

Flagrant Police Abuse: Why Black Lives (Also) Matter to the Fourth Amendment

Joëlle Anne Moreno*

Constitutional rights pivot on problems of proof. But traditional academic distinctions between “procedural” rules of evidence and “substantive” questions of constitutional law impede our understanding of how law works. In particular, how law works to identify, constrain, and remedy police abuse of constitutional rights.¹ Treating rights and remedies as abstract concepts ignores the fact that the exclusionary rule functions as a rule of evidence.² In theory, remedies are the life force of rights.³ In practice, constitutional violations are currently remediable only if a defendant can prove that he suffered intentional police abuse or prove that a police officer knew but ignored constitutional constraints.⁴

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* Associate Dean for Research & Professor of Law, Florida International University College of Law.

¹ See Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1891 (2014) (noting that the legal literature “has often treated exclusionary issues at a high level of abstraction”).

² See Arnold H. Loewy, *Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989) (providing a prescient and pragmatic perspective on the functional relationship between substance and procedure).

³ Professor Andrew E. Taslitz thoughtfully addresses the fundamental rights function of the exclusionary rule. See Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO L. REV. 419, 430-31 (2013) (“The instrumental function of rights is to give their bearers access to certain benefits to which society deems them entitled In the case of the Fourth Amendment, a defendant’s desired instrumental value is exclusion of evidence against him at trial, thus making it harder, occasionally impossible, to convict him of a crime.”).

⁴ Although the justices rarely consider real world evidentiary hurdles when establishing constitutional standards, Justice Ginsburg specifically noted that defendants will struggle to satisfy the increasingly burdensome suppression standard. See *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting). In her view, “[e]ven when deliberate or reckless conduct is afoot, the Court’s assurance will often be an empty

The problem of proving that police officers act with demonstrably culpable intent is also at the core of the Black Lives Matter cases. The growing number of acquittals and grand jury non-indictments following the police-custody and police-seizure deaths of Michael Brown,⁵ Eric Garner,⁶ Freddie Gray,⁷ Tamir Rice,⁸ and other victims of police violence⁹ reveals that judges and juries refuse to believe that police officers are culpable lawbreakers. Preventing and resolving these cases

promise: How is an impecunious defendant to make the required showing? If the answer is that a defendant is entitled to discovery (and if necessary, an audit of police databases . . . then the Court has imposed a considerable administrative burden on courts and law enforcement.” *Id.*

⁵ Erin McClam, *Ferguson Cop Darren Wilson Not Indicted in Shooting of Michael Brown*, NBCNEWS.COM (Nov. 25, 2014, 2:21 AM), <http://www.nbcnews.com/storyline/michael-brown-shooting/ferguson-cop-darren-wilson-not-indicted-shooting-michael-brown-n255391>.

⁶ In December 2014, a Staten Island grand jury delivered a vote of “no true bill” after finding no probable cause that a crime was committed by Officer Daniel Pantaleo. *See* Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC NEW YORK (Dec. 4, 2014, 1:59 PM) <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html#ixzz4FQtOAnEL>. However, a federal grand jury began hearing evidence of alleged civil rights violations in February 2016. Al Baker & Eli Rosenberg, *Federal Grand Jury Begins Hearing Evidence in Eric Garner Case*, N.Y. TIMES (Feb. 11, 2016), http://www.nytimes.com/2016/02/11/nyregion/federal-grand-jury-begins-hearing-evidence-in-eric-garner-case.html?_r=0.

⁷ Of the six officers charged in Mr. Gray’s death in police custody, three officers were acquitted of all charges, including one for murder, and one officer’s trial ended in a hung jury. Kevin Rector, *Judge acquits Lt. Brian Rice of all charges in Freddie Gray case*, BALT. SUN (July 18, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-rice-verdict-20160718-story.html>; Sarah Almkhatar et al., *Freddie Gray Case Ends With No Convictions of Any Police Officers*, N.Y. TIMES (updated July 27, 2016), <http://www.nytimes.com/interactive/2015/04/30/us/what-happened-freddie-gray-arrested-by-baltimore-police-department-map-timeline.html>.

⁸ Mark Berman, *Grand jurors in the Tamir Rice case voted that the shooting was justified, did not vote on specific criminal charges*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/20/grand-jurors-in-the-tamir-rice-case-voted-that-shooting-was-justified-did-not-vote-on-specific-criminal-charges/?utm_term=.b45d0ba8fe4e; Timothy Williams & Mitch Smith, *Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015), http://www.nytimes.com/2015/12/29/us/tamir-rice-police-shooting-cleveland.html?_r=0.

⁹ *See Fatal Force*, WASH. POST (NOV. 13, 2016), <https://www.washingtonpost.com/graphics/national/police-shootings-2016> (collecting police shooting data, including a brief description of facts and information about correct outcomes).

may be further complicated by a “Ferguson Effect,”¹⁰ causing public distrust of police and police fear and disinterest especially in minority urban communities. The long-term implications of these new developments on national and local strategies for policing the police are manifold and uncertain. The short-term lessons are clear and should be obvious. Over the past decade, the Roberts Court has expanded police authority and reduced Fourth Amendment protections against unreasonable police abuse by repeatedly refusing to recognize police aggression as remediable. In each new case, most recently in *Utah v. Strieff*,¹¹ the defendant seeking to suppress even obviously illegally-seized evidence faces the insurmountable burden of proving the police officers acted intentionally, recklessly, or with gross negligence¹² under the Roberts Court’s increasingly stringent “flagrant police abuse standard.”¹³

The flagrant police abuse suppression standard hypothesizes the possibility that the average criminal defendant could gather proof sufficient to convince a judge that a police officer acted: (1) illegally and (2) with the necessary mental culpability. But each new Fourth Amendment decision from the Court ignores the reality repeatedly uncovered in the Black Lives Matter cases. If, as the Black Lives Matter cases prove, prosecutors’ offices with their resources, access, and institutional police connections cannot prove that officers break the law, what hope is there for the average criminal defendant?

The exclusionary rule celebrated its centenary just three years ago.¹⁴ But *Strieff* is the latest example of the Court’s dangerous new Fourth Amendment jurisprudence that incentivizes aggressive policing (including suspicion-less police seizures), ignores obvious obstacles to defense proof of police wrongdoing, and invites prosecutors to feast on

¹⁰ Louis Beckett, *Is the ‘Ferguson effect’ real? Researcher has second thoughts*, THE GUARDIAN (May 16, 2016), <https://www.theguardian.com/us-news/2016/may/13/ferguson-effect-real-researcher-richard-rosenfield-second-thoughts>.

¹¹ *Utah v. Strieff*, 579 U.S. __ (2016).

¹² *Herring*, 555 U.S. at 143-144 (finding that “evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment” and that exclusion requires defense proof of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence”).

¹³ *Strieff*, 579 U.S. at *8 (holding that suppression was unwarranted because the officer’s illegal seizure was “an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.”).

¹⁴ *Weeks v. United States*, 232 U.S. 383 (1914).

2016

FLAGRANT POLICE ABUSE

39

*the illegal fruit of police abuse of fundamental rights.*¹⁵

I. Introduction.....	40
II. Flagrant Police Abuse in the Courts.....	47
A. The Current Suppression Standard: <i>Utah v. Strieff</i>	48
B. The Development of the Flagrant Police Abuse Standard....	48
1. The Roberts Court Creates a New Suppression Standard	48
2. Defining “Flagrant” Police Abuse	50
3. Redefining “Flagrant” as Intentional, but not Obvious...	51
C. Operating the Flagrant Police Abuse Standard.....	52
1. Distinguishing the Leon Objective “Good Faith” Standard	52
2. Distinguishing Proof of Objective and Subjective Police Abuse of Rights.....	54
3. Distinguishing Precedent	55
III. Flagrant Police Abuse On The Streets	56
A. Exclusion as a Component of Judicial Integrity	56
B. Exclusion as a Behavior Modification Tool	57
1. Ignoring the Consequences: Incentivizing Police Abuse	57
2. Ignoring the Evidence: The Ferguson Effect	58
3. Ignoring the Evidence: The Black Lives Matter Cases...	59
4. Ignoring the Evidence: Policing the Police	62

¹⁵ Jon B. Gould & Stephen Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 333 (2004); David A. Harris, *How Accountability-Based Policing Can Reinforce or Replace the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 154 (2009) (citing a 2004 field study of police adherence to search and seizure standards conducted by Jon B. Gould and Stephen D. Mastrofski which concluded that observed “Fourth Amendment violations, some quite egregious, showed up in almost a third of all of the observed police investigations.”); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 611 (2011) (describing research showing that “15% of police officers interviewed admitted they would intentionally conduct an illegal search . . . [which] probably understates the extent to which police willfully violate the Fourth Amendment, since it is an admission against interest”); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 540 (2013) (citing studies involving “observation of police officers on patrol that found that 46% of pat-down searches were unconstitutional”); Taslitz, *supra* note 3, at 419-20 (“Empirical data and psychological and economic theory establish . . . [that] law enforcement violations of Fourth Amendment protections are numerous, and the obstacles to alternative remedies so great as to render them largely meaningless.”).

C.	Three Lessons from the Aggregated Evidence	63
IV.	Flagrant Police Abuse and the Doctrine of Attenuation	63
A.	The Doctrine of Attenuation	63
1.	The Traditional Doctrine of Attenuation.....	64
2.	Reinterpreting the Traditional Doctrine of Attenuation	66
3.	The Post-Strieff Doctrine of Attenuation	66
4.	Justice Breyer’s Shifting View of the Doctrine of Attenuation	68
5.	The Rise of Flagrant Police Abuse in the Doctrine of Attenuation	68
6.	The (Not So) Mysterious Omission of <i>Hudson v.</i> <i>Michigan</i>	70
V.	Conclusion: Justice Sotomayor and the Legacy of Justice Brandeis	72
A.	A Shared Concern with Judicial Integrity and the Court’s Socio-Normative Role	72
B.	Justice Sotomayor and the Modern Court	73

I. INTRODUCTION

Prior to ratification of the Constitution, Alexander Hamilton recognized the centrality of search and seizure protections.¹⁶ Thomas Jefferson and John Adams similarly opined that colonists’ anger and fear over unreasonable searches and seizures catalyzed the American Revolution.¹⁷ Over two centuries later, the Roberts Court began its

¹⁶ ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* 57 (N.Y. Univ. Press, 2006).

¹⁷ According to the Supreme Court in *Boyd v. United States*, 116 U.S. 616, 625 (1886): “In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms ‘unreasonable searches and seizures,’ it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;’ since they placed ‘the liberty of every man in the hands of every petty officer.’ This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. ‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of

approbation of illegal investigatory tactics through the creation of a new flagrant police abuse standard in *Herring v. United States*.¹⁸ Interestingly, it was the deliberate decision to place the word “flagrant” at the fulcrum of its new suppression standard that enabled justices, who routinely use language to change law, to begin to use law to change language.

Flagrant, derived from the Medieval Latin *flagrantem*, originally meant “ablaze.”¹⁹ In virtually every other context, flagrant continues to mean *both* “obvious” and “intentional.”²⁰ Only in the Roberts Court’s contemporary Fourth Amendment jurisprudence has the definition of flagrant been truncated and the word used solely as a synonym for intentional.

