# Allowing "Lawless Police Conduct" in Order to Forbid "Lawless Civilian Conduct": The Court Further Erodes the Exclusionary Rule in *Utah v. Strieff*

*by* GEORGE M. DERY III*

## Introduction

The Supreme Court has repeatedly described the Fourth Amendment's[1] exclusionary rule as "a judicially created remedy" rather than "a personal constitutional right."[2] Therefore, as with any tool, the exclusionary remedy should only be used when its benefits outweigh its costs[3] (i.e., when it is the right tool for the job).[4] Ironically, in *Utah v. Strieff*, the Court has failed to heed its own wise advice.[5] In considering whether a police officer's illegal seizure of a person tainted his later recovery of methamphetamine,[6] the *Strieff* Court applied an attenuation

* Professor, California State University Fullerton, Division of Politics, Administration, & Justice; Former Deputy District Attorney, Los Angeles, California; J.D., Loyola Law School, Los Angeles, 1987; B.A., University of California Los Angeles, 1983. The author would like to thank his research assistant, Daniel Boughter, B.A. Criminal Justice, California State University Fullerton.

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2. United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 348 (1974).

3. *Leon*, 468 U.S. at 907.

4. BlainsFarmAndFleet, *The Right Tool for the Job*, YOUTUBE (Oct. 22, 2012), https://www.youtube.com/watch?v=fb7HSA1kKNY.

5. Utah v. Strieff, 136 S. Ct. 2056 (2016).

6. *Id.* at 2060.

analysis from *Brown v. Illinois*.[7] Problematically, the *Brown* Court and its progeny focused on whether an unlawful seizure tainted a later incriminating statement—a situation where the emotional or psychological impact of official illegality was the central concern.[8] In contrast, the Court in *Strieff*, which considered whether an illegal stop sullied physical evidence obtained during a search of clothing, noted that the mental state of the person wearing that clothing offered scant insight for the taint analysis.[9] Still, the *Strieff* Court dutifully applied several of the *Brown* Court's factors in spite of its prohibition against using the wrong rule for the job. It was as if, faced with the task of tightening a Phillips screw, the Court used a flathead screwdriver. The *Strieff* Court's blunder was particularly unfortunate because the Court could have employed a simpler rule to obtain a better result.[10]

*Strieff*'s placement of its own case in *Brown*'s procrustean bed was not the Court's only error. The *Strieff* Court, in attempting to minimize the officer's illegality with a rendition of all of his lawful acts, further drained the vitality of the exclusionary rule.[11] Further, the *Strieff* Court, in limiting exclusion to only purposeful and flagrant police illegality, set a dangerously low standard for police professionalism.[12] Finally, in allowing an outstanding arrest warrant, by itself, to cleanse taint, the *Strieff* Court violated the *Brown* Court's prohibition against using a *per se* rule to cleanse taint.[13]

In Part I, this Article reviews the Court's initial reluctance to adopt the exclusionary rule, its ultimate embrace of the exclusion of illegally obtained evidence as a constitutional mandate, and its limitation of this rule with the attenuation of taint analysis. Part II presents *Strieff*, including an overview of its factual background and an examination of the Court's opinion. Part III considers the various concerns created by the *Strieff*

7. *Id.* at 2062; Brown v. Illinois, 422 U.S. 590, 603 (1975).

8. Brown v. Illinois, 422 U.S. 590, 603 (1975); Dunaway v. New York, 442 U.S. 200, 216–18 (1979); Rawlings v. Kentucky, 448 U.S. 98, 106–08 (1980); Taylor v. Alabama, 457 U.S. 687, 690–92 (1982); New York v. Harris, 495 U.S. 14, 23 (1990); Kaupp v. Texas, 538 U.S. 626, 633 (2003).

9. *Strieff*, 136 S. Ct. at 2060.

10. The fact that the Court simply could have used a rule of proximate cause based on reasonable foreseeability is fully explored below in Part IV(B).

11. Utah v. Strieff, 136 S. Ct. 2056, 2062–63 (2016).

12. *Id.* at 2063.

13. Thus, the *Strieff* Court not only improperly chose to employ *Brown*, but also applied its analysis in a manner inconsistent with the reasoning of this case. *Id.* at 2059; Brown v. Illinois, 422 U.S. 590, 601–02 (1975).

Court's curious application of the attenuation analysis to the facts in this case.

## I. The Birth and Slow Decline of the Fourth Amendment Exclusionary Rule

### A. The Court's Initial Reluctance to Adopt an Exclusionary Rule

The Court's relationship with the Fourth Amendment exclusionary rule has been fraught with ambivalence and contradiction. The Court first authorized the exclusion of evidence upon constitutional violation in *Boyd v. United States*.[14] In *Boyd*, the federal government charged the defendants with fraud in importing cases of plate glass into the Port of New York without paying mandatory duties.[15] The prosecutor in the case subpoenaed the defendants for the business invoice for twenty-nine cases of glass.[16] Although the defendants produced the invoice, they objected to its admission into evidence as unconstitutional.[17]

The *Boyd* Court believed this case affected "the very essence of constitutional liberty and security" by involving an invasion of the individual's "indefeasible right of personal security, personal liberty."[18] The *Boyd* Court saw the "extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of a crime" as implicating both the Fourth and Fifth Amendments.[19] The Court concluded that the subpoena and the admission of the subpoenaed invoices were "unconstitutional and void."[20] Since admitting illegally obtained evidence was unconstitutional, suppressing the evidence—by means of an exclusionary rule—was the only constitutional choice.

Less than twenty years later, in the gambling paraphernalia case *Adams v. New York*, the Court reversed course, explicitly refusing to suppress illegally seized private papers.[21] The *Adams* Court ruled that even if the papers were illegally seized, such a fact did not create a "valid objection to their admissibility if they are pertinent to the issue."[22] If the

14. Boyd v. United States, 116 U.S. 616, 638 (1886).
15. *Id.* at 617–18.
16. *Id.* at 618.
17. *Id.*
18. *Id.* at 630.
19. *Id.*
20. Boyd v. United States, 116 U.S. 616, 638 (1886).
21. Adams v. New York, 192 U.S. 585, 586, 595 (1904).
22. *Id.* at 595.

items of evidence were relevant, the Court would "not take notice how they were obtained, whether lawfully or unlawfully."[23]

The Court's view of the exclusionary rule shifted a mere decade later in *Weeks v. United States*.[24] Although the *Weeks* Court also involved the unlawful seizure of gambling papers,[25] it had one significant difference with *Adams*: The illegality in *Weeks* came from "the Federal Government and its agencies" rather than state officials.[26] In the limited sphere of federal illegality, the *Weeks* Court ruled that the admission into trial of the letters obtained in violation of the Fourth Amendment was "prejudicial error."[27] In support of its ruling, the Court dramatically declared that if the private papers in the case can

> be seized and held and used in evidence against a citizen accused of an offense, the protection of the [Fourth] Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[28]

The Court warned that the "praiseworthy" efforts to bring criminals to justice "are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[29]

After creating the exclusionary rule in such striking fashion at the federal level, the Court refused to employ it against wayward state officials in *Wolf v. Colorado*.[30] While the *Wolf* Court readily accepted that the security guaranteed by the Fourth Amendment was "basic to a free society," and therefore applied to state officials, it refused to enforce this "basic right" by excluding evidence.[31] The Court considered imposition of an exclusionary rule on the states to be a dogmatic act that would preclude exploration of the "varying solutions" that could solve police illegality.[32]

23. *Id.*
24. Weeks v. United States, 232 U.S. 383, 398 (1914).
25. *Id.* at 386.
26. *Id.* at 398.
27. *Id.*
28. *Id.* at 393.
29. *Id.*
30. Wolf v. Colorado, 338 U.S. 25 (1949).
31. *Id.* at 27–28, 33.
32. *Id.* at 28.

The *Wolf* Court limited *Weeks*, claiming that it was a "matter of judicial implication" rather than an explicit requirement of the Fourth Amendment.[33] The beginning of the twentieth century thus provided little fertile ground for the exclusionary rule to flourish.

### B. The Court's Embrace of the Exclusionary Rule

In 1961, the Court fully endorsed the exclusionary rule for state violations of the Fourth Amendment in *Mapp v. Ohio*.[34] In *Mapp,* Cleveland police officers broke into Mapp's home in "defiance of the law" to search for a bombing suspect.[35] The officers instead found sexually explicit materials.[36] When Mapp challenged the officers' entry, the police offered her a "paper, claimed to be a warrant."[37] Mapp then grabbed the paper and placed it "in her bosom."[38] Police struggled with Mapp to recover the "warrant," running "roughshod" over her until she "yelled (and) pleaded" in pain.[39] When the government failed to produce the warrant in court, the trial judge doubted whether it ever existed.[40]

The Court in *Mapp* found the *Wolf* Court's reading of the exclusionary rule as "judicially implied" unconvincing, recasting *Weeks* as a rule "of constitutional origin."[41] *Mapp* saw the exclusionary rule serving two important purposes: (1) it deterred police illegality by compelling "respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"; and (2) it served "the imperative of judicial integrity" by preventing judges from sullying themselves in admitting unlawfully obtained evidence.[42] The *Mapp* Court therefore extended the exclusionary rule to the states, holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[43] Without the exclusionary

33. *Id.*

34. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

35. *Id.* at 644.

36. The police recovered "lewd and lascivious books, pictures, and photographs." *Id.* at 643.

37. *Id.* at 644.

38. *Id.*

39. *Id.* at 645.

40. Mapp v. Ohio, 367 U.S. 643, 645 (1961).

41. *Id.* at 646, 649.

42. *Id.* at 656, 659.

43. *Id.* at 655; The Court in *Mapp* ruled, "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*

rule, the right against unreasonable searches and seizures would only be "'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[44] The Court in *Mapp* deemed the exclusionary rule "an essential part" of the Fourth Amendment.[45] To deny the exclusionary rule to those whose Fourth Amendment rights have been violated would be "to grant the right but in reality to withhold its privilege and enjoyment."[46]

The *Mapp* Court's dramatic language masked continuing ambivalence among some justices about the constitutional basis of the exclusionary rule. Justice Black, in his concurring opinion, stated that he was "still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands."[47] His argument was based on simple textual analysis.[48] Since "the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence," Justice Black doubted the exclusionary rule "could properly be inferred from nothing more than the basic command against unreasonable searches and seizures."[49] In his dissent, Justice Harlan complained that the Court, in creating the exclusionary rule for Fourth Amendment violations, had "forgotten the sense of judicial restraint."[50] Writing separately, Justice Stewart expressed "no view as to the merits of the constitutional issue which the Court today decides."[51] Instead, he would have decided the matter on the issue of the "rights of free thought and expression assured against state action by the Fourteenth Amendment."[52] Justice Stewart would later explain that the Court had originally accepted the case on a First Amendment issue, only to mysteriously switch the basis of its ruling to the Fourth Amendment.[53] Thus, the Court's dramatic creation of the exclusionary rule in *Mapp* might have been built on a less than solid foundation, making it vulnerable to erosion from future cases.

