BLACK AND POOR: THE GRAVE CONSEQUENCES OF *UTAH V. STRIEFF*

CHANAE L. WOOD[1]

INTRODUCTION

Suppose a nineteen-year-old Black male, Jason, decides to watch a late night movie with friends.[2] The group of friends meet on the corner outside of the local convenience store.[3] However, Jason arrives early.[4] Out of habit, he paces back and forth, as he waits for the others to arrive.[5] Two police officers, patrolling the area for drug activity, notice Jason and find his pacing suspicious.[6] The officers approach Jason and proceed to

1. Chanae L. Wood, *Juris Doctor* Candidate May 2018, St. Thomas University School of Law, ST. THOMAS LAW REVIEW, *Editor-in-Chief*; Trial Team, *Competing Member*; B.S. Family, Youth, & Community Science, Minors in Public Leadership and International Development & Humanitarian Assistance, University of Florida, 2013. First and foremost, I must thank God, my amazing husband, and parents for their unwavering support. I am also very grateful to Professor Amy D. Ronner for inspiring me to speak on behalf of the "voiceless." Lastly, I would be remiss if I did not thank Solange Knowles for creating the soundtrack for this article. Black & poor communities have a *Seat at the Table*.

2. *See* Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 392 (2001) (citations omitted) (discussing the significance of flight in Black communities and its relation to Fourth Amendment rights). Ronner provides examples of encounters with Black males and police officers. *See id.* at 386–89. In her discussion of race and flight, she includes an encounter with Boston police officers and a nineteen-year-old Black male, documented by the Massachusetts Attorney General's Report on the practices of the Boston Police Department. *See id.* at 392. This hypothetical is loosely based on this encounter. *See id.* at 392.

3. *See* Ronner, *supra* note 2, at 389–92 (citations omitted) (providing stories of police officers targeting minorities); Merry C. Johnson, *Comment, Discovering Arrest Warrants During Illegal Traffic Stops: The Lower Courts' Wrong Turn in the Exclusionary Rule Attenuation Analysis*, 85 MISS. L.J. 225, 226–27 (2016) (posing a hypothetical question of whether evidence found during illegal traffic stops should be admissible); Paul Butler, *Walking while Black: Encounters With the Police on My Street*, LEGAL TIMES WEEK (Nov. 10, 1997), http://jay.law.ou.edu/faculty/Jmaute/Lawyering_21st_Century/Paul%20Butler.pdf (using an excerpt from Henry Louis Gates to compare "driving while back" to "walking while black").

4. *See* Ronner, *supra* note 2, at 392–93 (citations omitted) (explaining that the law encourages police harassment by including race as a justified pretext); Johnson, *supra* note 3, at 226–27 (suggesting that arrest warrants should not be considered an attenuating circumstance that remove the taint from an illegal stop).

5. *See* Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (acknowledging that pacing back and forth by itself is lawful); *see also* Terry v. Ohio, 392 U.S. 1, 6, 23 (1968) (explaining that the suspect's pacing back and forth paired with peering into the store window provided reasonable suspicion of a daytime robbery).

6. *See Wardlow*, 528 U.S. at 124–25 (finding that a suspect's flight in a high crime area,

unlawfully stop[7] him.[8] The officers ask him where he is headed and why he is out so late.[9] Jason tells them that he is going to the movies.[10] The officers ask for Jason's identification, and he cooperates with them.[11] However, after running his information through their database, the officers learn that Jason has an outstanding arrest warrant[12] for an unpaid traffic ticket.[13] The officers arrest Jason and proceed to lawfully[14] search him.[15]

upon noticing officers, can give rise to reasonable suspicion); *see also Terry*, 392 U.S. at 6, 23 (finding that a suspect's pacing back and forth among one of the factors considered in evaluating reasonable suspicion).

7. *See Terry*, 392 U.S. at 16 ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *see also Suspicion*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[A] police officer must have a reasonable suspicion to stop a person in a public place.").

8. *See* Ronner, *supra* note 2, at 392 (providing that a Massachusetts Attorney General's Report discovered that police officers stopped an individual because the area was drug restricted); Johnson, *supra* note 3, at 226–27 (discussing the hypothetical steps taken by an officer during a traffic stop); Butler, *supra* note 3, at 2–5 (discussing the injustices Blacks have faced when stopped by police officers). It is unknown how many Blacks have been victims of police abusive conduct. *See* Ronner, *supra* note 2, at 390. As a result of Supreme Court Fourth Amendment rulings, officers are permitted to conduct illegal searches without consequences. Johnson, *supra* note 3, at 227. For years, Black men have shared their troubling stories of police encounters with one another. Butler, *supra* note 3, at 3.