Starting with *Herring*, the Court redefined flagrant as deliberate law breaking, although a *mens rea* of recklessness or gross negligence could also suffice.²¹ The Court recently reaffirmed these stringent suppression requirements. In *Strieff*, the Court held that even a concededly illegal suspicion-less seizure is not flagrant, for suppression purposes, because, “[f]or the violation to be flagrant, more severe police misconduct

opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”

¹⁸ It is worth noting that much of what seemed new in *Herring* actually appeared 16 years earlier in a prescient but uncited law review article written by Professors Thomas and Pollack. See George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad Faith “Exception” to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 41-42 (1993). These authors anticipated an exclusionary rule bad faith standard “requiring a minimum mental state of recklessness,” or in the alternative defense proof of “ongoing and systematic violations of the Fourth Amendment.” *Id.* However, they notably diverged from the *Herring* Court in their opinion that juries, not judges, should decide all Fourth Amendment violation questions because “[g]iving juries the power to decree that the police have acted in bad faith is one small, but symbolically significant, way of putting the community in charge of the police.” See *id.* at 60.

¹⁹ *Flagrant*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/70958?redirectedFrom=flagrant#eid> (last visited Aug. 3, 2016); *Flagrant*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=flagrant&allowed_in_frame=0 (last visited Aug. 23, 2016).

²⁰ *Flagrant*, OXFORD ONLINE DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/flagrant (last visited Aug. 4, 2016); *Flagrant*, MERRIAM WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/flagrant> (last visited Aug. 23, 2016).

²¹ *Herring*, 555 U.S. at 143-44 (suppression requires defense proof of police “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence”).

is required than the mere absence of proper cause for the seizure.”²² *Strieff* builds on the *Herring* Court’s conclusion that “suppression is not an automatic consequence of a Fourth Amendment violation”²³ by clarifying that evidence of an obvious and apparent police abuse of rights is insufficient. Since *Herring*, the Court has justified the requirement of defense proof of police mental state with the opaque argument that “the [suppression] question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.”²⁴ However, the argument that behavior modification is more efficacious when the conduct one seeks to deter is more intentional is empirically unsupported and contrary to common sense, everyday experience, and the entire body of torts law.²⁵

The Court’s recent shift from flagrant as obvious to flagrant as intentional has escaped the attention of legal commentators, despite three profound effects of this “bait and switch” on law and practice. First, it covertly and dramatically increases the quantum of defense suppression proof. In the pre-*Herring* past, defendants could establish that a search or seizure was obviously illegal using the type of evidence typically available to them, their own eyewitness account of what police officers did and said. But because police officers rarely announce that they intend to break or disregard the law, defendants’ eyewitness testimony will be

²² *Strieff*, 579 U.S. at *9.

²³ *Herring*, 555 U.S. at 137.

²⁴ *Id.*

²⁵ An analysis of police and the efficacy of the Supreme Court’s efforts to deter police misconduct is beyond the scope of this Article. Currently, it may be beyond the scope of any article because little empirical research has ever been published on this question. Despite the lack of a real-world evidence base, the Court continues to simply presume that exclusion effectively deters at least some police misconduct. As Justice Blackmun complained 32 years ago in *United States v. Leon*, the assumption that police officers can be deterred “rests on untested predictions about police conduct.” *United States v. Leon*, 468 U.S. 897, 927-28 (1984). See also Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 856 (2013) (“Until the Court is willing to treat the exclusionary rule like other remedies and balance the deterrent function with additional priorities, it is left to fashion an exclusionary remedy relying exclusively on the empirically unanswerable questions surrounding deterrence.”); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 272 (1998) (“If one were to study the deterrence justification by interviewing convicted burglars, one would conclude that the threat of punishment does not deter at all.”); Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 16 (1993) (“[T]he defense of exclusion on the basis of its deterrent effect suffers from similar logical and empirical flaws.”).

either insufficient or, as the Black Lives Matter cases repeatedly demonstrate, unpersuasive.²⁶ Second, it rejects relevant precedent. The flagrant police abuse standard as understood and applied by the current Court requires judges to delve into the minds of individual officers, an inquiry inconsistent with the Court's longstanding view that police officers' "[s]ubjective intentions play no role in ordinary . . . Fourth Amendment analysis."²⁷ Third, it ignores reality. The Court's exclusionary jurisprudence rests on speculations about hypothetical suppression hearings that bear little resemblance to real world courts. As noted above, the consistent pattern of acquittals and grand jury non-indictments in the Black Lives Matter cases demonstrate that judges and juries are overwhelmingly reluctant to hold police officers mentally accountable for their aggressive, violent, or deadly conduct, even in the face of videotaped evidence.²⁸

Strieff arrives at a time when the challenges of policing and of policing the police have entered a new period of crisis.²⁹ The "Ferguson Effect," which the criminologist Richard Rosenfeld described in his June 14, 2016 report for the U.S. Department of Justice,³⁰ attributes a recent

²⁶ In *Herring*, the Court also suggested that exclusion could be warranted if the defendants provided adequate proof of systemic negligence. 555 U.S. at 157 (Ginsburg, J., dissenting). However, as Justice Ginsburg persuasively argued in her dissent, this was an "empty promise." *Id.* Defendants lack the resources for this type of discovery, and, even if they could pursue discovery, in most cases there would be no evidence to review because police departments have no incentive to maintain these records. *Id.*

²⁷ *Whren v. United States*, 517 U.S. 806, 813 (1996).

²⁸ The December 2014 grand jury non-indictment following Eric Garner's death, which was captured on videotape, surprised many New Yorkers including Mayor Bill de Blasio. See Amy Davidson, *What the Eric Garner Grand Jury Didn't See*, THE NEW YORKER (Dec. 4, 2014), <http://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see>.

²⁹ For an interesting study suggesting that police officers are, in fact, different from other government actors because they experience more intrinsic satisfaction when other people are punished, see Richard H. McAdams et al, *The Law of Police*, 82 U. CHI. L. REV. 135, 148 (2015) ("Now we can offer a simple explanation of the doctrinal distinction between police and other governmental actors. Even if many factors influence the decision to become a police officer, police are likely more punitive than other governmental actors or the public, and therefore they likely have lower thresholds of doubt for searches and seizures. Thus, police require more judicial monitoring and scrutiny than other governmental actors.").

³⁰ According to Professor Rosenfeld: "What has become known as the 'Ferguson effect' on the homicide increase, as noted, is subject to considerable controversy and evidence-free rhetoric. The term is also unfortunate, because it does not only apply to the police killing in Ferguson and because its precise meaning is unclear. The dominant de-policing

increase in homicides to a loss of trust in the police, especially in urban and racial and ethnic minority communities.³¹ Discussions of the existence or extent of any Ferguson Effect frequently include controversial causal speculations and allocation of blame to police departments and/or protesters.³² Putting aside questions of causation and responsibility that currently have no clear answer, Professor Rosenfeld's Justice Department report provides new and reliable evidence that recent unchecked public-police fear can have violent and even deadly consequences.

These problems should be apparent to members of the Supreme Court whose decisions are not made in a media vacuum. Decisions about Fourth Amendment rights and remedies are not theoretical or abstract. In fact, the justices have long acknowledged the impact of their decisions on policing³³ because, without constitutional constraints, for police officers who “engage[] in the often competitive enterprise of ferreting out crime,’ [it] raises the temptation to cut constitutional corners.”³⁴ Ultimately, it is police organizations that must respond to incentives and deterrents through training and internal controls, which makes the Court's repeated focus on individual officers confusing and counter-productive. Some knowledge of real-world policing clarifies the socio-normative jurisprudential obligations on the Court to anticipate, prevent, condemn, and remedy illegal police abuse of constitutionally protected rights.

interpretation is that highly publicized incidents of police use of deadly force against minority citizens, including but not limited to the Ferguson incident, caused police officers to disengage from their duties, particularly proactive tactics that prevent crime.” RICHARD ROSENFELD, NAT'L INSTITUTE OF JUSTICE, DOCUMENTING AND EXPLAINING THE 2015 HOMICIDE RISE: RESEARCH DIRECTIONS (2016), <https://www.ncjrs.gov/pdffiles1/nij/249895.pdf>.

³¹ *Id.* at 18-23.

³² Heather MacDonald, *The New Nationwide Crime Wave*, WALL ST. J. JOURNAL (May 29, 2015, 6:27 PM), <http://www.wsj.com/articles/the-new-nationwide-crime-wave-1432938425>; Matt Ford, *Debunking the Ferguson Effect*, THE ATLANTIC (Nov. 21, 2015), <http://www.theatlantic.com/politics/archive/2015/11/ferguson-effect/416931/>.

³³ *Weeks v. United States*, 232 U.S. 383, 392 (1914) (“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”)

³⁴ *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357, 374 (1998). (Souter, J. dissenting) (citing *United States v. Leon*, 468 U.S. at 914).

On the current Court, Justice Sotomayor increasingly speaks truth to power³⁵ by interjecting real-world policing problems, expressing concern for targeted populations, and seeking to preserve judicial integrity. In this role and context, Justice Sotomayor appears to be an intellectual heir to Justice Louis D. Brandeis who famously argued that the social and political role of the Court is to lead and teach by moral example.

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.³⁶

Justice Sotomayor aligned herself with Justice Brandeis when she warned of similar risks in her *Strieff* dissent:

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that *no one can breathe* in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.³⁷

When Justice Sotomayor wrote “no one can breathe,” she repeated Eric Garner’s dying words which have become a rallying cry for the “Black Lives Matter” movement.³⁸ Her powerful call to arms is a grim reminder that victims of violent or deadly police abuse are disproportionately young minority men. As Justice Sotomayor is undoubtedly aware, litigation resulting from New York City’s stop-and-frisk program³⁹ has recently substantiated (with extensive empirical evidence) the fact that minority groups are also disproportionately targeted for less intrusive interference with constitutional liberties.⁴⁰ But Justice

³⁵ Jade Greear, *Speaking Truth to Power*, Huffington Post (Dec. 22, 2015), http://www.huffingtonpost.com/jade-greear/speaking-truth-to-power_2_b_8824094.html

³⁶ *Olmstead v. United States*, 227 U.S. 438, 483-84 (1928).

³⁷ *Strieff*, 579 U.S. at *12 (Sotomayor J., dissenting).

³⁸ Ray Sanchez, *Police Chokehold Death Sparks New York Protest March*, CNN (Dec. 8, 2014), <http://www.cnn.com/2014/08/23/us/new-york-choke-hold-rally/>.

³⁹ *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 588 (S.D.N.Y. 2013).