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44. *Id.*

45. *Id.* at 657.

46. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

47. *Id.* at 661 (Black, J., concurring).

48. *Id.*

49. *Id.*

50. *Id.* at 672 (Harlan, J., dissenting).

51. *Id.* at 672 (Memorandum of Mr. Justice Stewart).

52. *Id.*

53. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983).

### C. The Court's "Attenuation of Taint" Limit on the Exclusionary Rule

The Court has long been troubled by the prospect of officers benefitting from their own illegal conduct.[54] Such exploitation of a constitutional violation occurred in the 1920 case, *Silverthorne Lumber Co. v. United States*, in which federal agents, "without a shadow of authority," performed "a clean sweep of all the books, papers[,] and documents" found in the office of Silverthorne and his father.[55] When the defendants moved to have their papers returned to them, the district court ruled in their favor.[56] The government, having previously made copies of the papers ordered to be returned, pursued an indictment "based upon the knowledge thus obtained" from the illegally seized, copied, and returned documents.[57] The prosecution then subpoenaed the defendants to produce the originals.[58] When the defendants refused to comply with the subpoena, they were found in contempt of court.[59]

The Court, finding the prosecution's position untenable, declared:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act.[60]

Still, the Court in *Silverthorne* recognized limits to the Fourth Amendment exclusionary rule. Illegally obtained facts did not become

54. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

55. *Id.* at 390.

56. *Id.* at 390–91.

57. *Id.* at 391.

58. *Id.*

59. *Id.*

60. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920). The Court further noted, "The Government now, while in form repudiating and condemning the illegal seizure, seeks to maintain its right to avail itself of the knowledge obtained by that means which otherwise it would not have had." *Id.*

irretrievably "sacred and inaccessible."[61] Instead, the Court understood that illegally gained evidence could be purged of its original taint.[62]

The Court first mentioned attenuation as a method for cleansing taint in *Nardone v. United States*, a case involving wiretapping in violation of a Congressional statute.[63] In *Nardone*, the Court declared that illegally acquired evidence would not only be excluded from court, it would "not be used at all."[64] Still, the Court recognized that evidence could be cleansed if the connection between the government impropriety and the evidence had "become so attenuated as to dissipate the taint."[65] A full analysis of the specifics of this doctrine would only be provided two decades later in *Wong Sun v. United States*.[66]

In *Wong Sun,* federal agents, pursuing a tip about narcotics, went to a laundry where James Toy lived.[67] When the agents identified themselves to Toy, he slammed his door on them and ran "down the hallway through the laundry to his living quarters at the back where his wife and child were sleeping in a bedroom."[68] The agents then broke open the door, chased Toy into his bedroom, drew a pistol on Toy, handcuffed him, and accused him of selling narcotics.[69] Toy denied ever selling drugs, but directed the agents to a man named "Johnny."[70] The narcotics agents then immediately visited Johnny Yee—finding heroin that Yee said he had obtained from Toy.[71]

Moreover, after piecing together statements from both Yee and Toy that connected a third person—Wong Sun—to the heroin, police went to Wong Sun's home and illegally arrested him.[72] After arraignment on federal narcotics charges, Wong Sun was released on his own

61. *Id.*

62. *Id.* The Court offered as an example the government gaining evidence through an independent source. *Id.* Later, in *Dunaway v. New York,* the Court cited *Silverthorne* for the attenuation doctrine (rather than for the independent source rule), declaring: "There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently *attenuated* to permit the use at trial of the statements and sketches." *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (emphasis added).

63. Nardone v. United States, 308 U.S. 338, 340–41 (1939).

64. *Id.* at 341.

65. *Id.*

66. Wong Sun v. United States, 371 U.S. 471 (1963).

67. *Id.* at 473.

68. *Id.* at 474.

69. *Id.*

70. *Id.*

71. *Id.*

72. Wong Sun v. United States, 371 U.S. 471, 475 (1963).

recognizance.[73] The government later questioned Toy, Yee, and Wong Sun at the station after explaining to each that any statement could be used against him and that each had a right to have an attorney present.[74] Toy and Wong Sun both spoke with the agent who questioned him, but refused to sign the resulting statement.[75]

The Court in *Wong Sun* had to decide whether the illegal arrest of Toy mandated the exclusion not only of the statement Toy gave in his bedroom, but also of the heroin agents obtained from Yee by following up on Toy's statement.[76] Also at issue was the admissibility against Wong Sun of his own stationhouse statements due to the illegality of his arrest.[77] The Court first focused on the evidence admitted against Toy. It noted that Toy's statements in his bedroom, obtained by violating the Fourth Amendment, had to be excluded if deemed the "'fruits' of the agents' unlawful action."[78] *Wong Sun*'s "broad exclusionary rule" barred the use of any evidence, whether obtained directly—or indirectly—from a Fourth Amendment violation.[79] The Court did not base its taint analysis on mere factual causation, explaining, "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."[80] Instead, the proper inquiry was "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."[81] In other words, did the police use or take advantage of their own unlawful behavior as a means of gathering evidence? If so, that use or exploitation tainted the evidence thus obtained.

The government in *Wong Sun* urged that the agents did not exploit their Fourth Amendment violation to obtain Toy's bedroom statement because any taint flowing from the illegal entry and arrest was attenuated by Toy's "intervening independent act of a free will."[82] The Court was unconvinced, noting that at least half a dozen officers broke down Toy's door in order to chase him into his bedroom where his family had been

73. *Id.*

74. *Id.* at 476. *Wong Sun*, occurring in 1963, was a pre-*Miranda* case.

75. *Id.*

76. *Id.* at 484.

77. *Id.* at 491.

78. Wong Sun v. United States, 371 U.S. 471, 484 (1963).

79. *Id.* at 484–85.

80. *Id.* at 487–88.

81. *Id.* at 488.

82. *Id.* at 486.

sleeping.[83] The Court doubted whether after such an intrusion, while arrested and handcuffed, Toy's statement could be "an act of free will" free of taint.[84] Toy—both a father and a husband—who was illegally chased into his own home and handcuffed in front of his wife and child, was caught in an atmosphere filled with tension and fear. The agents, in obtaining a statement given under these circumstances, exploited their own original illegality. The heroin obtained from Yee was likewise tainted by the agents' illegal arrest of Toy because the prosecutor candidly admitted, "we wouldn't have found those drugs except that Mr. Toy helped us to."[85] The Court found that this was not "a case in which the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'"[86] The Court saw officials taking advantage of their own unlawful conduct as the key to its analysis, noting, "We think it clear that the narcotics were 'come at by the exploitation of that illegality' and hence that they may not be used against Toy."[87]

The Court in *Wong Sun* adhered to its exploitation formulation when deciding that, "Wong Sun's unsigned confession was not the fruit of (the unlawful) arrest, and was therefore properly admitted at trial."[88] While the agents had clearly arrested Wong Sun illegally, they did nothing to exploit that illegality, such as forcing him to sit in a jail cell to soften him up. Instead, Wong Sun was released on his own recognizance. He "returned voluntarily several days later to make the statement."[89] This relinquishment of control over Wong Sun, for a matter of days, caused "the connection between the arrest and the statement [to] become so attenuated as to dissipate the taint."[90]

A dozen years after *Wong Sun*, the Court developed a multi-factor test for assessing the attenuation of taint in *Brown v. Illinois*.[91] In *Brown*, Chicago Police officers obtained two Mirandized statements from a suspect after illegally arresting him at gunpoint.[92] The Illinois courts had assumed that the *Miranda* warnings the police had provided Brown, "by

83. *Id.*
84. Wong Sun v. United States, 371 U.S. 471, 486 (1963).
85. *Id.* at 487.
86. *Id.*
87. *Id.* at 488.
88. *Id.* at 491.
89. *Id.*
90. Wong Sun v. United States, 371 U.S. 471, 491 (1963).
91. Brown v. Illinois, 422 U.S. 590 (1975).
92. *Id.* at 592, 594–95.

themselves," assured that his statements "were of sufficient free will as to purge the primary taint of the unlawful arrest."[93] The Court refused to accept any such *per se* rule that *Miranda* warnings, alone, would automatically cleanse a statement of prior illegality.[94] The *Brown* Court worried, "If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted."[95] Officers—realizing that any taint from an illegal seizure of a person could be dissipated "by the simple expedient of giving *Miranda* warnings"—would be incentivized to make stops without proper justification.[96]

The *Brown* Court noted that, while *Wong Sun* did consider the voluntariness of Toy's statement, "it was only to judge whether the statement 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion.'"[97] In deciding whether a confession was freely given, all facts had to be considered because no "single fact" was "dispositive."[98] The *Brown* Court explained, "The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test."[99] The first factor "in determining whether the confession is obtained by exploitation of an illegal arrest," was whether police gave the arrestee *Miranda* warnings.[100] *Brown*'s second factor assessed the "temporal proximity of the arrest and the confession," while its third factor identified "the presence of intervening circumstances."[101] The fourth factor weighed "the purpose and flagrancy of the official misconduct."[102] In assessing

93. *Id.* at 600.

94. *Id.* at 603.

95. *Id.* at 602.