9. *See* Ronner, *supra* note 2, at 392 (explaining that after illegally stopping a nineteen-year-old Black male, the officer asked where he was going and proceeded to pat him down); Johnson, *supra* note 3, at 226–27 (providing a hypothetical traffic stop encounter).

10. *See* Johnson, *supra* note 3, at 226–27 (providing a hypothetical traffic stop encounter, where the driver willingly provided the officer with identification); Butler, *supra* note 3, at 2 (comparing a personal experience with police officers to the Antebellum Period, when Blacks were required to carry papers containing their freedom status).

11. *See* Johnson, *supra* note 3, at 226–27 (using a hypothetical illegal traffic stop encounter to discuss whether arrest warrants should be considered an attenuating circumstance); Ronner, *supra* note 2, at 396–97 (citations omitted) (explaining that Black communities are targeted by police; thus, they are more prone to run at the mere sight of police officers).

12. *See* 22 C.J.S. *Criminal Procedure and Rights of Accused* § 53 (2017) (explaining that a warrantless arrest is fact-sensitive and the person who arrests the individual has the burden of proving a lawful arrest); *see also Warrant*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure.").

13. *See* Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016) (explaining that after the dispatcher ran Strieff's information through the database, the officer was made aware of an outstanding arrest warrant); Johnson, *supra* note 3, at 248–49 (explaining that active arrest warrants for failure to appear in court are common). In *Strieff*, the defendant had an outstanding warrant for a traffic violation. *See Strieff*, 136 S. Ct. at 2060. Johnson provides a hypothetical encounter with a driver and police officer. *See* Johnson, *supra* note 3, at 226. After illegally stopping the driver, the officer searched the driver's information in the database, and discovered an arrest warrant. *See id.*

14. *See* Mapp v. Ohio, 367 U.S. 643, 653 (1961) (noting that an officer may search a person if he or she has an outstanding arrest warrant); *see also* 5 AM. JUR. *Trials* 331 § 7 (1966) (establishing that a person may be searched and his possessions may be seized once he or she has been lawfully arrested).

In doing so, they discover two grams of marijuana.[16] The State, eventually, charges Jason with unlawful possession of marijuana.[17] Jason seeks to suppress the evidence, claiming that the officers illegally stopped him.[18] However, is Jason's arrest warrant for an unpaid traffic violation a sufficient event that purges "the taint of the illegal stop?"[19]

Previously, appellate courts[20] were led to different conclusions on whether the marijuana would be admissible as evidence, resulting in a circuit split.[21] The United States Supreme Court addressed this dispute among lower courts, giving a resounding answer in its recent decision, *Utah v. Strieff*,[22] deciding that an arrest warrant is an attenuating[23]

15. *See Strieff*, 136 S. Ct. at 2060 (explaining that Officer Fackrell lawfully arrested and searched Strieff after discovering an arrest warrant); *see also* Johnson, *supra* note 3, at 226–27 (providing that an arrest warrant allows an officer to lawfully search an individual's person and possessions).

16. *See Strieff*, 136 U.S. at 2060 (explaining that the officer stopped Strieff after surveilling a house); *see also* Johnson, *supra* note 3, at 228–29 (explaining that suppression of evidence is vital to deter police misuse of discretion). The Court in *Strieff* found that Officer Fackrell lawfully arrested and searched Strieff, discovering a baggie of methamphetamine and drug paraphernalia. *See Strieff*, 136 S. Ct. at 2060. Similarly, Johnson discusses a hypothetical police encounter, explaining that the officer finds two grams of marijuana in the driver's vehicle. *See* Johnson, *supra* note 3, at 226–27.

17. *See Strieff*, 136 S. Ct. at 2060 (noting that the State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia); *see also* United States v. Faulkner, 636 F.3d 1009, 1014 (8th Cir. 2011) (refusing to suppress evidence found from an illegal traffic stop).

18. *See Strieff*, 136 S. Ct. at 2060 (providing that Strieff sought to suppress the evidence, claiming that the officers stopped him illegally); *Faulkner*, 636 F.3d at 1014 (claiming that evidence should be suppressed since the officer did not have probable cause or reasonable suspicion to make the traffic stop).