⁴⁰ New York City announced on January 31, 2014 that it would settle its long-running legal fight over N.Y.P.D. stop and frisk practices and implement many of the specific

Sotomayor's warnings are aimed at a Court that is apparently immune to appeals to racial, ethnic, and social justice. A Court impervious to, if not complicit in, the police illegality it repeatedly condones by effectively ignoring police illegality and aggression by making blatant police abuse virtually irremediable.⁴¹

The exclusionary remedy, created over 100 years ago, once symbolized our moral commitment to lawful police investigations that respected privacy, property, and basic human dignity.⁴² By 1961, when *Mapp v. Ohio* was decided, exclusion was considered a vital component of our Fourth Amendment protections, if not a constitutional command.⁴³ Over the past half century, exclusion has lost its constitutional luster. Today the remedy is reserved only for defendants who can prove "police conduct . . . sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by

reforms identified in Judge Scheindlin's decision. Benjamin Weiser, *Mayor Says New York City Will Settle Suits on Stop and Frisk Tactics*, N.Y. TIMES (Jan. 31, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. Mayor Bill de Blasio's announcement was viewed as a dramatic reversal of the policies of the previous administration, which had credited a drop in violent crime to the same stop-and-frisk practices. *Id.*; see also Joseph Goldstein, *Judge Rejects New York's Stop and Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>; Katherine Macfarlane, *New York's Stop-and-Frisk Appeals are Still Alive*, BROOK. L. SCH. PRACTICUM (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370556 (essay exploring the possible effects of Judge Scheindlin's decision): Similar examples can be found outside of New York. . U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 4, 8 (2014), <http://www.justice.gov/usao/nj/Press/files/pdffiles/2014/NPD%20Findings%20Report.pdf> (finding that New Jersey Police Department stops have routinely violated the Fourth Amendment).

⁴¹ <http://www.scotusblog.com/2016/09/the-court-after-scalia-the-despicable-and-dispensable-exclusionary-rule/> (noting the "long line of cases . . . [where] the Court has refused to exclude evidence in various situations in which evidence found in or after an unconstitutional search").

⁴² As Justice Breyer observed in *Hudson v. Michigan*, 547 U.S. 586, 629-30 (2006) (Breyer, J., dissenting),

Our Fourth Amendment traditions place high value upon protecting privacy in the home. They emphasize the need to assure that its constitutional protections are effective, lest the Amendment sound the word of promise to the ear but break it to the hope. They include an exclusionary principle, which since *Weeks* has formed the centerpiece of the criminal law's effort to ensure the practical reality of those promises.

⁴³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

the justice system.”⁴⁴

The text of the Fourth Amendment remains unchanged. But over time, irremediable rights become ephemeral. By severely restricting access to exclusion, the Court has changed the nature and scope of constitutional protections. This concern transcends defendants confronted with illegally seized evidence at trial or during plea negotiations. It affects everyone who blithely assumes that the Bill of Rights protects against unlawful privacy intrusions and aggressive and illegal police abuse.

This article links the evolving suppression doctrine to the recent Black Lives matter cases to demonstrate the interrelationship between the Roberts Court’s jurisprudence and contemporary challenges that face anyone seeking to prove police culpability. Part I explores the constitutional evolution of the flagrant police abuse suppression standard including its most recent application to a concededly illegal seizure in *Utah v. Strieff*. Part II examines the problem of proving flagrant police abuse by contemplating the lessons of the Black Lives Matter cases. Part III critically evaluates recent efforts by the Roberts Court to map its increasingly stringent general suppression jurisprudence onto the preexisting, distinct, and more particularized doctrine of attenuation. Part IV locates this analysis within a more global understanding of the social, normative, and educational role of the Supreme Court as articulated nearly a century ago in the personal jurisprudence of Justices Brandeis and echoed today in decisions by Justice Sotomayor. The article concludes by denouncing our legal academic tradition of elevating explorations of theory at the cost of practice analysis. In virtually every area of inquiry, this is an artificial, unhelpful, and distracting divide. In the context of constitutional rights and remedies, theory arguments must incorporate an understanding of real police practices, evidentiary burdens, and the dangers to judicial integrity, social justice, and personal privacy. When theory and practice are properly integrated, evidence of police officer acquittals and non-indictments reveal flaws that should be fatal to the current Court’s theoretical speculations about the nature and operation of Fourth Amendment guarantees. Especially in this context, theory is epistemic only when it aids, illuminates, or organizes thinking; but theory repeatedly contradicted by actual evidence is prattle, philosophy, or politics.

II. FLAGRANT POLICE ABUSE IN THE COURTS

⁴⁴ *Herring*, 555 U.S. at 144.

A. The Current Suppression Standard: *Utah v. Strieff*

In June 2016, the Court decided *Utah v. Strieff*. The facts of this new case are simple. For the past half-century, since *Terry v. Ohio*,⁴⁵ police officers must have reasonable suspicion based on specific and articulable facts to stop anyone suspected of a crime.⁴⁶ In December 2006, an anonymous tipster called the Salt Lake City Police Department to report suspected drug activity at a particular house.⁴⁷ Officer Douglas Fackrell conducted intermittent surveillance for approximately three hours over the course of the following week.⁴⁸ While observing the house, Fackrell saw Edward Strieff leave and walk to a nearby convenience store. The officer followed and immediately seized Strieff by ordering him to stop in the store's parking lot.⁴⁹ Fackrell asked for identification. After Strieff had been seized without suspicion, the officer learned from police dispatch of an outstanding warrant for a minor traffic violation.⁵⁰ The officer placed Strieff under arrest and, during the search of his clothing incident to arrest, discovered a bag of methamphetamine and drug paraphernalia.⁵¹

Officer Fackrell's actions were unlawful because, as he conceded, he did not have reasonable suspicion to seize Strieff. Strieff unsuccessfully argued that the evidence should be suppressed and Justice Thomas, writing for a five-justice majority, easily agreed that exclusion was unwarranted. The short *Strieff* decision analyzed the legality of the search by examining the purpose and flagrancy of Officer Fackrell's conduct and whether the subsequent discovery of an outstanding warrant attenuated the search from the initial illegal seizure. *Strieff* purports to uphold precedent, but the opinion balances precariously on two legally and logically dubious conclusions: (1) a new variant on the evolving flagrant police abuse standard; and (2) counterfactual conclusions about actual police abuse. As discussed in more detail below, the *Strieff* Court also unpersuasively attempts to map its general suppression jurisprudence onto the distinct and more particularized doctrine of attenuation.

B. The Development of the Flagrant Police Abuse Standard

1. *The Roberts Court Creates a New Suppression*

⁴⁵ *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁴⁶ *Id.* at 21.

⁴⁷ *Strieff*, 579 U.S. at *2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Standard

As noted above, the flagrant police abuse standard used by the *Strieff* Court first appeared in *Herring v. United States*.⁵² *Herring* spawned a plethora of commentary and piscine puns,⁵³ but general academic grumbling about the disappearing exclusionary rule uniformly overlooked the Court's clever linguistic manipulations.⁵⁴ Starting with *Herring*, a majority of the Court transformed the operative constitutional language by inserting a single ambiguous word into the new suppression standard. In *Herring*, the Court focused on the fact that an "assessment of the *flagrancy* of the police misconduct constitutes an important step in the [exclusion] calculus."⁵⁵ Two years later, the *Davis* Court emphasized that suppression "focus[es] the inquiry on the *flagrancy* of the police misconduct at issue."⁵⁶ Most recently, the *Strieff* majority deemed suppression unwarranted based on the "especially significant [finding]

⁵² *Herring*, 555 U.S. at 144.

⁵³ See, e.g., Albert Alschuler, *Herring v. United States: A Minnow or a Shark Term Paper?* 7 OHIO ST. J. OF CRIM. L. 463 (2009); Kenneth Earl, *So Long and Thanks for All the Herring: The U.S. Exclusionary Rule after Herring and What the United States Can Learn from the Canadian Exclusionary Rule*, 31 WISC. INT'L L. J. 296 (2013); Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011).

⁵⁴ Many commentators found *Herring* obviously and immediately problematic. See, e.g., Michael Vitiello, *Herring v. United States: Mapp's "Artless" Overruling?* 10 NEV. L.J. 164, 165 (2009) ("*Herring* goes much further and points towards a much greater tolerance towards police misconduct because it allows the use of illegally seized evidence, unless it was the product of at least reckless conduct on the part of the police. If the Court, in fact, follows *Herring*'s logic and extends that rule to all searches, the Court will have adopted a rule without precedential support."); Claire Angelique Nolasco et al., *What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 223-24 (2011) ("Critics argue that the *Herring* decision has weakened the exclusionary rule, disregarded the rationale behind the good-faith doctrine, and effectively narrowed the exclusionary rule to exclude evidence only pursuant to systemic negligence and to flagrant and reckless violations of the Fourth Amendment.")

⁵⁵ *Herring*, 555 U.S. at 143; see also Vitiello, *supra* note 54, at 168 ("Building on the thesis of Judge Friendly's law review article on the exclusionary rule, the Court contended that the exclusionary rule should be limited to "flagrant or deliberate" violations of Fourth Amendment rights . . . [thereby] [i]gnoring many Supreme Court cases in which the Court suppressed evidence based on conduct that was arguably reasonable under the totality of the circumstances.")

⁵⁶ *Davis v. United States*, 564 U.S. 229, 238 (2011) (emphasis added) (internal quotations omitted).

that there is no evidence that Officer Fackrell's illegal stop reflected *flagrantly* unlawful police misconduct."⁵⁷ Thus, the Roberts Court's flagrant police abuse suppression standard has evolved to the point that concededly and patently illegal police misconduct is insufficiently flagrant to merit suppression.

2. Defining "Flagrant" Police Abuse

What is "flagrant" police misconduct? The word appears at the fulcrum of every modern exclusion case and over 55 times in the briefs filed in *Strieff*.⁵⁸ But not once in the voluminous pleadings, during oral arguments, or in the Court's own opinions do the justices, the parties, or amici attempt to define this pivotal word. Recent academic debate on the vanishing exclusionary rule has been especially lively. But the Roberts Court's decision to insert the word "flagrant" at the fulcrum of exclusion has, until now, been overlooked.

Flagrant is an interesting word. As noted above, *flagrantem* originally meant ablaze.⁵⁹ This meaning was derived from the phrase, *flagrantre delicto*, which describes a blazing crime and is evocatively and most commonly used for the mid-act discovery of sexual misconduct.⁶⁰ Thus, flagrant has always meant *both* "obvious" and "intentional."⁶¹ For example, in an analogous non-jurisprudential context, the dual meaning of "flagrant" recently motivated the NCAA Men's Basketball Rules Committee to change its official nomenclature replacing "intentional foul" with "flagrant foul."⁶² According to the NCAA, the change clarified that its goal is to penalize players who engage in obvious fouls without requiring officials to speculate about players' intent.⁶³

⁵⁷ *Strieff*, 479 U.S. at *9.

⁵⁸ The number 55 includes only the number of times the exact adjective "flagrant" was used throughout the briefs filed in *Strieff*. The word in its inverse, adverb, or noun forms (non-flagrant, flagrantly, and flagrancy) actually appears over 146 times throughout. *See id.*

⁵⁹ *See* definitions of "flagrant," *supra* notes 19-20.

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² The NFL, like the NCAA has deemphasized the question of the player's intent, noting that "[f]lagrant" in these rules does not necessarily imply malice on the part of the fouling player or an intention to injure an opponent." NAT'L FOOTBALL LEAGUE, 2015 OFFICIAL PLAYING RULES OF THE NAT'L FOOTBALL LEAGUE, *Preface* (2015) http://uaasnfl.blob.core.windows.net/live/1807/2015_nfl_rule_book_final.pdf.