96. *Id.*

97. Brown v. Illinois, 422 U.S. 590, 599 (1975). "In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken," the statement must be "sufficiently an act of free will to purge the primary taint." *Id.* at 601 (internal quotation marks omitted). The *Brown* Court intoned, "The voluntariness of the statement is a threshold requirement." *Id.* at 604. If the statement was not deemed voluntary at the outset, a court could forgo the rest of the rule. *Id.*

98. *Id.* at 603.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 604.

these factors, the Court placed the "burden of showing admissibility" upon the government.[103]

The Court in *Brown* concluded that the government had failed to meet its burden proving the statements' admissibility.[104] Although police did fulfill *Brown*'s first factor by providing their arrestee with *Miranda* warnings,[105] the second factor of "temporal proximity" was not satisfied because, "Brown's first statement was separated from his illegal arrest by less than two hours."[106] This, in turn, meant, "there was no intervening event of significance whatsoever" to satisfy the third factor.[107] The Court was also troubled when considering its fourth factor—purpose and flagrancy—because the arrest's "impropriety" was "obvious" and "virtually conceded" by the case's two detectives.[108] The Court noted:

> 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. The manner in which Brown's arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion.[109]

The facts proving purposefulness and flagrancy were quite dramatic. When Brown returned to his home, he saw a gun pointed at him through a window and heard the words, "Don't move, you are under arrest."[110] Then another man, also armed with a gun, came up behind him and repeated he was under arrest.[111] Such theatrics during an illegal arrest further hobbled attenuation.

The Court employed the *Brown* Court's attenuation formula in *Dunaway v. New York*, a case involving a killing during an attempted robbery at a pizza parlor.[112] Lacking evidence for a warrant, police picked up Dunaway at a neighbor's house, put him in an interrogation room at the

103. Brown v. Illinois, 422 U.S. 590, 604 (1975).
104. *Id.*
105. *Id.* at 594.
106. *Id.* at 604.
107. *Id.*
108. *Id.* at 605.
109. Brown v. Illinois, 422 U.S. 590, 605 (1975).
110. *Id.* at 592.
111. *Id.*
112. Dunaway v. New York, 442 U.S. 200, 202 (1979).

police station, and gave him his *Miranda* warnings.[113] Dunaway then "made statements and drew sketches that incriminated him in the crime."[114] The trial court denied Dunaway's motion to suppress his statements and sketches and a jury convicted him of attempted robbery and felony murder.[115]

Concluding that the officers illegally arrested Dunaway,[116] the Court considered whether the *Brown* Court's factors cleansed the statements and sketches of taint. Dunaway's receipt of *Miranda* warnings pointed to the voluntariness of his statement, allowing police to satisfy *Brown*'s "threshold" requirement.[117] *Miranda* warnings alone, however, could not cleanse taint because admitting the confession on this basis only would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth."[118] The *Brown* Court's remaining factors failed to cleanse taint.[119] Dunaway was exposed to no "intervening event of significance."[120] Moreover, police illegality was flagrant, as officers seized him "without probable cause in the hope that something might turn up."[121] Thus, Dunaway's statement simply remained tainted.[122]

The Court next applied *Brown*'s attenuation factors in *Rawlings v. Kentucky*, which was a case arising from a controlled substance conviction.[123] In *Rawlings*, six officers executed a warrant for a person named Lawrence Marquess, who turned out to be absent from the home.[124] During their unsuccessful search for Marquess, police saw marijuana seeds and smelled marijuana smoke, causing four officers to detain the home's four visitors and one occupant while the other two other officers left to obtain a search warrant.[125] Police only allowed the visitors—among whom were Vanessa Cox and David Rawlings—to leave if they consented to a

113. *Id.* at 203.

114. *Id.*

115. *Id.*

116. *Id.* at 215–16.

117. *Id.* at 216–17.

118. Dunaway v. New York, 442 U.S. 200, 219 (1979).

119. *Id.* at 218.

120. *Id.*

121. *Id.* The *Dunaway* Court frowned upon the lower court's attempt to distinguish *Brown* on the grounds that "the police did not threaten or abuse petitioner" by noting that this required "putting aside his illegal seizure and detention." *Id.*

122. *Id.* at 219.

123. Rawlings v. Kentucky, 448 U.S. 98, 100 (1980).

124. *Id.*

125. *Id.*

"body search."[126] Two visitors left after consenting to such a search.[127] During the forty-five minute wait for the officers' return with the search warrant, persons drank coffee, joked about a dog with a wagging tail, and listened to a record album.[128] Upon returning, the officers read both the warrant and *Miranda* warnings to the persons who still remained at the house.[129] Then, an officer ordered Cox to empty her purse onto a coffee table.[130] Cox complied in emptying "a jar containing 1,800 tablets of [Lysergic Acid Dietylamide]," as well as other drugs, onto the table.[131] When Cox told Rawlings to "take what was his," Rawlings "immediately claimed ownership of controlled substances."[132] An officer then searched Rawlings' person, finding $4,500 cash and a sheathed knife.[133] Kentucky prosecuted Rawlings for possession of controlled substances with the intent to sell.[134] The trial court refused to suppress Rawlings' drugs as well as his statements claiming ownership of the drugs, convicting him of the charges.[135]

The Court, in assuming Rawlings' detention violated the Fourth Amendment,[136] cautioned that his statements would only be excluded if they "were the result of his illegal detention."[137] Since even those subject to an illegal seizure "frequently may decide to confess, as an act of free will unaffected by the initial illegality," the *Rawlings* Court eschewed a "but for" analysis, choosing instead to apply *Brown*'s attenuation factors.[138] The police fared well with the *Brown*'s first factor, for they provided Rawlings with *Miranda* warnings.[139] Further, Rawlings himself did not argue that his admissions were involuntary.[140] In assessing *Brown*'s "temporal proximity" factor, the *Rawlings* Court noted that although forty-five

126. *Id.*

127. *Id.*

128. *Id.* at 100, 108.

129. Rawlings v. Kentucky, 448 U.S. 98, 100 (1980). At this time, Cox and Rawlings were sitting on a couch, with Cox's handbag in the space between them. *Id.*

130. *Id.* at 100–01.

131. *Id.* at 101. The other controlled substances, contained in "a number of smaller vials," were "benzphetamine, methamphetamine, methyprylan, and pentobarbital." *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Rawlings v. Kentucky, 448 U.S. 98, 101–02 (1980).

136. *Id.* at 106.

137. *Id.*

138. *Id.*

139. *Id.* at 107.

140. *Id.* at 110.

minutes typically "might not suffice to purge the initial taint," here, "the precise conditions under which the occupants of this house were detained" boded well for admission.[141] The detained visitors could move "freely about the first floor of the house," drink beverages, and listen to music in an atmosphere that was "courteous" and "congenial."[142] The Court found such facts outweighed "the relatively short period of time that elapsed between the initiation of the detention and petitioner's admissions."[143]

*Brown*'s "intervening circumstances" factor supported purging the taint because Rawlings' admissions were "apparently spontaneous reactions to the discovery of his drugs in Cox's purse," and therefore Rawlings's statements were of "free will unaffected by the initial illegality."[144] The *Brown* Court's "purpose and flagrancy" factor also pointed in the government's favor.[145] First, the officers, in aiming to prevent the removal or destruction of marijuana, were merely attempting to maintain the status quo.[146] Second, rather than being a blatant act of illegality, the temporary detention of persons "at the scene of suspected drug activity to secure a search warrant" involved "an open question."[147] Third, the belief that a search warrant for a place included the authority to search those present at the location had only been recently corrected by court case law.[148] Thus, viewing the totality of circumstances, the government carried its burden of proof that Rawlings' statements were cleansed of taint.[149]

The Court also considered *Brown*'s attenuation factors in *Taylor v. Alabama*, in which police, lacking probable cause, arrested Taylor for a grocery store robbery.[150] At the station, officers gave Taylor his *Miranda* warnings three times, fingerprinted him, and placed him in a lineup.[151] "After a short visit with his girlfriend and a male companion," Taylor wrote

141. Rawlings v. Kentucky, 448 U.S. 98, 107 (1980).

142. *Id.* at 107–08.

143. *Id.* at 108.

144. *Id.* Testimony indicated that Rawlings' motives for claiming the drugs were mixed; Rawlings did not wish to "pin" all blame on Cox, while at the same time he feared doing anything that would cause her to give evidence against him. *Id.* at 109.

145. *Id.* at 110.

146. *Id.* at 109–110.

147. Rawlings v. Kentucky, 448 U.S. 98, 110 (1980).

148. *Id.*

149. *Id.*

150. Taylor v. Alabama, 457 U.S. 687, 689 (1982).

151. *Id.* at 689, 691.

out his confession, which was entered into evidence at his trial, resulting in his conviction.[152]

Since the confession was "obtained through custodial interrogation after an illegal arrest," the Court in *Taylor* searched for intervening events to make it "sufficiently an act of free will to purge the primary taint."[153] While *Miranda* warnings made the statement voluntary under the Fifth Amendment, such a recitation was "not by itself sufficient to purge the taint of the illegal arrest."[154] Instead, the psychological damage of a Fourth Amendment violation could only be assessed by a consideration of all of *Brown*'s attenuation factors.[155] The Court found its case to be "a virtual replica of both *Brown* and *Dunaway*" because police arrested Taylor "without probable cause in the hope that something would turn up," which resulted in a confession lacking "any meaningful intervening event."[156] The government's "temporal proximity" argument that the six hours between Taylor's arrest and confession constituted a longer period of time than in *Brown* and *Dunaway* failed because a few hours difference lost significance in light of Taylor's subjection to uncounseled custodial questioning, fingerprinting, and lineup.[157] When the State offered Taylor's visit with his "girlfriend and a male companion" as an intervening event, the Court wondered how this "[five] to [ten] minute visit"—occurring only after Taylor had already signed a waiver of rights form—"could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will."[158] Indeed, the Court believed that the girlfriend's emotional upset during the meeting could have further sapped the suspect's free will.[159] Applying *Brown*'s purposeful and flagrant factor, the *Taylor* Court found the officers' actions as bad as those of police in *Brown* and *Dunaway* because they committed an "investigatory arrest" of Taylor based on nothing but the "hope that something would turn up."[160] In response to the State's strained plea that the officers acted in "good faith," the Court refused to recognize any such exception for this case.[161]

152. *Id.*

153. *Id.* at 690.

154. *Id.*

155. *Id.* at 690–92.

156. Taylor v. Alabama, 457 U.S. 687, 690–92 (1982).

157. *Id.*

158. *Id.*

159. *Id.* at 692.

160. *Id.* at 693.

