of a test that inquired whether a reasonable officer would have made the stop under the circumstances.[214] The defendants argued that, given the multitude of traffic regulations, officers would be tempted to perform traffic stops in order to investigate other matters.[215] Although the Court acknowledged the defendants' concern about selective enforcement of the traffic laws based upon race and other impermissible characteristics,[216] the Court stated that the Equal Protection Clause, and not the Fourth Amendment, was the proper avenue to adjudicate such disputes.[217]

The position of the Court is not indefensible. First, Justice Scalia wrote on behalf of a unanimous court.[218] Second, Justice Scalia noted the well-established principle that the existence of probable cause is assessed objectively and is not defeated by an officer's subjective assessments.[219] Moreover, the Court recognized certain practical consequences attendant to the reasonable officer position advanced by the defendants.[220] Specifically, the Court noted that it would be difficult to ascertain what reasonable officers would do in a given circumstance.[221] To do so, Justice Scalia stated, courts would be required to "plumb the collective consciousness of law enforcement in order to determine" the actions of the reasonable officer.[222] Justice Scalia added that such conduct by a reasonable officer would necessarily "vary from place to place and from time to time."[223]

Virtually any decision of the Court carries societal implications. The decision in *Whren*, allowing law enforcement to perform pretextual stops given the existence of probable cause, had obvious implications for automobile drivers and drivers of color in particular. This

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214 *Id.* at 809–10.

215 *Id.* at 810.

216 *See id.* at 810, 813 (observing that the defendants are Black and noting their contention that officers will employ impermissible factors when deciding which motorists to stop).

217 *Id.* at 813.

218 *Id.* at 807.

219 *Id.* at 812 (explaining that "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary").

220 *See id.* at 813–15.

221 *Id.*

222 *Id.* at 815.

223 *Id.*

effect was aggravated in *Atwater v. City of Lago Vista*.[224] In *Atwater*, the Supreme Court upheld the arrest of an automobile driver for failure to wear a seatbelt.[225] The driver, Gail Atwater, filed a civil action pursuant to 42 U.S.C. § 1983, contending that her arrest for a seatbelt violation—a comparatively minor offense—violated the Fourth Amendment.[226] The Court considered whether the Fourth Amendment limits the authority of an officer to arrest an individual for minor crimes.[227] The Court concluded that the Fourth Amendment contains no such limitation.[228]

Together, these cases establish that the police may follow, approach, and question individuals without suspicion,[229] stop them in their vehicles on a pretextual basis,[230] and arrest them for even minor offenses.[231] Subsequently, officers may freely search individuals[232] and grab areas incident to an arrest,[233] and under some circumstances, may search the passenger compartment of individuals' vehicles.[234] The Supreme Court has thus given officers the green light to pursue these investigative tactics with few disincentives not to pursue them with vigor. Commenting upon *Bostick*, Professor Devon Carbado has observed that an officer may consider an individual's race when deciding whether to approach and question an individual in the absence of any suspicion and wrongdoing.[235] To this, Professor Richard Frase adds that *Atwater* and *Whren* inevitably lead to pretextual stops and arrests that are designed "to harass . . . particular individual[s] or group[s]," and that "the potential for abuse is great" given the multitude of traffic code regulations and the frequency with which they are violated.[236]

These incentives are further entrenched given the Supreme Court's forgiving exclusionary rule jurisprudence. When *Mapp v.*

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224 532 U.S. 318 (2001).

225 *Id.* at 354–55.

226 *Id.* at 325, 347–48.

227 *Id.* at 326.

228 *Id.* at 354.

229 *See* Florida v. Royer, 460 U.S. 491, 497 (1983); Florida v. Bostick, 501 U.S. 429, 434–35 (1991).

230 *See* Whren v. United States, 517 U.S. 806, 813 (1996).

231 *See Atwater*, 532 U.S. at 354.

232 *See* United States v. Robinson, 414 U.S. 218, 235–36 (1973).

233 *See* Chimel v. California, 395 U.S. 752, 768 (1969).

234 *See* Arizona v. Gant, 556 U.S. 332, 351 (2009).

235 Carbado, *supra* note 204, at 137. Professor Carbado recommends that courts, as a part of their totality of the circumstances review, take race into account when determining whether a Fourth Amendment seizure has occurred. *Id.* at 143.

236 Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 356 (2002).