⁶³ Through their rules revision, the NCAA acknowledged a player's intent is often difficult or impossible to discern, so "a player does not actually have to intend to make the illegal contact for the official to assess the conduct as an intentional foul." NAT'L COLLEGIATE ATHLETIC ASS'N, 2011-12 AND 2012-13 NCAA MEN'S BASKETBALL RULES

3. Redefining “Flagrant” as Intentional, but not Obvious

The Roberts Court, unlike the college basketball court, has moved in the opposite direction. Starting with *Herring*, the Court has repeatedly used the word flagrant when it actually means intentional or mentally culpable.⁶⁴ The Court’s deliberately inaccurate usage becomes increasingly apparent in each new case. This may be, as Linda Greenhouse has observed, additional evidence that “the conservative majority is permitting the court to become an agent of partisan warfare to an extent that threatens real damage to the institution.”⁶⁵ It may also demonstrate that “Chief Justice Roberts, who during his confirmation hearings promised judicial restraint above all else, has presided over a court that has been far too willing to undermine or discard longstanding precedent.”⁶⁶ But politics aside, purporting to seek evidence of flagrant misconduct, while actually demanding defense proof that a police officer acted intentionally or with a culpable mental state of recklessness or gross negligence creates real problems for both constitutional theory and criminal practice.⁶⁷ When flagrancy is defined as a hidden mental state it becomes unknowable. As Professor Uviller presciently observed three decades ago, “the distinction probably should not be cast in terms of ‘flagrant’ versus ‘technical’ transgressions of protected rights. . . [because] flagrancy is frequently in the eye of beholder—in this case, a *post facto* judicial beholder to whom certain protections may seem stronger or clearer than they appear to the detestable constable on the

CHANGES (approved May 23, 2011), <http://fs.ncaa.org/Docs/rules/mbb/2011/2011MBBfinalrules.pdf>; Greg Johnson, *Rule changes designed to reduce physical play, create offensive flow*, NCAA.COM (Nov. 5, 2013), <http://www.ncaa.com/news/basketball-men/article/2013-11-05/rule-changes-designed-reduce-physical-play-create-offensive>.

⁶⁴ *Herring* was the first decision to conflate flagrant with intentional/culpable police conduct in its characterization of precedent. See *Herring*, 555 U.S. at 144. According to the *Herring* majority, “flagrant conduct was at issue in *Mapp* . . . [but] since *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.” *Id.*

⁶⁵ Linda Greenhouse, *Resetting the Post-Scalia Supreme Court*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/18/opinion/resetting-the-post-scalia-supreme-court.html>.

⁶⁶ *The Activist Roberts Court 10 years in*, N.Y. TIMES (July 4, 2015), <http://www.nytimes.com/2015/07/05/opinion/sunday/the-activist-roberts-court-10-years-in.html>.

⁶⁷ *Herring*, 555 U.S. at 144; *Davis v. United States*, 564 U.S. at 238.

scene.”⁶⁸

C. Operating the Flagrant Police Abuse Standard

The Roberts Court regularly, if implausibly, claims that courts deciding suppression motions use an objective police officer standard, which limits the burden on the defendants to proof of “unreasonable” police misconduct. For example, in *Herring* the majority protested that it was not seeking “an inquiry into the subjective awareness of arresting officers.”⁶⁹ According to Chief Justice Roberts, the Fourth Amendment “good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances.”⁷⁰ Similarly in *Davis*, the Court hypothesized that proof and counter-proof during the suppression hearing focuses on the hypothetical police officer “act[ing] with an objectively reasonable good-faith belief that their conduct is lawful.”⁷¹ These deliberate and inaccurate efforts to minimize the defense burden of proof reflect a thinly veiled effort to align the evolving suppression standard with preexisting doctrine.⁷²

1. Distinguishing the *Leon* Objective “Good Faith” Standard

The Roberts Court’s repeated claim that its flagrant police abuse

⁶⁸ H. Richard Uviller, *The Acquisition of Evidence for Criminal Prosecution*, 35 Vand. L. Rev. 501, 514 (1982) (suggesting instead that the only workable distinction would be between police mistakes of fact and of law). However, the Court resolved the mistake of law question in 2014 in *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (holding that reasonable suspicion for a stop could be based on a reasonable mistake of law).

⁶⁹ *Herring*, 555 U.S. at 145.

⁷⁰ *Id.* at 145 (citing *Leon*, 468 U.S. at 897, 922 n.23).

⁷¹ *Id.* (quotations omitted).

⁷² See Kinports, *supra* note 25, at 842 (noting that after *Herring*, “proof of reckless—and certainly deliberate—misconduct envisions a subjective inquiry into the state of mind of the actual officer whose actions are in question”); George M. Dery III, *The “Bitter Pill”: The Supreme Court’s Distaste for the Exclusionary Rule in Davis v. United States Makes Evidence Suppression Impossible to Swallow*, 23 GEO. MASON U.C.R. L.J. 1, 26 (2012) (noting that the problem with *Herring* was that the Court created a new “inquiry [stripping away] the straightforward assessment of what a reasonable person would do in a particular situation . . . [and] leads to questions of intent and motivation of a particular person and inquiry explicitly rejected by the court in *Whren*.”); see also Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1105 (2011) (suggesting that “the *Leon* opinion made clear that the Court had in mind an objective inquiry into costs and benefits: the proper inquiry was objective reasonableness, not subjective good faith . . . [However,] the phrase ‘good faith’ has led some courts to assume that the good faith exception applies when an officer acts in subjective good faith”).

standard merely applies *United States v. Leon*⁷³ is especially unconvincing. In *Leon*, the Court created a limited exception to the probable cause requirement covering cases involving a police officer's reasonable and "good faith"⁷⁴ execution of a facially-valid warrant.⁷⁵ *Leon* was a narrow decision that did not envision restricting remediable Fourth Amendment violations to mentally culpable police misconduct.

On closer inspection, the differences between *Leon* and the post-*Herring* suppression cases are greater than the similarities. First, in *Leon* the prosecutor (the party most likely to have access to relevant evidence) bore the burden of proof on the issue of reasonable police officer mental state. Second, because *Leon* involved the execution of a search warrant, the reviewing court had access to the documentary evidence necessary to assess both the lack of probable cause and the facial validity of the warrant (e.g., investigatory records, the affidavit, the warrant, and any other paperwork generated by the issuing judge or magistrate).⁷⁶ Third,

⁷³ *Leon*, 468 U.S. at 897.

⁷⁴ Astute commentators have opined that *Leon* conflated two different "good faith" standards because "the term, 'reasonable good-faith belief,' seems to be both objective and subjective[;] . . . [t]hat is, the policeman must subjectively believe in the validity of the warrant, and that belief must be objectively reasonable." Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 353-54 (2006); see also Orin S. Kerr, *supra* note 72 at 1105 (suggesting that although "the *Leon* opinion made clear that the Court had in mind an objective inquiry into costs and benefits: the proper inquiry was objective reasonableness, not subjective good faith . . . [b]ut the phrase 'good faith' has led some courts to assume that the good faith exception applies when an officer acts in subjective good faith").

⁷⁵ *Leon*, 468 U.S. at 922 (establishing an exception to the exclusionary rule based on proof from the prosecution that a police officer acted in "objectively reasonable reliance" on a "facially valid search warrant").

⁷⁶ On its face, *Leon* is limited to warrant-based searches. *Id.* at 922. Under *Leon*, a prosecutor seeking to establish reasonable police "good faith" following a search or seizure executed pursuant to a warrant, can rely on a paper trail that invariably includes the signed warrant and affidavit. *Id.* at 920-21. The paper trail is a vital component of the prosecutor's proof because "[i]t is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Id.* at 921. In fact, *Leon* implicitly rejects any extension of the new good faith exception to warrantless searches by finding that a "search warrant provides the detached scrutiny of a neutral magistrate . . . [it is] a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 913-14. Moreover, a 2012 study of over 700 federal appellate court cases found that, prior to *Herring*, the *Leon* good faith exception was almost exclusively applied in cases involving warrants. See Robert C. Hauhart & Courtney C. Choi, *The Good Faith Exception to the Exclusionary Rule*, 48 CRIM. L. BULL. 316, 343-

although *Leon* introduced a reasonable “good faith” search warrant exception, the actual mental culpability of the police officer was wholly irrelevant to the Court’s analysis. Under *Leon*, the only question for a court reviewing the “good faith” execution of a search warrant is whether a reasonable police officer, after reading the warrant, would have found it facially-valid and would have proceeded to execute the search.

2. *Distinguishing Proof of Objective and Subjective Police Abuse of Rights*

Deprived of legitimate *Leon* paternity, the Roberts Court must take responsibility for creating a new flagrant police abuse standard that appears to require defense proof of subjective, or at least partially subjective, police officer bad faith.⁷⁷ This expansion of the defense suppression burden is revealed by an examination of evolving law and existing practice.

First, the Fourth Amendment itself requires “reasonable” searches and seizures. The Roberts Court claimed that it merely required proof of unreasonable police misconduct. If that were true, the Court would have been seeking evidence that was both unnecessary and redundant.

Second, more recent case law clearly reveals a demand that defendants must prove subjective, or partly subjective police mental state. For example, the *Davis* Court characterized the defendant’s burden as proving that the “officers who conducted the search . . . violate[d] Davis’s Fourth Amendment rights deliberately, recklessly, or with gross negligence.”⁷⁸ As Justice Alito suggested, there must be evidence of the investigating officers’ deliberate, reckless, or grossly negligent states of mind. In *Herring*, Justice Ginsburg raised the subjective evidence concern in her dissent opining that “[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry onto the mental state of the

46 (2012) (conducting an extensive study of 700 federal appellate cases applying *Leon* to conclude that the cases only governed warrant-based searches).

⁷⁷ *Herring*, 555 U.S. at 144 (“As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct . . .”); see also Claire Angelique Nolasco, *What Herring Has Wrought: An Analysis of Post-Herring Cases in the Federal Court*, 38 AM. J. CRIM. L. 221, 222-23 (2011). Though defendants can attempt to prove that the illegality was the result of recurring or systemic police negligence, the Court’s suggestion that suppression could be obtained following proof of “systematic error” is likely an empty promise because most defendants lack the resources for this type of discovery and police departments have no incentive to maintain these types of records. See *Herring*, 555 U.S. at 150 (Ginsburg, J., dissenting).

⁷⁸ *Davis*, 564 U.S. at 240.

police.”⁷⁹ More recently, Professor Kinports persuasively argued that “an inquiry focused on the reasonable police officer with similar information and experience might arguably retain the objectivity of a reasonable-person-under-all-the-circumstances test, [but] this is a negligence standard.”⁸⁰ This cannot jibe because the post-*Herring* Court has consistently rejected the argument that proof of police negligence is sufficient evidence for suppression.