161. In rejecting the State's argument, the Court explained, "To date, we have not recognized such an exception, and we decline to do so here." *Id.*

The Court found *Brown*'s attenuation analysis inapplicable to the next case involving a confession after an illegal arrest in *New York v. Harris*.[162] Having probable cause that Harris had committed murder, the police unlawfully arrested him in his apartment in violation of *Payton v. New York,* which held that police cannot perform warrantless arrests in the home.[163] After receiving *Miranda* warnings at the station, Harris signed a written statement admitting to the killing.[164] The New York Court of Appeals deemed the statement inadmissible because the "connection between the statement and the arrest was not sufficiently attenuated" under *Brown*.[165] The *Harris* Court disagreed with the Court of Appeals, reiterating its rejection of any "but for" causation rule for attenuation.[166] The Court explained that any exclusion of evidence "must bear some relation to the purposes which the law is to serve."[167] The *Payton* Court meant to protect the "physical integrity" of the home by demanding a warrant for entry; it was this "sanctity of the home" that the officers in *Harris* violated in forgoing a warrant.[168] However, nothing in *Payton* rendered "unlawful continued custody of the suspect once he is removed from the house."[169] Since police possessed probable cause to arrest Harris, his custody, as he sat in the station house, was lawful, in spite of how it came to be.[170] *Harris* thus differed from *Brown* and its progeny because those cases involved evidence that was, "in some sense the product of illegal governmental activity."[171] In contrast, the *Harris* Court claimed "Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else."[172]

The most recent case before *Strieff* in which the Court considered the *Brown* factors analysis was *Kaupp v. Texas*.[173] In *Kaupp*, a nineteen-year-old man, after failing a polygraph examination for the third time, ultimately

162. New York v. Harris, 495 U.S. 14 (1990).
163. *Id.* at 15–16; Payton v. New York, 445 U.S. 573, 576 (1980).
164. *Harris*, 495 U.S. at 16.
165. *Id.*
166. *Id.* at 17.
167. *Id.*
168. New York v. Harris, 495 U.S. 14, 17 (1990).
169. *Id.* at 18.
170. *Id.*
171. *Id.*
172. *Id.* at 19.
173. Kaupp v. Texas, 538 U.S. 626 (2003).

confessed to fatally stabbing his half-sister.[174] Initially, when Kaupp's half-brother had implicated him in the killing, sheriffs decided to "get [Kaupp] in and confront him with what [the brother] had said."[175] After trying but failing to obtain a warrant, deputies went to Kaupp's home and woke him up at around 3:00 a.m.[176] They handcuffed him and took him—barefoot, in boxer shorts and a T-shirt—to where the body was found and then to the station.[177] After removing his handcuffs and reading him his *Miranda* rights, the deputies questioned Kaupp, who confessed his involvement after about ten or fifteen minutes into the interrogation.[178]

The Court in *Kaupp* declared that, due to the illegal arrest, the confession had to be suppressed unless it was "an act of free will [sufficient] to purge the primary taint of the unlawful invasion."[179] The government failed to meet its burden to establish "purgation" of taint because the deputies, in providing *Miranda* warnings, fulfilled only one of *Brown*'s attenuation factors.[180] The "temporal proximity" factor did not favor the government because there was "no indication from the record that any substantial time passed between Kaupp's removal from his home in handcuffs and his confession after only [ten] or [fifteen] minutes of interrogation."[181] Instead of providing "any meaningful intervening event" between the police illegality and the resulting confession, the record revealed that the deputies acted flagrantly, leaving Kaupp in a partially clothed state even though several of them knew that the arrest lacked probable cause.[182] On the record before it, the *Kaupp* Court ruled, "the confession must be suppressed."[183]

## II. *Utah v. Strieff*

### A. Facts

In December 2006, an anonymous caller left a message on the South Salt Lake City Police drug-tip line reporting "narcotics activity" at a

174. *Id.* at 627–28.
175. *Id.* at 628.
176. *Id.*
177. *Id.*
178. *Id.* at 628–29.
179. Kaupp v. Texas, 538 U.S. 626, 632 (2003).
180. *Id.* at 633.
181. *Id.*
182. *Id.*
183. *Id.*

particular house.[184] In response, Officer Doug Fackrell, "an [eighteen]-year law enforcement veteran with specialized training in drug enforcement," watched the home for a total of about three hours "off and on for a week or so."[185] Officer Fackrell observed some "not terribly frequent" "short-term visits" to the house, which, in his experience, raised suspicion that the home's occupants were selling drugs.[186] Although Officer Fackrell did not know who owned the house or who lived in it, he decided to detain "the next person he saw leaving the house."[187] Edward Strieff then exited the house, prompting Officer Fackrell to choose him.[188] The officer later testified that Strieff "was coming out of the house that I had been watching and I decided that I'd like to ask somebody if I could find out what was going on [in] the house."[189]

Since he had not seen Strieff enter the house, Officer Fackrell did not know how long Strieff had been inside and, therefore, lacked the information to conclude that he was either a short-term visitor or a resident of the home.[190] Further, since Strieff, in walking away from the residence, "had done nothing to arouse any suspicion that he was committing a crime," Officer Fackrell admitted that he had "no reason to stop him" outside of his exit from the house.[191] Officer Fackrell stopped Strieff in a 7-Eleven convenience store parking lot after Strieff had walked about a block from the home.[192] The officer identified himself and explained, "I had been watching the house and that I believed there might be drug activity there and asked him if he would tell me what he was doing there."[193] Officer Fackrell could not remember Strieff's response.[194]

Officer Fackrell then asked Strieff for his identification because he wanted "to know who I'm talking to."[195] When Strieff gave him his Utah identification card, the officer had the dispatcher run a warrants check,

184. Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016); Brief for Petitioner at 2, Utah v. Strieff, 136 S. Ct. 2056 (2016) (No. 14-1373).

185. *Strieff*, 136 S. Ct. at 2059; Brief for Petitioner, *supra* note 184; Brief for Respondent at 13, Utah v. Strieff, 136 S. Ct. 2056 (2016) (No. 14-1373).

186. *Strieff*, 136 S. Ct. at 2059; Brief for Petitioner, *supra* note 184; Brief for Respondent, supra note 185, at 14.

187. Brief for Respondent, *supra* note 185, at 13–14.

188. *Id.* at 14.

189. *Id.*

190. Brief for Petitioner, *supra* note 184.

191. Brief for Respondent, *supra* note 185, at 14.

192. Brief for Petitioner, *supra* note 184.

193. Brief for Respondent, *supra* note 185, at 14.

194. *Id.*

195. *Id.*

which revealed an outstanding "minor traffic warrant."[196] On the strength of this information, Officer Fackrell arrested Strieff and then searched him incident to the arrest.[197] As a result of the search, the officer found methamphetamine and drug paraphernalia in his pocket.[198]

The State charged Strieff with "unlawful possession of methamphetamine and drug paraphernalia."[199] The trial court denied Strieff's motion to suppress the evidence obtained as a result of the illegal seizure of his person, prompting the defendant to enter a conditional guilty plea and reserve the right to appeal.[200]

### B. The Court's Opinion in *Strieff*

The *Strieff* Court framed the issue in its case as "how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant."[201] The Court held, "The evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest."[202] The Court noted that, historically, officers who violated the Fourth Amendment were "traditionally considered trespassers" who could be sued civilly by their victims.[203] The Court cautioned that only later did the Court adopt the exclusionary rule for Fourth Amendment violations, and then only allowed it to apply when "its deterrence benefits outweighe[d] its substantial costs."[204]

The Court pointed out that the exclusionary rule had its exceptions, including "the attenuation doctrine," which allowed admission of illegally obtained evidence when the connection between the constitutional violation and the evidence was "remote or has been interrupted by some intervening

196. Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016); Brief for Respondent, *supra* note 185, at 15.

197. *Strieff*, 136 S. Ct. at 2060.

198. *Id.* The drug paraphernalia was a "glass drug pipe and a small plastic scale with white residue." Brief for Petitioner, *supra* note 184, at 3.

199. *Strieff*, 136 S. Ct. at 2060.

200. *Id.*; Brief for Respondent, *supra* note 185, at 15.

201. *Strieff*, 136 S. Ct. at 2060. Elsewhere in its opinion, the *Strieff* Court offered a more detailed version of the issue in the case, asking whether the Court's "attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to arrest." *Id.* at 2059.

202. Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

203. *Id.* at 2060–61.

204. *Id.* at 2061.

circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'"[205] The *Strieff* Court then applied *Brown*'s attenuation factors to determine "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of the drug-related evidence on Strieff's person."[206]

*Strieff* readily noted that *Brown*'s first factor, "temporal proximity" between the illegality and the search for the evidence,[207] supported suppression in its case.[208] The time, which elapsed between the unlawful stop of Strieff and the search incident to arrest, was only a matter of minutes—too short to constitute the "substantial time" needed to cleanse taint.[209] The government's prospects improved when the Court proceeded to *Brown's* second factor, "intervening circumstances," which "strongly favor[ed] the State."[210] The Court identified this intervening event as the arrest warrant, which was not only "valid," but also "predated" and "entirely unconnected" with the illegal stop.[211]

The Court in *Strieff* spent most of its focus on *Brown's* third element, "the purpose and flagrancy of the official misconduct," which it found "strongly favor[ed] the State."[212] The Court reiterated that, since evidence should be suppressed "only when the police misconduct is most in need of deterrence," exclusion should be restricted to official behavior that "is purposeful or flagrant."[213] Such severe misconduct was missing from *Strieff*, as Officer Fackrell simply made "two good-faith mistakes."[214] The officer committed his first error when, failing to see when Strieff entered the house, he stopped Strieff—even though he lacked the basis to conclude that his detainee was a "short-term visitor" at the home to buy drugs.[215]

205. *Id.*

206. *Id.* 2061–62.

207. In *Brown*, the case that created the multifactored test, the first factor listed was whether police gave the arrestee *Miranda* warnings. Brown v. Illinois, 422 U.S. 590, 603 (1975). Unlike *Brown*, the *Strieff* Court made no mention of this factor, so its "first factor" was "temporal proximity." *Strieff*, 136 S. Ct. at 2062.

208. Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016).

209. *Id.*

210. *Id.* To bolster this conclusion, the Court relied on *Segura v. United States*, which was a case involving the distinct exclusionary rule exception, independent source. Segura v. United States, 468 U.S. 796, 805 (1984).

211. *Strieff*, 136 S. Ct. at 2062.

212. *Id.* at 2063.