19. Johnson, *supra* note 3, at 227; *see* Nardone v. United States, 308 U.S. 338, 341 (1939); *see also Fruit-of-the-poisonous-tree doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Fruit of the poisonous tree doctrine*]. The Court has established that evidence obtained by illegal means is not admissible. *Nardone*, 308 U.S. at 341. This evidence is often referred to as tainted evidence. Johnson, *supra* note 3, at 227. The evidence ("fruit") has been tainted by the illegal search, arrest, or interrogation ("poisonous tree"). *Fruit of the poisonous tree doctrine*, *supra*.

20. *See Faulkner*, 636 F.3d at 1015, 1017 (affirming the lower court's decision to deny the defendant's motion to suppress after drugs were discovered during an unlawful traffic stop); *see also* Johnson, *supra* note 3, at 227 (citations omitted) (explaining that the Seventh and Eighth Circuit Courts of Appeal have held that the discovery of arrest warrants are considered a superseding circumstance that justifies an illegal traffic stop, while the Sixth, Ninth, and Tenth Circuits have held otherwise).

21. *See* Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 837 (2014) (providing that federal courts are not bound by the decisions of other circuit courts); *see also* Johnson, *supra* note 3, at 227 (explaining a disagreement between the courts). A circuit split is created when circuit courts reach a different decision on the same issue. Moyer, *supra*, at 837. The Seventh and Eighth Circuits differ from the Sixth, Ninth, and Tenth Circuits regarding admission of illegally obtained evidence. Johnson, *supra* note 3, at 227.

22. *See Strieff*, 136 S. Ct. at 2064 (finding for the prosecution); Matt Ford, *Justice*

circumstance.[24] As such, the forbidden "fruit of the poisonous tree"[25] now has the Court's stamp of approval.[26]

Strieff establishes that Jason and others who are similarly situated are no longer shielded from unlawful searches[27] by the exclusionary rule.[28]

Sotomayor's Ringing Dissent, THE ATLANTIC (June 20, 2016), http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ (criticizing the Court's decision in *Strieff*). The Court held that the evidence obtained by the officer was admissible because the discovery of an outstanding arrest warrant broke the connection between the unlawful stop and the evidence found on the suspect. *Strieff*, 136 S. Ct. at 2064. However, commentators argue that *Strieff* weakens the Constitution's protections against unlawful police stops by ruling that an outstanding arrest warrant is considered an attenuating circumstance. Ford, *supra*.

23. *See Strieff*, 136 S. Ct. at 2061 (explaining that an attenuating circumstance is a "sufficient intervening event [that] break[s] the causal chain between the unlawful stop and the discovery of . . . evidence"); Johnson, *supra* note 3, at 232–33 (explaining that even though evidence violates Fourth Amendment rights, it may still be admissible if the connection between the evidence and the unlawful stop is significantly remote); *Attenuation Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The rule providing that evidence obtained by illegal means may nonetheless be admissible if the connection between the evidence and the illegal means is sufficiently remote.").

24. *See* Ronad C. Tyler, *Utah v. Strieff: A Bad Decision on Policing With a Gripping Dissent by Justice Sotomayor*, STANFORD LAW SCHOOL (July 5, 2016), https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor/ (acknowledging that the Court's decision in *Strieff* has been discussed by not only legal commentators and court watchers, but also ordinary people as well); Kevin Carty, *The Ten Supreme Court Cases You Need to Know This Term*, MORNING CONSULT (Oct. 6, 2015), https://morningconsult.com/2015/10/06/the-ten-supreme-court-cases-you-need-to-know-this-term/ (listing *Strieff* as one of the ten Supreme Court cases that the public must know for the term).

25. *See Fruit of the poisonous tree doctrine*, *supra* note 19 (providing that evidence obtained "from an illegal search, arrest, or interrogation is inadmissible because the evidence (the 'fruit') was tainted by the illegality (the 'poisonous tree')"); *see also* Sherry F. Colb, *A Potential Landmine in Waiting in* Utah v. Strieff, VERDICT (June 28, 2016), https://verdict.justia.com/2016/06/28/potential-landmine-waiting-utah-v-strieff (explaining the Court's decision suggests that the death of the exclusionary rule is to follow).

26. *See* Mark Joseph Stern, *Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE (June 20, 2016), http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_strieff_takes_on_police_misconduct.html (arguing that *Strieff* adds a loophole to the exclusionary rule by allowing illegal stops to be legitimatized by arrest warrants); Stella Shannon, *What Now, Justice? A Q&A with Utah v. Strieff*, THE POLITIC (June 26, 2016), http://thepolitic.org/what-now-justice-a-qa-with-utah-v-strieff/ (explaining that Justice Sotomayor foresees a detrimental loophole that will encourage racial profiling).