Ohio[237] made the Fourth Amendment's exclusionary rule penalty applicable to the states via the Fourteenth Amendment's Due Process Clause, the Court unambiguously stressed that exclusion was embedded within the Constitution.[238] Absent an exclusionary remedy, the Court stated that the constitutional guarantee to be free from unreasonable searches and seizures would constitute an "empty promise."[239] The Court added that the exclusion of evidence was "the only effectively available way" to encourage law enforcement respect for these principles.[240]

Yet in the decades since *Mapp*, the Court has moved away dramatically from this constitutional interpretation. The Court now considers the exclusionary rule a nonconstitutional principle that is employed only when excluding evidence would sufficiently deter police misconduct.[241] Exceptions allowing for officer good faith[242] and attenuating circumstances[243] have not only been established but have blossomed. The Court has also noted with some frequency the substantial costs associated with exclusion and has downplayed the significance of judicial integrity.[244] Relatedly, the Court has significantly narrowed the landscape of individuals eligible to present exclusion claims.[245]

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237 367 U.S. 643 (1961).

238 *Id*. at 655.

239 *Id.* at 660.

240 *Id.* at 648, 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

241 *See* Davis v. United States, 564 U.S. 229, 236, 246 (2011) (stating that the purpose of the exclusionary rule is not embodied in the Constitution and its "*sole* purpose" is "to deter misconduct by law enforcement").

242 *See* Arizona v. Evans, 514 U.S. 1, 14–16 (1995) (applying good faith exception to action involving error by a court clerk); Illinois v. Krull, 480 U.S. 340, 349–53 (1987) (applying good faith exception to action involving reliance upon legislation).

243 *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963) (finding Wong Sun's confession voluntary and therefore admissible due to attenuating circumstances despite earlier constitutional breach); Hudson v. Michigan, 547 U.S. 586, 592–99 (2006) (admitting evidence obtained when police violated knock-and-announce requirement because "[a]ttenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence").

244 *See* United States. v. Leon, 468 U.S. 897, 907 (1984) (noting the exclusionary rule's "substantial social costs"); *Hudson*, 547 U.S. at 591 (stating that an exclusion penalty is a remedy of "last resort"); *see also* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47 (2010) (asserting that judicial integrity was the original rationale for the exclusionary rule but that its relevance has since been "eviscerated" by the Court).

245 *See* Julian A. Cook, III, *Policing in the Era of Permissiveness: Mitigating Misconduct Through Third-Party Standing*, 81 BROOK. L. REV. 1121, 1142 (2016) (discussing the narrowed landscape of individuals eligible to assert exclusionary rule remedies since *Jones v. United States*, 362 U.S. 257 (1960)).

Moreover, qualified immunity protects officers from civil liability unless they violate a clearly established law. For example, in *Graham v. Connor*,[246] a case involving the police use of deadly force, the Court observed that officer actions are assessed for reasonableness and that courts should consider the "split-second judgments" that officers often make in "tense, uncertain, and rapidly evolving" circumstances.[247] Professor Daniel Epps observes that Supreme Court doctrine, such as that enunciated in *Graham*, "often prevent courts from second-guessing police use of deadly force."[248] He adds that "[q]ualified immunity routinely requires courts to say that there will be no penalty for a police officer who has violated the Constitution," which conveys to law enforcement and the public "that the police are above the law."[249]

The signal that the Supreme Court has sent to police organizations since the end of the Warren Court era is clear and continues to impact the culture of law enforcement institutions. In granting and expanding police powers and shielding police officers from responsibility, the Court has fueled a police organizational culture that encourages aggressive practices and discourages respect for constitutional safeguards. When police officers violate *Terry* or engage in aggressive behavior toward people of color, such behavior is sometimes explained as the actions of a "few bad apples." However, I submit that this perception is misguided.[250] As Professor Barbara Armacost states, these actions are more often the byproduct of organizational cultures.[251] She writes that "[v]irtually all major police commissions and task forces convened over the last thirty or forty years have concluded that the patterns of repeated, wrongful incidents identified in these troubled police departments were at least partly caused by systemic features of police culture."[252] Professors Jeffrey A. Fagan and Alexis

246 490 U.S. 386 (1989).

247 *Id.* at 396–97.

248 Daniel Epps, Opinion, *Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/opinion/police-qualified-immunity.html [https://perma.cc/7DZS-NA3K]. See also *Malley v. Briggs*, 475 U.S. 335 (1986), in which the Court noted that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

249 Epps, *supra* note 248.

250 *See, e.g.*, James Downie, Opinion, *Time to Toss the 'Bad Apples' Excuse*, WASH. POST (May 31, 2020, 5:09 PM), https://www.washingtonpost.com/opinions/2020/05/31/time-toss-bad-apples-excuse/ [https://perma.cc/M9GQ-6MWT]; Sean Illing, *Why the Policing Problem Isn't About "A Few Bad Apples,"* VOX (June 6, 2020, 8:01 AM) https://www.vox.com/identities/2020/6/2/21276799/george-floyd-protest-criminal-justice-paul-butler [https://perma.cc/3CFK-684S].

251 Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457 (2004).