213. *Id.*

214. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

215. *Id.*

Since he lacked sufficient justification for seizing Strieff, Officer Fackrell made his second mistake by demanding that Strieff speak with him, rather than request he do so.[216] The Court dismissed these violations as mere "errors in judgment" which hardly rose to "purposeful or flagrant" violations of the Fourth Amendment.[217] Officer Fackrell's further intrusion of running a warrant check was only a "negligibly burdensome" precaution, and all of his further actions were "lawful."[218] Instead of dealing with a matter rife with "systemic or recurrent police misconduct," the *Strieff* case involved an "isolated instance of negligence" in an otherwise "bona fide investigation."[219] After weighing *Brown*'s factors, the *Strieff* Court concluded, "the evidence discovered on Strieff's person was admissible because the illegal stop was sufficiently attenuated by the pre-existing arrest warrant."[220]

## III. Implications of *Strieff's* Rationales

### A. In Emphasizing Lawful Police Conduct in an Effort to Minimize a Fourth Amendment Violation, *Strieff* Weakened the Exclusionary Rule

In the first sentence of its opinion, before even presenting the issue in the case, the *Strieff* Court took the trouble to weaken the exclusionary rule by noting that it was only used to vindicate violated Fourth Amendment rights "at times."[221] This was not the Court's only gambit to erode the exclusionary rule, for the Court later mentioned that the Fourth Amendment was "historically enforced" through "torts suits or self-help."[222] The Court highlighted the rule's recent origin by emphasizing that it had only become the "principal judicial remedy" in the "[twentieth] century."[223] The Court then identified the exclusionary rule's "significant costs" and "substantial social costs" without making any mention of any possible benefits.[224] The Court then concluded, "Suppression of evidence . . . has always been our last resort, not our first impulse."[225] The

216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).
221. *Id.* at 2059.
222. *Id.* at 2061.
223. *Id.*
224. *Id.*
225. *Id.*

repeatedly negative characterizations of the exclusionary rule—beginning even before the reader learned the question in the case—ate away at the vitality of this mandate before it was even applied to the facts.

Further, in its quest to avoid suppressing evidence, the Court in *Strieff* repeatedly emphasized all of the lawful aspects of Officer Fackrell's behavior, despite the illegality that triggered the case.[226] The Court noted that the arrest warrant was "valid," "pre-existing," and "predated Officer Fackrell's investigation."[227] The warrant was "wholly independent of the illegal stop" and "entirely unconnected with the stop."[228] The Court took care to note that Officer Fackrell's conduct after his violation "was lawful," and it was "undisputedly lawful to search Strieff as an incident of his arrest."[229] The officer's choice to run the warrant check was only "negligibly burdensome" to Strieff, and Fackrell only made "two good-faith mistakes."[230] The Court characterized the constitutional violation as "an isolated instance of negligence that occurred in connection with a bona fide investigation."[231] The entire thrust of Strieff's curious argument here was that officers could somehow bank an earthly form of karma or extra credit to immunize themselves from a violation they later commit or have committed in the past. If an officer performs enough lawful acts before and after performing an unreasonable seizure of a person, such good acts will smother the violation out of existence. The problem with this contention is that it fails to account for the fact that the Constitution does not work that way. Peace officers, as government actors serving the public, are forever held to a constitutional minimum regardless of all the good they do.

Another problem with the *Strieff* Court's focus on lawful conduct was its tendency to obscure Officer Fackrell's unlawful actions. As noted by Justice Kagan, the officer's illegal seizure was a "far cry from a Barney Fife-type mishap."[232] The officer's "calculated" decision to illegally stop Strieff was "taken with so little justification that the State has never tried to defend its legality."[233] The officer stopped Strieff not to bring a criminal to

226. Utah v. Strieff, 136 S. Ct. 2056, 2062–63 (2016).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 2063.

231. *Id.*

232. Utah v. Strieff, 136 S. Ct. 2056, 2072 (2016) (Kagan, J., dissenting).

233. *Id.*

book but to "fish for evidence"[234] in "the hope that something might turn up."[235]

Officer Fackrell then compounded the intrusion by having Strieff wait while he ran a warrant check on him.[236] *Rodriguez v. United States*—a case decided in the same term as *Strieff*—reveals Officer Fackrell's exacerbation of his original Fourth Amendment violation here.[237] In *Rodriguez*, a police officer pulled Rodriguez's vehicle over for veering onto a shoulder in violation of Nebraska's traffic laws.[238] After issuing Rodriguez a warning ticket and thus taking care of "all of the business" of the stop, the officer had a police dog sniff the car for drugs, despite the driver's explicit refusal of consent to do so.[239] When the canine was alerted, the police searched the vehicle and eventually recovered a bag of methamphetamine. The Eighth Circuit deemed this "seven or eight-minute delay" permissible.[240] The Supreme Court disagreed, holding that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."[241] The Court broke the officer's actions down into its two parts: (1) the investigation and resolution of the traffic infraction; and (2) the canine sniff.[242] The Court then ruled that the seizure's duration could "last no longer than is necessary to effectuate" the purpose of the stop.[243] Since a warrant check serves the same purpose as the initial stop, enforcing the traffic code by ensuring the violator is not wanted for other traffic offenses is a proper part of the seizure.[244] The dog sniff, in contrast, was not aimed at ensuring traffic safety; instead, it was focused on finding evidence for "ordinary criminal wrongdoing."[245] The extra time spent for the canine sniff, however brief, violated the Fourth Amendment because it extended the seizure of a citizen

234. *Id.* at 2067 (Sotomayor, J., dissenting).

235. *Id.* at 2072 (Kagan, J., dissenting).

236. "The officer deepens the breach when he prolongs the detention just to fish further for evidence of wrongdoing. In his search for lawbreaking, the officer in this case himself broke the law." *Id.* at 2065 (Sotomayor, J., dissenting) (internal citations omitted); *see* Rodriguez v. United States, 135 S. Ct. 1609, 1615–16 (2016).

237. *Rodriguez*, 135 S. Ct. at 1609.

238. *Id.* at 1612–13.

239. *Id.* at 1613.

240. *Id.* at 1614.

241. *Id.* at 1612.

242. Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2016).

243. *Id.*

244. *Id.*

245. *Id.*

beyond the time needed to deal with the traffic violation.[246] The Court in *Rodriguez* turned a deaf ear to the argument that the delay was *de minimis* because any prolongation of the stop, no matter of how little duration, beyond its proper purpose was unlawful.[247]

The *Strieff* Court, in its mission to diminish the illegality of Officer Fackrell's seizure, ignored its own ruling in *Rodriguez*.[248] As in *Rodriguez*, the stop in *Strieff* had two parts: (1) Officer Fackrell's stop of Strieff "to ask somebody" about "what was going on [in] the house";[249] and (2) the officer's switch of tasks to Strieff's own possible criminal record.[250] Even though the Court deemed the arrest warrant "entirely unconnected to the stop," it never addressed the *Rodriguez* Court's holding, prohibiting a seizure's extension to perform such activity, "unconnected" as it was from the initial purpose of the stop.[251] Instead, the *Strieff* Court's pursued the "*de minimis*" argument,[252] which the Court in *Rodriguez* had explicitly rejected by minimizing the extra time Officer Fackrell took to pursue a warrant check as a "negligibly burdensome precaution[]."[253]

Finally, in its effort to cleanse the evidence in *Strieff*, the Court declared the officer's search incident to arrest to be "undisputedly lawful."[254] This search, of course, was only lawful if it was not tainted by the illegal stop that preceded it. The Court thus employed a conclusion it hoped for—a search cleansed of the taint from an illegal stop as one of the intervening factors used to purge the taint in the first place.[255] Since a search incident to arrest relies solely on the lawfulness of the arrest itself, the search can only be deemed lawful when it is clearly established that the arrest justifying it is lawful.[256] The *Strieff* Court turned a blind eye to

246. *Id.* at 1614.

247. *Id.* at 1616.

248. Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016).

249. Brief for Respondent, *supra* note 185, at 14.

250. *Strieff*, 136 S. Ct. at 2060.

251. *Id.* at 2062.

252. *Id.* at 2063.

253. *Id.*; Rodriguez v. United States, 135 S. Ct. 1609, 1616 (2016).

254. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

255. *Id.* at 2062–63.

256. In *United States v. Robinson*, the Court ruled,

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

Officer Fackrell's exploitation of his original illegal stop to run the warrant, which justified the arrest that allowed the search incident to the arrest. However, acknowledgment of this chain of events would cause the Court's search incident to arrest claims to unravel.[257] With such mental contortions, the *Strieff* Court strained to cleanse the taint to avoid a result it dreaded: The exclusion of evidence.[258]

### *B.* *Strieff* Applied an Attenuation Rule that Was Not Designed for Physical Evidence and, Therefore, Failed to Adequately Address the Taint in Its Case

The Court in *Strieff* hobbled its own attenuation analysis by improperly applying *Brown*'s factors to Officer Fackrell's recovery of methamphetamine. In her dissent, Justice Kagan explained how the Court struck out in applying *Brown*'s three factors of "temporal proximity," "purposeful and flagrant police misconduct," and "intervening circumstances."[259] The Court suffered "strike one," as it acknowledged, when the time lapse between the illegal stop and the discovery of the drugs was only a matter of minutes, far too short to fulfill the *Brown* Court's "substantial time" requirement.[260] "Strike two" occurred when the officer admitted his purposefulness by stating he only stopped Strieff to learn what was going on in the home under surveillance.[261] Finally, the Court committed "strike three" in labeling the warrant an intervening event because outstanding warrants are so "run-of-the-mill" that they hardly "appear as bolts from the blue."[262]

In applying *Brown* to Strieff's stop, all of the justices, whether in the majority or in dissent, assumed this case provided the rule best able to decide the issue. A closer analysis of *Wong Sun*, *Brown*, and the later cases applying *Brown*'s factors, however, reveal that the justices' assumptions in *Strieff* might have been unwarranted. In *Wong Sun*, the evidence subjected to the attenuation analysis was either verbal statements from arrestees or physical items obtained in reliance on such statements.[263] Specifically, the Court in *Wong Sun* considered the admissibility of James Toy's statement

United States v. Robinson, 414 U.S. 218, 235 (1973).

257. *Strieff*, 136 S. Ct. at 2065; *see* Wong Sun v. United States, 371 U.S. 471, 488 (1963).

258. *Strieff*, 136 S. Ct. at 2061.

259. *Id.* at 2071–72 (Kagan, J., dissenting). Justice Sotomayor also determined that the Court improperly applied the *Brown* Court's three attenuation factors. *Id.* at 2066 (Sotomayor, J., dissenting).

260. Utah v. Strieff, 136 S. Ct. 2056, 2072 (2016).

261. *Id.*

262. *Id.* at 2073.