Finally, there is a vast (if frequently overlooked) practical and evidentiary difference between proving that a police officer acted intentionally, recklessly, or with gross negligence and proving that an abuse of rights was intentional, reckless, or grossly negligent. When police officers investigate crimes their actions are virtually always intentional, rather than accidental or mistaken. So it will never be difficult for defense counsel to prove, for example, a police officer intended to enter a dwelling, deliberately stopped a driver, or knowingly searched a suspect’s pockets. In contrast, proving an intentional, reckless, or grossly negligent abuse of rights—especially post-*Strieff* which deemed an obvious and conceded police illegality insufficient—will be virtually impossible.⁸¹

Proof of *mens rea* is, of course, an element of virtually all criminal laws. But we accept this heavy prosecution burden as a foundational component of the presumption of innocence. In contrast, the Roberts Court’s decision to place an equally heavy burden on defendants seeking suppression devalues fundamental Fourth Amendment protections and ignores the realities of police investigations, discovery of evidence, and criminal practice. Searches and seizures are rarely witnessed events, police officers characteristically do not disclose to suspects their intent to violate the constitution, and police officers who witness illegal police conduct are unlikely to be cooperative and forthcoming. Thus, defendants typically must rely on their own first-hand eyewitness accounts of police misconduct, which are necessarily self-serving and may also be incomplete or poorly-recalled.

3. *Distinguishing Precedent*

⁷⁹ *Herring*, 555 U.S. at 157 n.7 (Ginsburg, J., dissenting).

⁸⁰ See Kinports, *supra* note 25, at 842.

⁸¹ Under our exclusionary rule precedents, this acknowledged absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. *Davis*, 564 U.S. at 240 (citing *Herring*, 555 U.S. at 144).

The Court initially addressed the distinction between proof of objective and subjective police intent two decades ago, in *Whren v. United States*. In the well-known language of *Whren*, Justice Scalia opined that “[s]ubjective intentions play no role in ordinary . . . Fourth Amendment analysis.”⁸² Eight years later, Justice O’Connor elaborated on the complexities of proving subjective police intent in *Missouri v. Siebert*.⁸³ According to Justice O’Connor, restricting suppression to “intentional violations would require focusing constitutional analysis on a police officer’s subjective intent, an unattractive proposition that we all but uniformly avoid.”⁸⁴ Justice O’Connor sensibly opined that police mental culpability should be wholly irrelevant to the decision to admit or exclude evidence because “[t]houghts kept inside a police officer’s head cannot affect that [suspect’s] experience.”⁸⁵ Under these cases, a defendant seeking suppression could rely on objectively ascertainable facts witnessed by the defendant during the investigation and did not need to prove police mental state. Proof of police intent was unnecessary because a “suspect who experienced exactly the same [police abuse of rights] . . . save for a difference in the undivulged, subjective intent of the interrogating officer . . . would not experience [it] any differently.”⁸⁶

III. FLAGRANT POLICE ABUSE ON THE STREETS

A. Exclusion as a Component of Judicial Integrity

As the exclusion doctrine has developed over time, the Court’s objectives have narrowed and solidified. When *Mapp v. Ohio* was decided in 1961, the Court famously opined that exclusion was “an essential part of the right to privacy.”⁸⁷ The Fourth Amendment “right to privacy,” according to the *Mapp* Court, included the exclusion of illegally seized evidence as a matter of constitutional principle and judicial integrity. Suppression, according to the *Mapp* Court, would also teach state police officers to respect constitutional limits when conducting criminal investigations.⁸⁸ *Mapp* incorporated the remedy of exclusion following constitutional violation by state police, but many issues remained unresolved. These included questions about the status of the remedy status (e.g., Was it a constitutional requirement or a judge-made rule?) and its

⁸² *Whren*, 517 U.S. at 813.

⁸³ *Missouri v. Seibert*, 542 U.S. 600, 625-26 (2004) (O’Connor, J., concurring).

⁸⁴ *Id.*

⁸⁵ *Id.* at 624-25.

⁸⁶ *Id.*

⁸⁷ *Mapp*, 367 U.S. at 656.

⁸⁸ *Id.* at 657.

objectives (e.g., Did the remedy preserves the legitimacy of the criminal justice system, protect courts from unreliable evidence, and/or deter government law-breaking?). How the Court has answered or avoided these questions over the past six decades provides insight into the justices' shifting constitutional priorities and their evolving views on police practices and criminal justice.

B. Exclusion as a Behavior Modification Tool

Although *Mapp* did not contain a balancing test, modern suppression cases typically balance the “cost” of exclusion against the “benefit” of police deterrence.⁸⁹ The Court has wide latitude to advance conceptual or theoretical objectives (e.g., competing approaches to textual interpretation, conflicting views on the limits of congressional authority, or alternative understandings of scope of the Free Exercise Clause). But these are rhetorical frameworks that organize and prioritize interpretation of a binding or guiding text, relevant and persuasive case law, pertinent historical information, and arguments of logic and common sense. Arguably the justices should be more constrained when they purport to engage in behavior modification. Much has been written elsewhere (and will not be repeated here) about the lack of empirical support for the Roberts Court's repeated claim that intentional or otherwise mentally culpably behavior is easier to deter. In the suppression context, the Court purports to use its authority to deter police abuse of Fourth Amendment rights. Because these are not rhetorical or theoretical objects, the Court should operate from an evidence-based understanding of human behavior and be accountable for the real-world consequences of its decision. However, as Justice Sotomayor recently argued, the Court remains willfully blind to its effects on policing and to the fact that “unlawful police stops corrode all our civil liberties and threaten all our lives.”⁹⁰

1. Ignoring the Consequences: Incentivizing Police

⁸⁹ In *Herring*, the Court found that “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring*, 555 U.S. at 144. The *Herring* Court also opined that, even if the application of the rule would have some deterrent effect, the Court must additionally conclude that “the benefits of deterrence must outweigh the costs.” *Id.* at 145. In *Davis*, the Court found that “real deterrent value is a necessary condition for exclusion, but it is not a sufficient one.” *Davis*, 564 U.S. at 237. Most recently, in *Strieff*, the Court found “that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits.” *Strieff*, 579 U.S. at *1.

⁹⁰ *Strieff*, 579 U.S. at *12 (Sotomayor J., dissenting).

Abuse

A Supreme Court that ignores evidence relevant to assessing the effect of its decisions on police abuse of constitutional rights abnegates its normative, social, and educational responsibilities. As Justice Sotomayor recently opined, decisions from the Court withholding the remedy of exclusion can (paradoxically) incentivize rather than deter illegal searches and seizures because “condon[ing] officers’ use of these [investigatory] devices without adequate cause . . . giv[es] them reason to target pedestrians in an arbitrary manner.”⁹¹ More specifically, Justice Sotomayor has expressed her fear that the *Strieff* Court incentivized aggressive policing that disproportionately affects poor, ethnic, and minority communities because, in certain neighborhoods, police officers will play the odds by assuming the existence of an outstanding warrant insulating their illegal conduct from subsequent judicial scrutiny.⁹²

2. Ignoring the Evidence: The Ferguson Effect

New concerns that the Court’s flagrant police abuse standard may have long term deleterious consequences—especially on urban minority communities—have recently been substantiated. In Professor Richard Rosenfeld’s June 2016 U.S. Department of Justice Report,⁹³ 2015 crime data from 56 U.S. cities revealed a 17% overall increase in homicides⁹⁴ and a 33% increase in homicides in the top 10 cities.⁹⁵ According to Professor Rosenfeld, the evidence indicates “some version of the Ferguson Effect.”⁹⁶ Professor Rosenfeld equivocates in his attribution of fault to avoid aligning himself with either of the two controversial but conflicting explanations for a Ferguson Effect.⁹⁷ According to Professor

⁹¹ *See id.* at *10.

⁹² *See id.*

⁹³ *See Rosenfeld, supra* note 30.

⁹⁴ *Id.* at 5-10.

⁹⁵ *Id.* at 10-11.

⁹⁶ *Id.* at 18; *Murder Rate Spike Could Be ‘Ferguson Effect’, DOJ Study Says*, NPR.COM (June 15, 2016, 4:41 AM), <http://www.npr.org/2016/06/15/482123552/murder-rate-spike-attributed-to-ferguson-effect-doj-study-says>.

⁹⁷ Professor Rosenfeld presents numerous theories in this paper. The most controversial suggests that after law enforcement killings of young black men, residents of urban minority neighborhoods have lost confidence in the police. “A loss of trust could make residents of those places less likely to share information with law enforcement about dangerous criminals. With a newfound sense of impunity, these criminals might have begun committing even more crimes. And threatened by violence, neighbors might harm themselves instead of going to the police for protection, the theory suggests.” Max Ehrenfreund, *A new federal report discusses an unexpected theory for why murders are rising in U.S. cities*, WASH. POST (June 15, 2016),

Rosenfeld,

[P]eople disagree about what that effect is. It could be about police holding back, afraid they'll be criticized later for what they see as doing their job. Or you could look at it from the opposite point of view: that it's a matter of citizens — especially black people — losing faith in local cops.⁹⁸

Ultimately, it may be difficult to establish which factors have contributed to the recent increase in violent crime. However, Professor Rosenfeld's evidence seems to disprove popular speculation that attributes increased urban homicides to a larger heroin market⁹⁹ or to the recent release of former prisoners¹⁰⁰ and to unequivocally demonstrate a significant increase in crime that correlates with the post-Ferguson increase in public-police distrust.

3. *Ignoring the Evidence: The Black Lives Matter Cases*

The “Ferguson Effect” purports to link the recent increase in homicides and other violent crime to media attention focusing on a series of cases involving fatal police encounters, especially with young African-American suspects, and their legal and social aftermath. But the social impact of these cases is poorly communicated by the aggregated data. Instead, it is enlightening to review the facts and circumstances of a few recent cases – some of which received the media spotlight and galvanized social protest – while others were virtually ignored.

Michael Brown: An unarmed 18-year-old shot to death on August 9, 2014 in Ferguson, Missouri by Police Officer Darren Wilson. Officer Wilson was not indicted by the grand jury.¹⁰¹

Eric Garner: An unarmed 43-year-old died after being put in a chokehold while being arrested for allegedly selling cigarettes on July 17, 2014. The event was captured on a cellphone video and Eric Garner can be heard uttering his last words: “I can't breathe, I can't breathe.” In December, the grand jury declined to indict Officer Pantaleo, the officer

<https://www.washingtonpost.com/news/wonk/wp/2016/06/15/the-unexpected-way-the-ferguson-effect-might-be-causing-more-murder/>.

⁹⁸ Rosenfeld, *supra* note 30, at 18.

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 16.