252 *Id.*

D. Campbell add that police culture affects "the going rate of aggressiveness in citizen-police interactions, perceptions of the legitimacy of law and when violations are appropriate, and the parameters of situations in which violence is justified against certain citizens."[253]

Undoubtedly, numerous factors shape police culture, and by no means are police cultures uniform in their characteristics.[254] However, when the Supreme Court over the course of several decades renders judgments that enhance police powers and largely shield the police from accountability, it defies logic to suggest that police organizations are not influenced. Police behavior will respond accordingly, and aggressive conduct will at times be a byproduct of these investigative freedoms. When the Court grants police the authority to "stop and frisk," officers will, in turn, "*stop and frisk*," and they will not infrequently push and exceed those legal boundaries. And when the Court announces a new principle that forgives officer noncompliance with reasonable suspicion safeguards, as it did in *Strieff*, then officers will take notice and act in accordance with their newly granted investigative freedoms.

Conclusion

In the post-*Strieff* world, is it any wonder why three Aurora, Colorado police officers acted in such an aggressive manner toward Elijah McClain?[255] We may never know the impetus underlying the officers' conduct. What is certain, however, is that decades of Supreme Court precedent laid the foundation for such aggressive police behaviors. The Court has steadily and consistently encouraged law enforcement to flout constitutional safeguards, and *Strieff* further entrenches this most regrettable history. *Strieff* encourages the very problems that are in desperate need of correction. Its lasting and unfortunate legacy will undoubtedly be felt by all; however, predominately minority communities will likely experience its ramifications most acutely.[256] History

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253 Fagan & Campbell, *supra* note 48, at 969.

254 Professor Samuel Walker notes that police cultures are not homogeneous. *See* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 St. Louis U. Pub. L. Rev. 57, 69 (2012). He states, for example, that in recent decades the demographics of police departments in this country have changed "dramatically." *Id.* He also asserts that police forces are now much more diversified in terms of racial, ethnic, gender, sexual orientation, and educational representation. *Id.* And he contends that this diversity has resulted in "significant variations in attitudes" concerning aggressive policing tactics. *Id.* at 70–71.

255 *See supra* notes 9–26 and accompanying text.

256 *See* Case Comment, *supra* note 123, at 346 ("For [the *Strieff* majority], the boost to the efficacy of suspicionless stops must have been more societally valuable than diminished Fourth

certainly suggests such an outcome. Law enforcement has traditionally targeted these neighborhoods and disproportionately victimized minority residents through aggressive police strategies and tactics.[257]

Elijah McClain's sudden and premature death at the hands of three police officers was senseless, needless, and without any plausible community safety justification.[258] Yet his story has become all too familiar. From coast to coast this theme has been replayed, with each instance differentiated only by its distinctive facts.[259] Nobody should have been surprised by what happened to Elijah McClain, nor should they be when this happens to others in the years to come given the current state of Supreme Court jurisprudence, which continues to afford police officers significant deference with no real accountability.[260]

Amendment protection, increased incentive for police to abuse their discretion, and heightened justifiable distrust of police in minority and poor neighborhoods."); *see also* Erwin Chemerinsky, *Chemerinsky: Has the Supreme Court Dealt a Blow to the Fourth Amendment?*, ABA J. (Aug. 2, 2016, 8:30 AM), https://www.abajournal.com/news/article/chemerinsky_has_the_supreme_court_dealt_a_blow_to_the_fourth_amendment [https://perma.cc/URG2-3KHA] (noting that "*Strieff* was decided at a time of great social tension about policing, especially in minority communities").

257 *See supra* Part I.

258 *See* Katie Shepherd, *An Unarmed 23-Year-Old Black Man Died After Police Stopped Him. The Colorado Governor Wants a New Probe*, WASH. POST (June 25, 2020, 6:35 AM), https://www.washingtonpost.com/nation/2020/06/25/colorado-elijah-mcclain-death/ [https://perma.cc/E24K-AL9T].

259 *See* Scott Wilson, *Elijah's McClain's Death Reflects Failures of White, Suburban Police Departments*, WASH. POST (Sept. 2, 2020, 7:46 PM), https://www.washingtonpost.com/national/elijah-mcclains-death-reflects-failures-of-white-suburban-police-departments/2020/09/02/8750a726-e3e4-11ea-9dd2-95be2a2bef2e_story.html [https://perma.cc/AHV8-SAMQ] (detailing various instances of police killings involving African Americans).

260 *Cf.* Jackie Spinner, Opinion, *Elijah McClain's Final Words Haunt Me as the Parent of a Child Who Is 'Different,'* WASH. POST. (June 29, 2020, 12:50 PM), https://www.washingtonpost.com/opinions/2020/06/29/elijah-mcclains-last-words-haunt-me-could-that-happen-my-son/ [https://perma.cc/RS2B-4PXY] (expressing fears as the mother of an autistic son that law enforcement will misconstrue his actions and react aggressively).