263. Wong Sun v. United States, 371 U.S. 471, 474, 491 (1963).

given in his bedroom, the heroin obtained from Johnny Yee that police learned of due to James Toy's statement, and Wong Sun's statement sometime after his illegal arrest.[264] In deciding Toy's statement was not cleansed by any "intervening event," the Court explored the psychological impact of the agents' illegal actions:

> Six or seven officers had broken the door and followed on Toy's heels into the bedroom where his wife and child were sleeping. He had been almost immediately handcuffed and arrested. Under such circumstances it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.[265]

The Court explored Toy's mind by surmising, "It is probable that even today . . . there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."[266] Similarly, the Court placed Wong Sun on the couch when weighing whether his statement was tainted. Since police released Wong Sun "on his own recognizance after a lawful arraignment," and he himself had "returned voluntarily several days later" to speak with police, his statement was free of the coercive psychological atmosphere that surrounded Toy's situation.[267]

As in *Wong Sun*, the cases applying *Brown*'s attenuation factors explored the emotional impact an illegal seizure had on later statements.[268] In *Brown*, the suspect provided two statements after police pointed guns at his front and back during an illegal arrest.[269] The Court, venturing into the realm of "free will," despaired at the complexity of "the human mind."[270] The *Brown* Court also noted the officers performed their illegal arrest in a manner "calculated to cause surprise, fright, and confusion."[271]

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264. *Id.* at 484, 491.

265. *Id.* at 486.

266. *Id.* at 486, n.12.

267. *Id.* at 491.

268. Brown v. Illinois, 422 U.S. 590, 592, 594–95 (1975); Dunaway v. New York, 442 U.S. 200, 203 (1979); Rawlings v. Kentucky, 448 U.S. 98, 101 (1980); Taylor v. Alabama, 457 U.S. 687, 689, 691 (1982); Kaupp v. Texas, 538 U.S. 626, 628–29 (2003).

269. *Brown*, 422 U.S. at 590, 592, 594–95.

270. *Id.* at 603.

271. *Id.* at 605. The *Dunaway* Court also considered, however briefly, mental factors when assessing the taint of an arrestee's confession. In this matter, the Court found no "intervening event of significance." *Dunaway*, 442 U.S. at 218.

The Court in *Rawlings*, where officers would not allow visitors of an apartment to leave without a body search, went further in examining the psychological impact of an illegal seizure.[272] There, the Court focused on the emotional setting surrounding Rawlings' admission about owning drugs when analyzing the "temporal proximity of the arrest and the confession."[273] Rather than just noting the time length between seizure and confession, the Court in *Rawlings* examined "the precise conditions under which the occupants" were detained.[274] At the start of the detention, the visitors could move freely about the home.[275] One of the detainees, Dennis Sadler, helped himself to a cup of coffee, joked with the police about the puppy on the premises, and offered the officers beverages.[276] In this "congenial atmosphere," Sadler even turned on some music.[277] Such a relaxed and friendly setting indicated little chance of continuing mental harm stemming from the illegal detention, even though a "relatively short period of time" had elapsed from its commission.[278] Psychology also dominated the Court's consideration of *Brown*'s next factor, "intervening circumstances."[279] Rawlings' admission, rather than being a product of his illegal seizure, stemmed from his own "spontaneous reaction" to the discovery of the drugs and his own motives for claiming them.[280] Aware that his fellow visitor, Cox, was "freaking out," Rawlings demonstrated conflicting "motivations."[281] Rawlings both wished to spare Cox blame ("[H]e wasn't going to try to pin that on her."), and feared she would incriminate them further ("[H]is main concern was whether or not Vanessa Cox was going to say anything[]").[282] This penetrating analysis of the most minute mental motivations were all to ensure that Rawlings' statements were "acts of free will unaffected by any illegality in the initial detention."[283]

The Court in *Taylor* also emphasized the link between a detainee's confession and his psyche. The State, understanding the centrality of the

272. *Rawlings*, 448 U.S. at 100.
273. *Id.* at 107.
274. Rawlings v. Kentucky, 448 U.S. 98, 107 (1980).
275. *Id.* at 108.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. Rawlings v. Kentucky, 448 U.S. 98, 108–09 (1980).
281. *Id.* at 109.
282. *Id.*
283. *Id.* at 110.

mental experience, urged that the six hours between the illegal arrest and Taylor's statements gave him "every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will."[284] Unlike the prosecution, the Court doubted whether the five to ten minute visit could have contributed to careful and objective judgment.[285] Instead, the girlfriend's upset nature might have inflamed Taylor's own emotions, since after seeing her, he immediately recanted his ignorance about the robbery and signed his confession.[286] This probing exploration of Taylor's inner mental state had only one aim: to determine that his confession was "the fruit of his illegal arrest."[287]

In contrast to *Wong Sun* and the *Brown* line of cases, the evidence subject to attenuation in *Strieff* was not a confession or an item found because of a confession, but methamphetamine, a drug pipe, and a plastic scale.[288] Since Officer Fackrell based his search incident to arrest on a "minor traffic warrant,"[289] he had no need to rely on any statement from Strieff. Indeed, it is arguable that the officer paid little heed to Strieff's words, for he could not even remember Strieff's response to his question about the activity in the house.[290] Lacking any reason to assess the effect of an illegal seizure on a resulting statement, the *Strieff* Court did not need to delve into the psychological impact of the Fourth Amendment violation. The Court's ruling in *Wong Sun* that a statement must not only be voluntary under the Fifth Amendment, but also be guided by free will, clear of taint,

284. Taylor v. Alabama, 457 U.S. 687, 691 (1982).

285. *Id.*

286. *Id.* at 691–92.

287. *Id.* at 694. The *Harris* Court also used the *Brown* Court's factors to study the link between police "control of the defendant's person" and his "challenged statement." New York v. Harris, 495 U.S. 14, 19 (1990). Since the police in *Harris* had formed probable cause before arresting Harris, they did not exploit their unlawful warrantless entry into his home to in order to continue to hold him in custody as he sat in the station. *Id.* Unlike in other attenuation cases, the officers in *Harris* did not take advantage of their original illegality (invading the "sanctity of the home") to obtain the statement. *Id.* at 17. While Harris was being questioned at the station, police pulled no emotional levers about the privacy of his home to get him to speak. *Id.* The *Harris* Court therefore reasoned that its case differed from *Brown* and its progeny because those cases involved evidence that was, "in some sense[,] the product of illegal governmental activity." *Id.* at 19. The Court in *Kaupp* also relied on the emotional impact of official behavior on the arrestee's decision to confess. Kaupp v. Texas, 538 U.S. 626, 633 (2003). In assessing the existence of taint, the Court noted that the fact that Kaupp "remained in his partially clothed state in the physical custody of a number of officers," was hardly a situation conducive to clear thinking. *Id.*

288. Brief for Petitioner, *supra* note 184, at 3.

289. Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016); Brief for Respondent, *supra* note 185, at 15.

290. Brief for Respondent, *supra* note 185, at 14.

simply had no application in *Strieff*.[291] Instead, the *Strieff* Court could have simply focused on the *Wong Sun* Court's true inquiry: Whether the evidence had been obtained by exploitation of illegality "or instead by means sufficiently distinguishable to be purged of the primary taint."[292]

An attenuation rule recognizing the distinction between confessions and physical evidence would considerably limit *Brown*'s impact because some of its factors were designed or applied to analyze the effect of illegality on confessions. The applicability to confessions of *Brown*'s first factor, *Miranda* warnings, is self-evident in light of their purpose in shielding a suspect from the inherently coercive pressures to confess during custodial interrogation.[293] *Brown*'s second factor, "temporal proximity of the arrest and the confession," not only explicitly references a confession, but also, as seen in *Taylor*, has been applied to analyze the emotional impact of the violation on the resulting confession.[294] The *Rawlings* Court applied *Brown*'s third factor, "intervening circumstances," by assessing its impact on a confession admitting drug possession.[295] *Brown* applied its fourth factor, "the purpose and flagrancy of conduct," to assess a confession.[296] As support for its consideration of official flagrancy and purposefulness, the *Brown* Court cited three lower court cases: *United States v. Edmons*, *United States ex rel. Gockley v. Myers*, and *United States v. Kilgen*.[297] While *Edmons* involved an arrest to place a suspect in a

291. Wong Sun v. United States, 371 U.S. 471, 486 (1963).

292. *Id.* at 487. To say that the taint analysis for confessions and physical evidence can differ, is not to say that one or the other kind of evidence falls outside the exclusionary rule. The Court, in *United States v. Crews*, clearly indicated that all kinds of evidence could be suppressed, specifically noting:

> [T]he exclusionary sanction applies to any "fruits" of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.

United States v. Crews, 445 U.S. 463, 470 (1980). However, the fact that the exclusionary rule applies to both physical evidence and confessions does not necessarily mean that the attenuation analysis for exclusion needs to apply *in the same way* to these different kinds of evidence.

293. Brown v. Illinois, 422 U.S. 590, 592, 603 (1975); *see* Miranda v. Arizona, 384 U.S. 436 (1966).

294. Taylor v. Alabama, 457 U.S. 687, 691 (1982).

295. Rawlings v. Kentucky, 448 U.S. 98, 109 (1980).

296. *Brown*, 422 U.S. at 604.