27. *See* U.S. CONST. amend. IV (pronouncing that unreasonable searches are unconstitutional); *see also Mapp*, 367 U.S. at 654–55 (explaining that searches that are not accompanied by a warrant or are unreasonable are unlawful).

28. *See* Davis v. United States, 564 U.S. 229, 231–32 (2011) (explaining that the exclusionary rule prevents the prosecution from introducing evidence that was obtained in violation of the Constitution); United States v. Davis, 760 F.3d 901, 903 (8th Cir. 2014), *cert. denied* (explaining that the exclusionary rule excludes both primary evidence and subsequent

Thus, the proposition that the exclusionary rule serves as a remedy[29] for Fourth Amendment[30] violations has been weakened.[31] This has been achieved by the Supreme Court's continued creation of exceptions[32] and rulings that undermine the exclusionary rule's purpose.[33] Accordingly, *Strieff* serves to chip away at Fourth Amendment rights yet again.[34] While this ruling applies to all U.S citizens, the law will most likely have a disparate impact on Blacks[35] and lower socioeconomic citizens[36] in particular.[37]

---

evidence found as a result of an unlawful search).

29. *See Mapp*, 367 U.S. at 680 (recognizing that the "exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future"); United States v. Calandra, 414 U.S. 338, 347 (1974) (noting that the remedy for Fourth Amendment violations is generally the exclusion of the illegally obtained evidence).

30. *See* U.S. CONST. amend. IV; *Davis*, 564 U.S. at 232 (holding that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule"). The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. CONST. amend. IV. This right "shall not to be violated, and no Warrants shall [be] issue[d] 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." *Id.* While the Fourth Amendment protects the right to be free from unreasonable search and seizures, it is silent about how this right should be enforced. *Davis*, 564 U.S. at 231.

31. *See* L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 673 (1998) (noting that carving out "exception after exception" has left the rule "battered and bloodied"); *see also* Orin Kerr, *Opinion analysis: The exclusionary rule is weakened but it still lives*, SCOTUSBLOG (June 20, 2016), http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/ ("It should be noted . . . [*Strieff*] does not purport to break new doctrinal ground. The opinion applies the factors from 1975's ***Brown v. Illinois*** and concludes that suppression is unwarranted.").

32. *See* United States v. Leon, 468 U.S. 897, 899 (1984) (acknowledging the good-faith exception to the exclusionary rule); *see also* Jason V. Owens, Note, *Hearing Thy Neighbor: The Doctrine of Attenuation and Illegal Eavesdropping by Private Citizens*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 177, 179 (2007) (noting that exceptions to the exclusionary rule include: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine).

33. *See* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1186–87 (2012) (arguing that the Court's creation of exceptions to the exclusionary rule has undermined the rule's applicability and impact); *see also* Perrin, *supra* note 31, at 673 n.11 (arguing that the exclusionary rule is limited by a number of exceptions).

34. *See* Shannon, *supra* note 26 (explaining that after *Strieff*, the Fourth Amendment is not as strong); Joshua Waimberg, *The Supreme Court's Utah v. Strieff decision and the Fourth Amendment*, CONSTITUTION DAILY (June 22, 2016), http://blog.constitutioncenter.org/2016/06/the-supreme-courts-utah-v-strieff-decision-and-the-fourth-amendment/ (explaining that *Strieff* gives police officers incentives to find an arrest warrant).

35. *See Report of The Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement*, CITY AND COUNTY OF SAN FRANSISCO (July 2016), http://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf (citations omitted)

Justice Sonia Sotomayor's dissent in *Strieff* sheds light on the disparities that exist within these minority communities, and the effect the law will have on these citizens.[38] Yet, Justice Sotomayor leaves one question unanswered.[39] What should an officer do once he or she discovers that the questioned individual has an outstanding arrest warrant?[40]

This Comment brings reconciliation between the majority and minority opinions in *Strieff* by proposing a solution that will uphold Fourth Amendment rights and public safety.[41] Part II explores the Fourth Amendment by tracing the origins of the exclusionary rule, and then discusses the Court's first step in undermining constitutional rights in *Terry v. Ohio*.[42] Part III discusses the Court's trend of weakening Fourth Amendment rights and provides an in-depth analysis of the impact its most

(explaining that there are racial disparities regarding San Francisco Police Department stops, searches, and arrests, particularly for Black people, and that Black adults in San Francisco are more than seven times as likely as White adults to be arrested); *see also* Richard Wolf, *Supreme Court allows searches based on outstanding arrest warrants*, USA TODAY (June 20, 2016), http://www.usatoday.com/story/news/politics/2016/06/20/supreme-court-arrest-warrant-search-seizure-utah-drugs/86134884/ ("There were 16,000 outstanding arrest warrants in Ferguson, Mo., as of 2015—a figure that amounts to roughly 75% of the city's population . . . . Cincinnati recently had more than 100,000 warrants pending for failure to appear in court. New York City has 1.2 million outstanding warrants.").