¹⁰¹ *Fires, vandalism, gunfire follow grand jury decision in Ferguson*, NBC NEWS (Nov 24, 2014), <http://www.cbsnews.com/news/ferguson-decision-grand-jury-decides-not-to-charge-police-officer-darren-wilson-in-michael-brown/>.

who performed the illegal chokehold.¹⁰²

Tamir Rice: A 12-year-old playing with a pellet gun in a park in Cleveland Ohio, shot to death on November 22, 2014 by Police Officers Loehmann and Garmback. Officers Loehmann and Garmback were not indicted by the grand jury.¹⁰³

John Crawford III: A 22-year-old shot to death on August 5, 2014 in a Wal-Mart in Beavercreek, Ohio after picking up a BB gun in one of the store aisles. The grand jury, which had access to photographic and video evidence and heard from 18 witnesses, declined to indict any of the police officers involved.¹⁰⁴

Alex Nieto: A 27-year-old college student and security officer shot to death on March 14, 2014 by four police officers who fired over 48 bullets. Mr. Nieto was sitting on a Bernal Heights Park bench in San Francisco, California eating a burrito next to the Taser he carried for his job. The officers were not indicted and a federal jury rejected the family's claim for civil damages finding that the force used by the four officers was not excessive.¹⁰⁵

Christian Taylor: An unarmed 19 year-old shot to death on August 7, 2015 by Police Officer Brad Miller at a car dealership in Arlington, Texas. Officer Miller, a trainee, was not indicted by the grand

¹⁰² Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 14, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?_r=0.

¹⁰³ Tim Stelloh, *Report Questions Tamir Rice Grand Jury Proceedings*, NBC NEWS (Jan. 21, 2016), <http://www.nbcnews.com/news/us-news/report-raises-questions-about-tamir-rice-grand-jury-n500851>; Berman, *supra* note 8; Ben Mathis-Lilley, *Report: Tamir Rice Grand Jury Never Actually Voted on Whether to Indict Officers*, SLATE (Jan. 20, 2016), http://www.slate.com/blogs/the_slatest/2016/01/20/report_tamir_rice_grand_jury_never_voted_on_indictment.html.

¹⁰⁴ Mark Berman, *No indictments after police shoot and kill man at an Ohio Wal-Mart; Justice Dept. launches investigation*, WASH. POST (Sept. 24, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/24/no-indictments-after-police-shoot-and-kill-man-at-an-ohio-wal-mart-justice-dept-launches-investigation/?utm_term=.ff21ff2e4093; Mark Gokavi, *Special grand jury to get evidence in Walmart shooting case*, DAYTON DAILY NEWS (Sept. 20, 2014), <http://www.daytondailynews.com/news/news/crime-law/special-grand-jury-to-get-evidence-in-walmart-shoo/nhQsD/>.

¹⁰⁵ Kale Williams et al., *Jury in Nieto trial finds SF cops did not use excessive force*, S.F. GATE (March 10, 2016), <http://www.sfgate.com/news/article/Jury-in-Nieto-trial-find-SF-cops-did-not-use-6882807.php>.

jury.¹⁰⁶

David Kassick: An unarmed 59-year-old shot to death on February 2, 2015 in Hummelstown, Pennsylvania by Police Officer Lisa Mearkle, after Kassick began running for unknown reasons. Mearkle, who stunned Kassick four times with a Taser and shot him twice in the back, was acquitted of all charges.¹⁰⁷

John Hesselbein: An unarmed 32-year-old, was shot to death on January 30, 2011 in Sacramento, California by Police Officer Paul Beckham. Officer Beckham, who had arrested, handcuffed, and placed Hesselbein into the back of his patrol car shot him in the face with his rifle. After claiming self-defense, Officer Beckham was acquitted of all charges.¹⁰⁸

Nicholas Thomas: A 23-year-old Goodyear employee shot to death on March 24, 2015 in Cobb County, Georgia by Sergeant Kenneth Owens. Sergeant Owens, who was attempting to serve a subpoena when Thomas jumped into a customer's Maserati and began driving, was not indicted by the grand jury.¹⁰⁹

Jonathan Santellana: An unarmed 17-year-old shot to death on November 13, 2013 in Navasota, Texas by plainclothes off-duty Police Officer Rey Garza after Santellana put his car in reverse and attempted to flee. Officer Garza, who shot Santellana in the back seven times, was not indicted by the grand jury.¹¹⁰

¹⁰⁶ *Grand Jury declines to indict Arlington officer for shooting teen at dealership*, FOX 4 NEWS (June 8, 2016), <http://www.fox4news.com/news/156025177-story>; Mitch Mitchell, *Fired Arlington officer not indicted for killing Christian Taylor*, FT. WORTH STAR-TELEG. (June 8, 2016), <http://www.star-telegram.com/news/local/community/arlington/article82558822.html>.

¹⁰⁷ *Pennsylvania officer who fatally shot unarmed man in back cleared of murder*, THE GUARDIAN (Nov. 5, 2015), <https://www.theguardian.com/us-news/2015/nov/05/pennsylvania-officer-acquitted-murder-david-kassick>; Ivey De Jesus, *Why the jury acquitted Lisa Mearkle*, PENN LIVE (Nov. 9, 2015), http://www.pennlive.com/midstate/index.ssf/2015/11/lisa_mearkle_verdict_jury_acqu.html.

¹⁰⁸ Denny Walsh, *Jury exonerates Elk Grove police officer in shooting*, THE SACRAMENTO BEE (Nov. 18, 2015), <http://www.sacbee.com/news/local/crime/article45422316.html>.

¹⁰⁹ Mandi Milligan, *Grand jury finds Smyrna officer justified in Nicholas Thomas shooting*, CBS46.COM (July 9, 2015), <http://www.cbs46.com/story/29511972/grand-jury-finds-smyrna-officer-justified-in-nicholas-thomas-shooting?autostart=true>.

¹¹⁰ Tom Abrahams, *Navasota Officer Won't Face Charges for Fatally Shooting Teen*, ABC13.COM (Aug. 26, 2014), <http://abc13.com/news/navasota-officer-wont-face-charges-for-fatally-shooting-teen/281936/>; James Pinkerton, *Local Grand Juries Cleared*

The FBI does not keep records of “justifiable police homicides,”¹¹¹ so specific case narratives provide the only reliable information about the nature of the current policing crisis. Unless the FBI policy changes, estimating the number of police officers who are unindicted or acquitted after deadly seizures or attempted seizures of suspects will remain impossible.

4. *Ignoring the Evidence: Policing the Police*

The new Justice Department report confirms policing concerns revealed through other recent research efforts. For example, a large study conducted by the Pew Research Center immediately after Michael Brown’s 2014 death in Ferguson, Missouri, people asked whether the public trusted the police to treat people equally, regardless of race.¹¹² At the time, “46% of black respondents told Pew that they had “very little” confidence in the police to do so. This was a significant shift from previous survey results. In 2009, when Pew had asked the same question, just one third of black respondents expressed similar policing concerns.¹¹³

The growing body of empirical evidence of a policing crisis includes proof of increased police misconduct at all levels. In recent lawsuits challenging the constitutionality of New York City’s stop-and-frisk program,¹¹⁴ the federal district court developed extensive evidence that New York City police officers routinely disregarded Fourth Amendment rights and interfered with liberty interests for no reason or based on racial or ethnic stereotypes and profiles.¹¹⁵ The data from New

Every Officer in Shooting cases last year, THE HOUSTON CHRONICLE (Jan. 4, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Local-grand-juries-cleared-every-officer-in-5993700.php>.

¹¹¹ Taylor Kate Brown, *The Cases Where U.S. Police have Faced Killing Charges*, BBC NEWS (April 8, 2015), <http://www.bbc.com/news/world-us-canada-30339943>.

¹¹² <http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/>

¹¹³ Ehrenfreund, *supra* note 97.

¹¹⁴ *Floyd*, 959 F. Supp. 2d at 588.

¹¹⁵ New York City announced on January 31, 2014 that it would settle its long-running legal fight over N.Y.P.D. stop and frisk practices and implement many of the specific reforms identified in Judge Scheindlin’s decision. Benjamin Weiser, *Mayor Says New York City Will Settle Suits on Stop and Frisk Tactics*, N.Y. TIMES (Jan. 31, 2014), <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>. Mayor Bill de Blasio’s announcement was viewed as a dramatic reversal of the policies of the previous administration, which had credited a drop in violent crime to the same stop-and-frisk practices. *Id.*; see also Joseph Goldstein, *Judge Rejects New York’s Stop and Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights->

York also demonstrated that the law enforcement and community policing benefits of an aggressive “stop and frisk” program were scant because over the ten-year review period, only 1.5% of 4.4 million people stopped were actually carrying weapons.¹¹⁶

C. Three Lessons from the Aggregated Evidence

The empirical evidence illuminates three problems plausibly linked to a decade of Roberts Court’s exclusion doctrine. First, the evidence substantiates Justice Sotomayor’s concern that the Court “reward[s] manifest neglect if not an open defiance of the prohibitions of the Constitution.”¹¹⁷ Second, it revives Justice Blackmun’s nearly four-decade-old concern that the Court’s suppression jurisprudence should not “rest on untested predictions about police conduct.”¹¹⁸ Third, it suggests that the Court’s repeated reluctance to publicly disavow aggressive policing by suppressing evidence also is having an increasingly deleterious effect on public-police trust.

IV. FLAGRANT POLICE ABUSE AND THE DOCTRINE OF ATTENUATION

A. The Doctrine of Attenuation

As discussed above, in *United States v. Strieff*, the Court found “no evidence that Officer Fackrell’s illegal stop reflected *flagrantly* unlawful police misconduct.”¹¹⁹ However, the Court also held that the

judge-rules.html; Katherine Macfarlane, *New York’s Stop-and-Frisk Appeals are Still Alive*, BROOK. L. SCH. PRACTICUM (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370556 (essay exploring the possible effects of Judge Scheindlin’s decision); Similar examples can be found outside of New York. . U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 4, 8 (2014), <http://www.justice.gov/usao/nj/Press/files/pdffiles/2014/NPD%20Findings%20Report.pdf> (finding that New Jersey Police Department stops have routinely violated the Fourth Amendment).

¹¹⁶ See *Floyd*, 959 F. Supp. 2d at 558 (“52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.”), *appeal dismissed* (Sept. 25, 2013); David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 124 (2013); Robert Gearty & Corky Siemaszko, *NYPD stop-and-frisk policy yielded 4.4 million detentions but few results: study*, N.Y. DAILY NEWS (Apr. 3, 2013), <http://www.nydailynews.com/new-york/nypd-stop-and-frisk-detains-millions-resultsarticle1.1307179> (discussing Professor Jeffrey Fagan’s research revealing that only one-tenth of 1% of New York City stop-and-frisks resulted in firearms confiscation from 2004 to June 30, 2012).

¹¹⁷ *Strieff*, 579 U.S. at *3,

¹¹⁸ *Leon*, 468 U.S. at 928.

¹¹⁹ *Strieff*, 579 U.S. at 9

search at issue had been attenuated from the illegal seizure by subsequent discovery of the outstanding warrant.¹²⁰ This second rationale reflects an obvious, if ultimately unpersuasive, effort to map its increasingly stringent general suppression jurisprudence onto the preexisting, distinct, and more particularized doctrine of attenuation.