297. *Id.* at 604, 604, n. 9; United States v. Edmons, 432 F.2d 577, 584 (1970); United States *ex rel.* Gockley v. Myers, 450 F.2d 232, 236 (1971); United States v. Kilgen, 445 F.2d 287, 289 (1971). The *Brown* Court also referred its readers to *Wong Sun*, where the Court offered, "The petitioner has never suggested any impropriety in the interrogation itself which would require the exclusion of this statement." Wong Sun v. United States, 371 U.S. 471, 491 (1963). This is hardly a rock-solid foundation for *Brown's* fourth factor.

lineup, the other two concerned arrests for confessions.[298] No officers in any of these cases had, as the goal of their arrest, the collecting of physical evidence.[299]

Some of *Brown*'s factors lose relevance when applied to a physical item. The Court in *Strieff* implicitly recognized as much when it skipped over *Brown*'s "*Miranda* warnings" factor without mention and labeled "temporal proximity" as its first factor to consider.[300] When faced with an attenuation issue regarding physical evidence rather than a confession, the *Strieff* Court should abandon the *Brown* Court's holding in favor of a straightforward proximate cause rule based on reasonable foreseeability. In such an analysis, the Court would simply inquire whether a reasonable officer, in the particular officer's situation, could reasonably foresee that illegal conduct could result in the recovery of incriminating evidence. In this streamlined attenuation rule, "temporal proximity" and "intervening events" would be assessed only in regard to whether such factors increased or decreased the foreseeable likelihood of obtaining evidence. *Brown*'s factors would be dropped, due either to their irrelevancy or their problematic impact on the Exclusionary Rule Doctrine.[301]

A simple rule of proximate cause based on foreseeability possesses several advantages for Fourth Amendment litigation. First, this rule is hardly a wrenching break from precedent, as shown by Justice Kagan's explanation that "Fourth Amendment attenuation analysis 'looks to whether the constitutional violation was the proximate cause of the discovery of the evidence.'"[302] In the guise of intervening circumstances, proximate cause is well known to the courts, which have long applied this concept in tort law.[303] Second, a focus on reasonable foreseeability steers clear of the kind of "rigid" or "specific" test that the Court has previously refused, in *Illinois v. Gates*, to force upon police.[304] In *Gates*, the Court preferred a definition of probable cause that avoided the "library analysis by scholars" in favor of rule understandable to "those versed in the field of

298. United States v. Edmons, 432 F.2d 577 (1970); United States v. *ex rel.* Gockley v. Myers, 450 F.2d 232 (1971); United States v. Kilgen, 445 F.2d 287 (1971).

299. *Id.*

300. Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016).

301. As previously noted, the *Strieff* Court, itself, already jettisoned the *Brown* Court's *Miranda* warnings factor without comment. *Id.* A full analysis of the suggestion to rid attenuation of the purpose and flagrancy factor is addressed in Part IV(B) below.

302. *Strieff*, 136 S. Ct. at 2072 (Kagan, J., dissenting).

303. *Id.*

304. Illinois v. Gates, 462 U.S. 213, 231 (1983). In *Gates*, the Court favored a "totality-of-the-circumstances" test for probable cause over the prior "rigid" and "specific" *Aguillar/Spinelli* test it replaced. *Id.*

law enforcement."[305] The Court saw the nontechnical aspect of its probable cause rule as strength because it would be used by "nonlawyer" officers in the field who often worked in haste.[306] Likewise, the simplified reasonably foreseeable test could be properly applied based on "common-sense judgments of laymen" making quick decisions during rapidly unfolding situations on the street.[307] Third, analyzing reasonable foreseeability would give the attenuation analysis a textual anchor in the Fourth Amendment, for the first clause of the Fourth Amendment involves reasonableness.[308] Finally, a proximate cause rule for physical evidence would return the Court to *Wong Sun*'s "proper inquiry": Whether police had exploited their own illegality obtaining the evidence.[309] If an officer took advantage of his or her own unlawful behavior to gain evidence, then the evidence would be so intimately linked to the illegality that it cannot be said to be "remote."[310] Therefore, the interest protected by the Fourth Amendment would be served by suppression of such evidence.[311]

Officer Fackrell's conduct provides a prime example of official exploitation of illegality. Rather than dedicating himself to a prolonged stakeout, the officer made sporadic visits over a week that in their entirety added up to only three hours.[312] He saw some "short-term visits" infrequently occur at the home, some ambiguous evidence that raised his suspicion that drugs sales were occurring at the house.[313] Even though a reasonable officer possessing Officer Fackrell's eighteen years of experience would know better, the officer decided to seize "the next person he saw leaving the house."[314] The Court reluctantly recognized Fackrell's negligence[315] and the officer himself admitted that the stop was based on nothing more than the desire to ask "somebody" about "what was going on" in the residence.[316] Edward Strieff just happened to be that somebody.

305. *Id.* at 232.

306. *Id.* at 231, 235.

307. *Id.* at 236.

308. U.S. CONST. amend. IV.

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

310. The Court in *Strieff* explained that evidence becomes attenuated when it "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.'" Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).

311. *Id.*

312. *Id.* at 2059; Brief for Petitioner, *supra* note 184, at 2.

313. Brief for Petitioner, *supra* note 184, at 2; Brief for Respondent, *supra* note 185, at 14.

314. Brief for Respondent, *supra* note 185, at 13–14.

315. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

316. Brief for Respondent, *supra* note 185, at 14.

Officer Fackrell admitted that Strieff had "done nothing to arouse any suspicion that he was committing a crime" other than leave the home.[317] The illegality of Officer Fackrell's "calculated decision" to stop Strieff was so clear that the State never even attempted to "defend its legality."[318] This "gratuitous and avoidable" misconduct is "precisely the type of behavior most in need of deterrence."[319]

Thus, Officer Fackrell intentionally committed the stop—despite the fact that an objectively reasonable eighteen-year veteran with his specialized drug enforcement experience would know better—in order to obtain evidence.[320] The result of the officer's illegality was not only foreseeable, but the very goal of his unlawful act—the recovery of evidence. The evidentiary prize, however, did not come from inside the home, as the officer originally intended, but from Strieff's own person. Still, finding evidence in Strieff's pocket was itself a foreseeable consequence of the illegal stop due to Officer Fackrell's "standard practice."[321] The officer explained that he routinely sought identification at stops because, "of course it's normal for me to want to know who I am talking to so I told him that, you know, if he had some [identification] if I could please see it."[322] The existence of an outstanding warrant was foreseeable; indeed, by the officer's own admission, that possibility was the very purpose for running the check in the first place. Officer Fackrell therefore exploited his illegal stop by getting the name and identification of Strieff for a warrant check, something he could not have gained in any practical manner without first illegally stopping him.

The fact that the officer could not remember Strieff's response to his question presented a red flag.[323] If Strieff had provided Officer Fackrell with anything that added to his suspicions about the house, then the officer would likely have been able to remember it for such a tip would enable him to pursue his original target, the drug dealers inside the residence. A forgettable response would probably be an answer so innocuous that it failed to help the officer in advancing his investigation. When presented

317. *Id.* If one were to give police and citizens equal treatment, then the *Strieff* Court's rationale that an officer's lawful conduct mitigates the illegality it surrounds should apply equally to Strieff's own actions. Then, by the Court's strained logic, Strieff's lawful behavior should lessen the significance of the fact he exited a suspicious home. *See* Part IV(A).

318. Utah v. Strieff, 136 S. Ct. 2056, 2072 (2016) (Kagan, J., dissenting).

319. Jarvis v. United States, 435 U.S. 934, 937 (1978) (White, J., dissenting).

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

321. Brief for Respondent, *supra* note 185, at 14.

322. *Id.* Officer Fackrell thus exacerbated the initial illegality of his stop by prolonging it with a warrant check. Rodriguez v. United States, 135 S. Ct. 1609, 1615–16 (2016).

323. Brief for Respondent, *supra* note 185, at 14.

with no additional incriminating evidence, Officer Fackrell did not let Strieff go, but pursued a second fishing expedition by checking for a warrant. The officer only ceased when he had obtained evidence; this strongly suggests that gaining evidence was not only foreseeable, but the ultimate goal of the entire inquiry.

### C. By Emphasizing Purposefulness and Flagrancy, *Strieff* Set an Alarmingly Low Bar as Its New Standard for Lawful Policing

In applying the *Brown* Court's "flagrancy" factor to its case, the *Strieff* Court made much of Officer Fackrell's "good faith" in being "at most negligent."[324] The *Strieff* Court justified its focus on flagrancy by arguing that since the exclusionary rule's purpose is "to deter police misconduct," it should be used "only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant."[325] The idea that police negligence is immune to the exclusionary rule does not square with logic. Justice Sotomayor noted that the "officers prone to negligence" are the very officials in "the most need" of learning the lessons that exclusion forcibly teaches.[326] Since these individuals are not the hardened or cynical rule breakers, exclusion might be most effective on changing their motives to "err on the side of constitutional behavior."[327] Common sense would suggest that the best way to promote good conduct is to nip problems in the bud rather than waiting until they progress to being committed purposefully or flagrantly. Even the early opponents to the exclusionary rule understood that it applied to constitutional violations without consideration of purpose and flagrancy. When Judge Cardozo famously complained "[t]he criminal is to go free because the constable has blundered," he understood that evidence would be suppressed when officers made a mistake.[328] In response to Judge Cardozo's lament, the Court in *Mapp* did not limit its new rule to only the most egregious behavior, but frankly gave the reason for suffering it instead: taking the "ignoble shortcut to conviction" by admitting illegally obtained evidence "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."[329]

Further, the Court's assumption that deterrence works best when limited to only the most egregious and intentional conduct lacks an empirical basis. Scholars have long recognized that "[c]ompliance with

324. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

325. *Id.*

326. *Id.* at 2068 (Sotomayor, J., dissenting).

327. *Id.*

328. People v. Defore, 242 N.Y. 13, 21 (1926).

329. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

laws and regulations depends on the expected penalty facing violators. The expected penalty depends on both the probability of punishment and the severity of the punishment if caught."[330]

The general theory of deterrence postulates, "increases in variables such as the probability of detection and conviction, along with increases in the penalty (either fines or jail terms) tend to reduce crime rates."[331] Traditionally, it was understood that "increases in the probability of punishment have a larger and more significant impact than increases in the severity of punishment."[332] Although the greater impact of probability of punishment over its severity has been the subject of recent debate, the consensus seems to be that both factors have some impact on deterrence.[333]

Since certainty of punishment is an important, if not the leading, factor in deterrence, the exclusionary rule's effectiveness would be improved by promoting its certainty of application to police misconduct. The Court's tendency to carve out exceptions to the exclusionary rule limits the certainty of its application and, therefore, undermines its deterrence value.[334] The *Strieff* Court's restriction of exclusion to only purposeful and flagrant constitutional violations dramatically limits the frequency and, thus, the certainty of evidence suppression. Moreover, because recent research indicates the importance of a punishment's severity for deterrence, the *Strieff* Court's complaints about exclusion's "significant costs" might actually prove the rule's efficacy.[335] In *Hudson v. Michigan*, the Court accurately noted that the costs of exclusion "sometimes include setting the

330. *See* Lana Friesen, *Certainty of Punishment Versus Severity of Punishment: An Experimental Investigation*, S. ECON. J., 399 (2012); *see also* Murat C. Mungan, *The Certainty Versus the Severity of Punishment, Repeat Offenders, and Stigmatization*, ECON. LETTERS, 1, 126 (2017) ("A belief shared by many criminologists is that the certainty of punishment (p) affects deterrence more than the severity of punishment (s), and there is some empirical evidence supporting this belief.").

331. Friesen, *supra* note 330, at 400.

332. *Id.*

333. *Id.* at 416 ("The main conclusion of this article is that an increase in the severity of punishment is a more effective deterrent than an equivalent increase in the probability of punishment."); *see also* Mungan, *supra* note 330.

334. United States v. Calandra, 414 U.S. 338, 354 (1974) (holding that the exclusionary rule does not apply to evidence at grand jury proceedings); Stone v. Powell, 428 U.S. 465, 494 (1976) (explaining that when a defendant has received a full and fair opportunity to litigate his Fourth Amendment claim in state court, his claim to exclude evidence will not be heard on habeas corpus); United States v. Leon, 468 U.S. 897, 922 (1984) (holding that evidence will not be excluded when an officer has relied in objective good faith on a warrant issued by a detached and neutral magistrate); United States v. Havens, 446 U.S. 620, 627–28 (1980) (holding that use of illegally obtained evidence can be used to properly impeach defendant).

335. Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).

guilty free and the dangerous at large."[336] The *Hudson* Court also rightly worried that evidence suppression exerts a "costly toll" on the courts' central purpose of seeking truth.[337] The Court in *United States v. Leon* labeled the fact that the guilty might go free or receive reduced sentencing as an "objectionable collateral consequence" of the exclusionary rule's "interference with the criminal justice system's truth-finding function."[338] What the Court misses when bemoaning such results is that they are not a bug but rather a feature of the exclusionary rule. Exclusion is certainly costly, indeed it is meant to be so. The *Mapp* Court explained that a key purpose of excluding evidence was deterrence through punishment, to "deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[339] The Court in *Mapp* recognized that, in applying the exclusionary rule to all state officials, it was committing itself to an endeavor with the highest of stakes.[340] The Court stated, "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, its disregard of the charter of its own existence."[341]

When the exclusionary rule's costs are visited upon the individual officer, he or she will suffer in a personal and pragmatic way. Lost cases due to exclusion of evidence, particularly if they continue to occur, could cause individual upset, loss of professional reputation, and even damage to career prospects. Patterns of failure reflect poorly on leadership, which feel the pressure to discipline or at the very least educate.[342] The Court recognized this dynamic in *Stone v. Powell*, in noting that the exclusionary

336. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

337. *Id.*

338. *Leon*, 468 U.S. at 907 (1984).

339. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

340. *Id.* at 659.

341. *Id.*

342. The Court, in *Hudson v. Michigan,* noted the following improvement in policing:

> Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. Even as long ago as 1980 we felt it proper to "assume" that unlawful police behavior would "be dealt with appropriately" by the authorities, but we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been "wide-ranging reforms in the education, training, and supervision of police officers."

Hudson v. Michigan, 547 U.S. 586, 598–99 (2006) (internal citations omitted). The Court offered this observation as justification for limiting the exclusionary rule, unaware that such increased police professionalism was likely due to the very exclusionary rule it was currently limiting. *Id.*

rule was meant to prevent "unlawful police activity in part through the nurturing of respect for Fourth Amendment values."[343] Without the exclusionary rule's practical consequences, "lawless police" would hypocritically pursue lawless civilians.[344] As Justice Brandeis declared nearly eight decades ago, "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen."[345] He further warned, "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."[346]

It is curious that, at a time of increasing violence and distrust between police and citizenry—where police wear body cameras[347] and citizens record traffic stops with their cell phones[348]—the Court would limit its enforcement of Fourth Amendment rights to only flagrant or purposeful violations.[349] If police fail to follow the law, or even if there is only a general perception that officers are law violators, it is the officer on the street who suffers.[350] The Court should thus use care when limiting enforcement of a basic constitutional right.

### *D. Strieff* Destroyed Incentives to Avoid Illegal Seizures by Providing Police with a *Per Se* Rule for Automatically Cleansing Taint

In creating its attenuation factors, the *Brown* Court explicitly refused to consider the reading of *Miranda* after an illegal arrest as alone sufficient to cleanse taint.[351] Such a *per se* rule would encourage police to violate the Fourth Amendment secure in the knowledge that any evidence obtained as

343. Stone v. Powell, 428 U.S. 465, 491 (1976).

344. Utah v. Strieff, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting).

345. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

346. *Id.*

347. William Lee, *Police Body Cameras to Be Implemented Citywide a Year Early: Officials*, CHI. TRIB., (Dec. 28, 2016, 6:04 PM), http://www.chicagotribune.com/news/local/breaking/ct-body-cameras-chicago-police-20161228-story.html.

348. CBS SF Bay Area, *Minnesota Man Fatally Shot by Police; Aftermath Posted on Facebook*, YOUTUBE (July 7, 2016), https://www.youtube.com/watch?v=aOgqXkICAck ("These days, when people see anything, their reflex action is to pull out the cell phone to start recording."); ABC News, *Live Police Shooting of Philando Castile | Livestream Video [GRAPHIC CONTENT]*, YOUTUBE (July 7, 2016), https://www.youtube.com/watch?v=jaB8MJhncDc.

349. Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

350. Faith Karimi et al., *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN, (July 9, 2016, 1:37 AM), http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/.

351. Brown v. Illinois, 422 U.S. 590, 601–02 (1975). This Article, in Part IV(B) above, suggests the Court abandon the *Brown* Court's factors when assessing attenuation of taint for physical items. If the Court, however, adheres to the *Brown* decision, it should consistently follow all implications of this rule.

a result of the violation "could well be made admissible at trial by the simple expedient of giving *Miranda* warnings."[352] The Court in *Brown* declared, "Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all,' and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to 'a form of words.'"[353]

What the Court wisely forbade in 1975, it recklessly allowed in 2016. In *Strieff*, the Court embraced the cure-all of the unknown warrant; instead of having the expedient of the *Miranda* warnings, the *Strieff* Court gave police the expedient of an outstanding arrest warrant.[354] After *Strieff*, police who have no reason to seize a citizen can do so with the bare hope that a warrant in the system will clean up their Fourth Amendment mess. If a check reveals a warrant, the unlawful stop is erased; if the check shows no warrant exists, the officer can just let the person leave. The only person who suffered a cost—whether in time, dignity, or peace of mind—is the hapless citizen. With *Strieff*, officers who have nothing (no objective suspicion) will lose nothing (no exclusion of evidence) if they violate the Constitution. However, these same officers, similar to gamblers pulling the arm of a slot machine, might gain something on the off chance that a warrant exists when they pull the person aside.

In actuality, the officers pursuing these stops will be participating less in gambling than in a sure thing. Justice Sotomayor noted, "Outstanding warrants," whether for such relatively minor matters as traffic tickets or for probationers breaking curfew, are "surprisingly common."[355] State and federal government databases, which list "7.8 million outstanding warrants," might still be failing to account for the "'staggering' numbers of warrants, 'drawers and drawers' full, that many cities issue for traffic violations and ordinance infractions."[356] The danger of police abusing their ability to instantly cleanse an illegal stop with an outstanding warrant is not just real but ongoing. A justice department analysis of warrant-checked stops, mentioned by Justice Sotomayor, reported that "approximately [ninety-three percent] of the stops would have been considered unsupported by articulated reasonable suspicion."[357]

352. *Id.* at 602.

353. *Id.* at 602–03.

354. Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

355. *Id.* at 2068 (Sotomayor, J., dissenting).

356. *Id.*

357. *Id.* at 2069.

## Conclusion

Justice Kagan's reference to Barney Fife in her dissent had significance beyond the Court's "purposefulness" inquiry.[358] In one episode of the venerable television series, *Andy Griffith*, Barney Fife tickets a car for illegal parking, only to learn that it is the governor's limousine.[359] Instead of having Deputy Fife humiliated or fired, the governor visits Barney to shake his hand. The moral underlying the episode respects the rule of law; the law is so important, that no one, not even the governor, can flout it. This simple and compelling lesson has been lost on the *Strieff* Court. In Andy Griffith's world, even a governor has to face the consequences of even the most trivial illegality. In *Strieff*, an officer can avoid accountability for violating the supreme law of the land[360] if his quarry happened to have an unknown and unresolved traffic violation.[361] Such condoning of "lawless police conduct" in pursuit of "lawless civilian conduct" violates "a basic principle that lies at the heart of the Fourth Amendment."[362]

Further, vintage television highlights the concern caused by the *Strieff* Court's acceptance of any officer illegality falling short of being "purposeful and flagrant."[363] In 1980s television show, *Hill Street Blues*, a crusty sergeant would habitually end his roll calls by imploring his officers, "Let's be careful out there!"[364] If the *Strieff* Court were to write a script to bring back the television series, its morning roll calls would end with the sergeant perverting the standard admonition to, "Let's be careless out there! Just avoid being purposeful or flagrant!" The break the *Strieff* Court gave to negligent officers will serve only to weaken the competence and professionalism of our police forces in times when adroit policing is all the more needed.

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358. *Id.* at 2072 (Kagan, J., dissenting).

359. *Barney Fife Did It Right*, (July 28, 2013), TIMES-REPUBLICAN, http://www.timesrepublican.com/opinion/your-view/2013/07/barney-fife-did-it-right/ ("Old people in town riled Barney Fife because a big car was parked illegally. Barney gave a ticket and then found out it was the governor's car. The governor wanted to see Barney, and Barney was worried. The governor thanked Barney for doing his job."); Barney and the Govenor, IMBD, http://www.imdb.com/title/tt0512448/.

360. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, § 2.

361. Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016); Brief for Respondent, *supra* note 185, at 15.

362. *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting).

363. *Id.* at 2063.

364. Odis Shavonne, *Hill Street Blues 'Let's Be Careful Out There,'* YOUTUBE (Oct. 6, 2016), https://www.youtube.com/watch?v=_plkkzDagsY.

In the seminal Fourth Amendment case, *Terry v. Ohio*, the Court, in speaking of the Fourth Amendment, declared, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[365]

The Court in *Terry* recognized its "traditional responsibility to guard against police conduct" that trenched upon "personal security without the objective evidentiary justification which the Constitution requires," while still approving "restrained investigative conduct undertaken on the basis of ample factual justification."[366] By increments over the decades, the Court seems to have strayed from this mission. Now, after *Strieff*, the right of the individual to control one's own person has lost its sacred status.

365. Terry v. Ohio, 392 U.S. 1, 9 (1968).

366. *Id.* at 15.