1. *The Traditional Doctrine of Attenuation*

The Supreme Court first explored the possibility that a prosecutor might establish the attenuation of constitutional violation taint in 1963 in *Wong Sun v. United States*.¹²¹ In *Wong Sun*, which involved the admissibility of two different statements, the Court held that statements made immediately after the officers' unlawful entry should have been excluded.¹²² However, statements made days later (after the suspect had been released from custody and returned voluntarily to speak to the police) had been properly admitted because "the connection between the arrest and the statement had become so attenuated as to dissipate the taint."¹²³ According to Justice Brennan:

We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.¹²⁴

Under *Wong Sun*, prosecutors bore the full burden of proving attenuation, by showing that the suspect's statement "was sufficiently an act of free will to purge the primary taint of the unlawful invasion."¹²⁵ After *Wong Sun*, the Court did not address attenuation for the next 12 years.

¹²⁰ *See id.*

¹²¹ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

¹²² *Id.* at 487-88 ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.").

¹²³ *Id.* at 491.

¹²⁴ *Strieff*, 579 U.S. at *3 (Sotomayor, J., dissenting) ("Fruit that must be cast aside includes not only evidence found by an illegal search but also evidence 'come at by exploitation of that illegality.'") (citing *Wong Sun*, 371 U.S. at 488).

¹²⁵ *Wong Sun*, 371 U.S. at 486.

In 1975, in *Brown v. Illinois*, the Court held unconstitutional an Illinois statute creating a *per se* rule that *Miranda* warnings broke the causal chain.¹²⁶ But *Brown* provided more general guidance for prosecutors seeking to argue attenuation.¹²⁷ Echoing *Wong Sun*, the “apt” attenuation question, according to the *Brown* Court, was “whether . . . the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”¹²⁸ According to Justice Blackmun, who wrote for the *Brown* majority, “[i]t is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality.”¹²⁹ But to break the causal chain, attenuation required prosecution proof “not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be sufficiently an act of free will to purge the primary taint.”¹³⁰

The *Brown* Court relied on a totality of the circumstances approach to conclude that the illegal arrest had tainted the suspect’s subsequent Mirandized statements.¹³¹ According to Justice Blackmun, in the case at hand, the illegal arrest had been a patently lawless effort to gather inculpatory evidence.

The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was for investigation or for questioning. The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up.¹³²

Under these circumstances, the fact that the suspect’s statement was taken nearly two hours after the arrest and in a different location did not alter the Court’s finding that “there was no intervening event of significance whatsoever” or its decision to exclude the suspect’s statements as the poisoned fruit of his illegal seizure.¹³³

As *Wong Sun* and *Brown* illustrate, under traditional attenuation

¹²⁶ *Brown v. Illinois*, 422 U.S. 590, 591-92 (1975).

¹²⁷ *Id.* at 604.

¹²⁸ *Id.* at 599.

¹²⁹ *Id.* at 603.

¹³⁰ *Id.* at 602.

¹³¹ *Id.* at 605.

¹³² *Id.*

¹³³ *Id.* at 604.

doctrine, the Court has balanced prosecution-proffered proof of attenuation against defense proof of lasting constitutional taint. As was the case in *Brown*, defendants seeking to rebut prosecution evidence of attenuation could prevail by offering proof of patently illegal police abuse of constitutional rights because courts provided with such proof were instructed to suppress the evidence whenever “the impropriety of the arrest was obvious.”¹³⁴ Notably missing from these cases is any suggestion that defendants also bore the burden of proving the mental culpability of the police officers who had engaged in the obvious and remediable misconduct.

2. *Reinterpreting the Traditional Doctrine of Attenuation*

In *Strieff*, Justice Thomas concluded that Officer Fackrell’s “discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest.”¹³⁵ The *Strieff* Court arrived at this conclusion by reducing the Court’s attenuation jurisprudence to a single case,¹³⁶ misreading the case as limited to three factors, and then solving the constitutional question arithmetically. According to the *Strieff* majority, under *Brown v. Illinois*, attenuation must be established by judicial assessment of: (1) temporal proximity; (2) intervening circumstances; and (3) the purpose and flagrancy of the police misconduct.¹³⁷

3. *The Post-Strieff Doctrine of Attenuation*

According to the *Strieff* Court, the first factor in the assessment of attenuation of constitutional taint is a measure of the time that passes “between the initially unlawful stop and the search.”¹³⁸ Here, because Officer Fackrell discovered the contraband just a few minutes after the illegal stop, considerations of temporal proximity favored suppression.¹³⁹ Presumably, after *Strieff*, timing will remain a relevant attenuation criterion.

When applying the second *Brown* factor, the *Strieff* Court

¹³⁴ *Id.* at 605.

¹³⁵ *Strieff*, 579 U.S. at *10 (Kagan, J., dissenting).

¹³⁶ *Id.* (citing *Brown*, 422 U.S. at 590).

¹³⁷ *Strieff*, 579 U.S. at *10 (noting that there were just “three factors articulated in *Brown v. Illinois*”: (1) the “‘temporal proximity’ between the initially unlawful stop and the search;” (2) “‘the presence of intervening circumstances;” and (3) “‘the purpose and flagrancy of the official misconduct.’”).

¹³⁸ *Id.* at *6.

¹³⁹ *Id.*

embarked on a tortured reading of *Segura v. United States*.¹⁴⁰ According to Justice Thomas, *Segura* supports the *Strieff* Court's conclusion that the existence of an outstanding traffic warrant, although unknown to the arresting officer at the time of the illegal seizure, was sufficient to attenuate the constitutional taint created by the illegal seizure.¹⁴¹

This argument is wholly unpersuasive because *Segura* is entirely distinct from *Strieff*. *Segura*, decided in 1984, involved illegal entry by the police into a New York City apartment based on a suspicion of drug deal, but without probable cause.¹⁴² The police officers, after arresting the occupants, secured the apartment from within. The officers then sat in the apartment and waited 19 hours for a search warrant.¹⁴³ Based on these unusual facts, the *Segura* Court held that because the officers had refrained from searching while inside the apartment until *after* the warrant arrived, "the evidence first discovered [19 hours after the illegal entry] in execution of the warrant was not a fruit of the illegal entry."¹⁴⁴ Given these facts, it is hard to credit Justice Thomas's claim that cases are "similar" or his argument that *Segura* demonstrated "that *the existence of a valid warrant* favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"¹⁴⁵ The *Segura* decision rested on the fact that the investigating officers waited for a valid warrant to be obtained before beginning their search. In fact, as Justice Sotomayor accurately observed, "[i]n *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant."¹⁴⁶ Thus, *Segura* should have no bearing on *Strieff* where "the officer's illegal conduct in stopping

¹⁴⁰ See *Segura v. United States*, 468 U.S. 796, 798 (1984).

¹⁴¹ As Justice Sotomayor said during oral argument:

What's going to stop police officers if we announce your rule . . . [that] once we have your name, if there's a warrant out on you, that's an attenuating circumstance under every circumstance. What stops us from becoming a police state and just having the police stand on every corner down here and stop every person, ask them for identification, put it through, and if a warrant comes up, searching them?

Transcript of Oral Argument at 5, *Utah v. Strieff*, 579 U.S. http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1373_3d46.pdf.

¹⁴² *Segura*, 468 U.S. at 798.

¹⁴³ *Id.* at 801.

¹⁴⁴ *Id.* at 798.

¹⁴⁵ *Strieff*, 579 U.S. at *7 (quoting *Segura*, 468 U.S. at 815).

¹⁴⁶ *Id.* (Sotomayor, J., dissenting) ("In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping *Strieff* was essential to his discovery of an arrest warrant.").

Strieff was essential to his discovery of an arrest warrant.”¹⁴⁷ Justice Thomas’s misuse of *Segura* is fairly egregious; *Segura* would support attenuation only in an alternate universe where Officer Fackrell refrained from seizing Mr. Strieff until *after* he had gathered the reasonable suspicion necessary for a lawful *Terry* stop.

4. *Justice Breyer’s Shifting View of the Doctrine of Attenuation*

Justice Breyer, prior to joining the *Strieff* majority, apparently would have agreed that exclusion was warranted by the illegal seizure. In 2006, Justice Breyer notably interpreted *Segura* as follows: “[t]he relevant fact about the warrant there was that it was lawfully obtained and arguably set off an independent chain of events that led the police to seize the evidence.”¹⁴⁸ *Segura*, in Justice Breyer’s pre-*Strieff* view, would not support attenuation where “there is no such independent event, or intervening chain of events that would purge the [illegal] taint.”¹⁴⁹ However, a decade later Justice Thomas, with Justice Breyer now in tow, finds attenuated taint based, not on an independent event, but on the immediately subsequent discovery of an unrelated traffic warrant unknown to the police officer at the time of the illegal seizure. Justice Sotomayor denounces the majority’s attenuation bait and switch because the “warrant check . . . was not an ‘intervening circumstance’ separating the stop from the search for drugs . . . [if] [i]t was part and parcel of the officer’s illegal expedition for evidence in the hope that something might turn up.”¹⁵⁰

5. *The Rise of Flagrant Police Abuse in the Doctrine of Attenuation*

The third *Brown* factor cited by the *Strieff* majority, was the purposeful flagrancy of the police conduct. Here the Court found that Officer Fackrell’s unlawful decision to seize Mr. Strieff without reasonable suspicion was a “good-faith mistake”¹⁵¹ that was “at most negligent.”¹⁵² The assessment of flagrancy was a not-so-subtle attempt to map the current Court’s flagrant police abuse suppression standard onto preexisting attenuation doctrine. This component of the analysis also provided an opportunity for the Court to double down on its narrow

¹⁴⁷ *Id.*

¹⁴⁸ *Hudson*, 547 U.S. at 625 (Breyer, J., dissenting).

¹⁴⁹ *Id.*

¹⁵⁰ *Strieff*, 579 U.S. at *5 (Sotomayor, J., dissenting).

¹⁵¹ *Id.* at *2.

¹⁵² *Id.*

definition of remediable Fourth Amendment violations. After *Strieff*, defense proof of intentional or mentally culpable police misconduct is required for suppression and the same virtually insurmountable burden of proof has been allocated to defendants seeking to rebut a prosecutor's argument of attenuated taint.

The *Strieff* majority used two distinct rhetorical strategies in its effort to harmonize the flagrant police abuse standard with traditional attenuation doctrine. First, on the facts, the Court simply accepted the prosecution's conclusions, despite substantial contradictory evidence. According to Justice Thomas, Officer Fackrell was merely negligent.¹⁵³ The facts do not support this conclusion. Officer Fackrell was investigating an anonymous tip of unknown reliability. During his intermittent surveillance of the suspected drug house, Officer Fackrell had failed to observe Mr. Strieff enter so, as he candidly acknowledged, he "lacked a sufficient basis to conclude that *Strieff* was a short-term visitor who may have been consummating a drug transaction."¹⁵⁴ Without waiting to develop reasonable suspicion for a lawful stop, Officer Fackrell simply seized Mr. Strieff hoping that he could exploit the unlawful detention to "find out what was going on [in] the house."¹⁵⁵ The evidence, on its face, cannot support a finding of mere negligence. Second, on the law, Justice Thomas purported to rely on *Brown* for his legal finding of negligent police error.¹⁵⁶ But as shown above, the *Brown* Court had clearly held that the *sine qua non* of remediable police misconduct is proof that "factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."¹⁵⁷ In *Brown*, as in *Strieff*, "the impropriety of the arrest was obvious . . . [because] the purpose of [the police officers'] action was 'for investigation' or for 'questioning' [and] [t]he arrest, both in design and in execution, was investigatory."¹⁵⁸ Thus, *Brown* could not plausibly support attenuation in *Strieff* because Officer

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at *7 (Sotomayor, J., dissenting) (The majority also posits that the officer could not have exploited his illegal conduct because he did not violate the Fourth Amendment on purpose. Rather, he made "good faith mistakes." Never mind that the officer's sole purpose was to fish for evidence. The majority casts his unconstitutional actions as "negligent" and therefore incapable of being deterred by the exclusionary rule.").

¹⁵⁷ *Brown*, 422 U.S. at 610-11.

¹⁵⁸ *Id.* at 605.

Fackrell admittedly “embarked upon this expedition for evidence in the hope that something might turn up.”¹⁵⁹

The *Strieff* Court’s attempt to map its flagrant police abuse standard onto traditional attenuation doctrine reflects an effort to ensure that future illegal seizures and searches will be irremediable. *Strieff* guided courts to simply assume police negligence, regardless of the facts. As Justice Sotomayor predicted:

What’s going to stop police officers if we announce your rule . . . [that] once we have your name, if there’s a warrant out on you, that’s an attenuating circumstance under every circumstance. What stops us from becoming a police state and just having the police stand on every corner down here and stop every person, ask them for identification, put it through, and if a warrant comes up, searching them?¹⁶⁰ If Justice Sotomayor is correct, as more prosecutors successfully argue attenuation, aggressive policing will be further incentivized.

6. *The (Not So) Mysterious Omission of Hudson v. Michigan*

Strieff is notably not the first Roberts Court decision to address attenuation. A decade ago, in *Hudson v. Michigan*,¹⁶¹ the Court expanded traditional attenuation doctrine in a case involving police officers’ knowing violation of the constitutional “knock and announce” search warrant rule.¹⁶² According to Justice Scalia, who wrote for the *Hudson* majority, a search that occurred just seconds after the officers’ unlawful entry was nevertheless attenuated because “[w]hether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.”¹⁶³ After *Hudson*, prosecutors could successfully argue attenuation by proving that the purposes of a constitutional safeguard would not be served by exclusion of the evidence.¹⁶⁴

Given the bloated scope of attenuation after *Hudson*, the case unexpectedly played no real role in the *Strieff* Court’s attenuation analysis and was cited just twice by the majority. First, for the now perfunctory

¹⁵⁹ *Strieff*, 579 U.S. at *4 (Kagan, J., dissenting).

¹⁶⁰ Transcript of Oral Argument at 5, *Utah v. Strieff*, 579 U.S. __ (No. 14-1373) http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-1373_3d46.pdf.

¹⁶¹ *Hudson v. Michigan*, 547 U.S. 586 (2006).

¹⁶² *Id.* at 589.

¹⁶³ *Id.* at 592.

¹⁶⁴ *Id.* at 593.

suppression balance-of-interest qualification that the remedy is “applicable only . . . where its deterrence benefits outweigh its substantial social costs.”¹⁶⁵ Second, to support the Court’s conclusion that “[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.’”¹⁶⁶ In fact, the second citation was actually altered to decrease its precedential weight. *Hudson* did not, as Justice Thomas suggested, simply adopt the historical broken causal chain limitation on attenuation.¹⁶⁷ Instead, Justice Scalia, writing for the *Hudson* majority, had dramatically expanded attenuation by inventing a sort of “interest attenuation” that 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 obtained.”¹⁶⁸

The somewhat mysterious demotion of *Hudson* may be best explained by Justice Breyer’s appearance as a member of the *Strieff* majority. A decade earlier, in his dissent in *Hudson*, Justice Breyer had argued—in the very sentence now quoted in *Strieff*—that “the majority gives the word ‘attenuation’ a new meaning.”¹⁶⁹ A decade ago, Justice Breyer had been outraged that Justice Scalia’s interest attenuation denigrated the constitutional interests at stake and ignored the Court’s long history of excluding evidence even when the “evidence or its possession has little or nothing to do with the reasons underlying the unconstitutionality of a search.”¹⁷⁰ At the time, Justice Breyer advanced a more traditional attenuation approach noting that “what this Court’s precedents have typically used that word to mean[,] . . . [required] that the discovery of the evidence come about long after the unlawful behavior took place or in an independent way, *i.e.*, through means sufficiently distinguishable to be purged of the primary taint.”¹⁷¹ In an extreme reversal in *Strieff*, Justice Breyer has apparently overcome his previous

¹⁶⁵ *Strieff*, 579 U.S. at *4 (quoting *Hudson*, 547 U.S. at 591).

¹⁶⁶ *Id.* (quoting *Hudson*, 547 U.S. at 593).

¹⁶⁷ *Hudson*, 547 U.S. at 593.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 620.

¹⁷⁰ *Id.* at 621 (Breyer, J., dissenting).

¹⁷¹ *Id.* at 619-20 (citing *Wong Sun*, 371 U. S. at 487-88 and *Brown*, 422 U. S. at 603-604).

fear that the Court was expanding its attenuation doctrine to swallow the exclusionary rule.

V. CONCLUSION: JUSTICE SOTOMAYOR AND THE LEGACY OF JUSTICE BRANDEIS

A. A Shared Concern with Judicial Integrity and the Court's Socio-Normative Role

Over the past eight years the Roberts Court has been recalibrating the balance of safety and liberty by redefining remediable Fourth Amendment violations. These developments trouble Justice Sotomayor, who has opined that “[t]he exclusionary rule . . . keeps courts from being made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”¹⁷² In her view, when courts concerned with judicial integrity “admit only lawfully obtained evidence, they encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.”¹⁷³ According to Justice Sotomayor, the current Court risks its integrity because “when courts admit illegally obtained evidence as well, they reward manifest neglect if not an open defiance of the prohibitions of the Constitution.”¹⁷⁴

These concerns echo the decisions of Justice Louis D. Brandeis. In his 2016 autobiography, Professor Jeffrey Rosen opined that Justice Brandeis’s perpetual popularity – especially among civil libertarians – is most directly attributable to his robust views on the norm of judicial integrity.¹⁷⁵ Nearly a century before Justice Sotomayor, Justice Brandeis opined that the role of the Court was to lead and educate by normative example. In his famous dissent in *Olmstead*,¹⁷⁶ Justice Brandeis illuminated his conceptualization of the fundamental principle of judicial integrity.

The governing principle has long been settled; a court will not redress a wrong when he who invokes its aid has unclean hands. The

¹⁷² *Strieff*, 579 U.S. at *3 (Sotomayor, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* (citations omitted).

¹⁷⁵ JEFFREY ROSEN, LOUIS D BRANDEIS: AMERICAN PROPHET (JEWISH LIVES)195 (2016). (“Brandeis’s hour seems to be coming around at last . . . In a poll of leading libertarian and civil libertarian scholars and judges by Reason Magazine, the libertarian journal of ideas, four of the fourteen respondents identified Brandeis as their favorite Supreme Court justice, largely because of his dissenting opinion in *U.S. v Olmsted*.”).

¹⁷⁶ *Id.*

maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law . . . Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.¹⁷⁷

Justice Brandeis retired from the Court a quarter century before *Mapp v. Ohio*¹⁷⁸ was decided. But the reasoning of *Mapp*, the apotheosis of Fourth Amendment protection, resonates with typical Brandeisian themes. According to *Mapp*:

The ignoble shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognize that the right to privacy embodied in the fourth amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we could no longer permit that right to remain an empty promise.¹⁷⁹

In fact, the *Mapp* Court cited Justice Brandeis in its most famous passage: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, disregard of the charter of its own existence.”¹⁸⁰ Today, the task of reminding the nation that improper government reliance on the poisoned fruit of police illegality harms the citizenry by destroying privacy and corrupting the moral authority of our police, prosecutors, and courts falls to Justice Sotomayor, an intellectual heir to Justice Brandeis’s legacy.

B. Justice Sotomayor and the Modern Court

¹⁷⁷ *Id.*

¹⁷⁸ *Mapp v. Ohio*, 367 U.S. 643 (1991).

¹⁷⁹ *Id.* at 660.

¹⁸⁰ *Mapp*, 367 U.S. at 659 (“As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, ‘Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.’”)

Over the past half century, the Court has adopted an increasingly utilitarian approach to the protection of constitutional rights and liberties. The current micro-focus on deterrence side steps the Brandeisian moral imperative that courts educate by example when they abjure illegally-seized evidence. The Roberts Court suppression doctrine, which increasingly and narrowly links suppression to deterrence of mentally culpable law-breaking police officers, discourages consideration of broader objectives.

While philosophically aligned with Justice Brandeis on the moral and educational role of the judiciary, Justice Sotomayor is more of a pragmatist. She understands that a criminal justice system also loses legitimacy on the streets when police officers engage in abusive and disparate treatment with impunity. As the growing empirical evidence discussed above demonstrates, the Roberts Court cannot plausibly continue to operate on the demonstrably false premise that policing is fungible across socio-economic, ethnic/racial, or geographic lines.

The effects of aggressive policing are disproportionately felt in urban, poor, and minority communities.¹⁸¹ Alone on the Court, Justice Sotomayor confronts the mounting evidence that police officers do not equally protect and serve all people or each community.

It is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.¹⁸²

It is entirely possible that, as the Roberts Court wields its power to the short-term benefit of police and prosecutors, it will disrupt or destroy efforts aimed at long-term policing progress. *Strieff* now empowers the police to use illegal stops and seizures as a routine investigatory tool, especially in neighborhoods where outstanding

¹⁸¹ *Strieff*, 579 U.S. at *12 (Sotomayor, J., dissenting).

¹⁸² *Id.*

warrants are “surprisingly common.”¹⁸³ If these practices continue or increase, police aggression, including the deadly police encounters at issue in the Black Lives Matter cases, will destroy the community trust necessary to achieve public peace and safety, which should be law enforcement’s primary objective.

Justice Sotomayor is an increasingly effective advocate for a constitutional criminal jurisprudence that accommodates both theory and practice. Her unique voice serves as a powerful reminder that rights are not abstractions but everyday safeguards against police overreach. Her robust and realistic approach to policing problems rejects traditional academic distinctions between “procedural” rules of evidence and “substantive” questions of constitutional law that impede our understanding of how law works to identify, constrain, and remedy police abuse of constitutional rights. Solutions, as she recognizes, must bridge this divide.

In the near and distant future, courts will need new tools and models to assess the scope and boundaries of Fourth Amendment protections—especially as we store private information in manners unimaginable just a decade ago. Judges will also need practical rules and standards to govern the allocation and quantification of burdens of proof, the assessment of evidence of police abuse of rights, and the application of the remedy of suppression. Policing the police requires an evidence-based understanding of how police officers treat suspects and how courts really work. The Roberts Court appears to have instead chosen an eyes wide shut approach to the protection of Fourth Amendment rights which rewards aggressive police practices and risks the lives of some and the privacy of all.

¹⁸³ *Id.* at 7 (“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.”).