36. *See Socioeconomic status*, AM. PHYSIOLOGICAL ASS'N (last visited Dec. 9, 2017), http://www.apa.org/topics/socioeconomic-status/ (explaining that an individual's social economic status is derivative of his or her social standing or class and is measured as a combination of education, income and occupation); Ann Chih Lin & David R. Harris, *The Colors of Poverty: Why Racial & Ethnic Disparities Persist*, NAT'L POVERTY CTR. (Jan. 2009), http://www.npc.umich.edu/publications/policy_briefs/brief16/ (noting that, even in the 21st century, racial differences continue to result in socioeconomic disadvantages).

37. *See* Carimah Townes, *How Driving While Poor Became A Crime In California*, THINKPROGRESS (Apr. 8, 2015), https://thinkprogress.org/how-driving-while-poor-became-a-crime-in-california-1fd1ff768274#.rkexqgygb (explaining the effects that traffic fines have on lower socioeconomic individuals). If a driver who may not be able to afford to pay a $490 fine does not pay it off quickly enough or fails to appear in court, the consequence is a suspended license or arrest warrant. *Id.* A study showed that in Ferguson, Missouri, municipal courts were arresting and jailing a large number of people for unpaid traffic violations. *Id.*

38. *See* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, S., dissenting) (citations omitted) (noting that "many innocent people are subjected to the humiliations of these unconstitutional searches" but that "it is no secret that people of color are disproportionate victims of this type of scrutiny"); *see also* Kerr, *supra* note 31 ("Citing sources ranging from Ta-Nehisi Coates to Michelle Alexander, Sotomayor gives voice to the anger and frustration of social movements such as Black Lives Matter.").

39. *See Strieff*, 136 S. Ct. at 2064 (Sotomayor, S., dissenting) (arguing that *Strieff* "allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong"); Waimberg, *supra* note 34 (referring to Justice Sotomayor's "scathing" dissent to explain her disagreement with the majority's view).

40. *See infra* Part IV.

41. *See infra* Part V.

42. *See infra* Part II.

recent Fourth Amendment ruling, *Strieff*, will have on Blacks and lower socioeconomic citizens.[43] Part IV provides a comprehensive solution, suggesting a warrant hierarchy system that will alleviate the disparate impact that *Strieff* will cause.[44] Part V concludes by explaining that the Court has weakened the exclusionary rule, and should adopt the warrant hierarchy system in order to curb the grave effects of *Strieff*.[45]

II. BACKGROUND

A. THE FOURTH AMENDMENT

In its simplest form, the Fourth Amendment effectuates the right to be protected from unreasonable searches and seizures.[46] Even a temporary detainment of a driver during a traffic stop or a pedestrian for questioning will fall within the Fourth Amendment's meaning of "seizure."[47] While the Fourth Amendment is praised for its protection of individual rights, it is also criticized for its vagueness.[48]

The Fourth Amendment leaves two questions unanswered: (1) what is considered "reasonable," and (2) what remedy is available for Fourth Amendment violations.[49] The Supreme Court is, thus, tasked with creating rules and tests[50] that not only enforce the Fourth Amendment, but also

43. *See infra* Part III.

44. *See infra* Part IV.

45. *See infra* Part V.

46. *See* U.S. CONST. amend. IV; *see also* Lewis v. United States, 385 U.S. 206, 213 (1966) (citations omitted). The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. This right "shall not be violated, and no Warrants shall [be] issue[d], 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." *Id.* The Fourth Amendment protects individuals from governmental intrusion. *See Lewis*, 385 U.S. at 213.

47. *See* Whren v. United States, 517 U.S. 806, 809–10 (1996) (providing that even if an officer stops an individual for a brief period and for a limited purpose, it is still considered a "seizure" under the Fourth Amendment); *see also* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (holding that stopping a motorist without reasonable suspicion is unreasonable under the Fourth Amendment).

48. *See* Johnson, *supra* note 3, at 230 (recognizing that the Fourth Amendment is known for both its "virtue of brevity" and "vice of ambiguity"); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 990 (2004) (explaining that the framers did not provide any inclination as to the meaning of "reasonableness," neither in the drafting nor ratification process).

49. *See* Johnson, *supra* note 3, at 230 (stating that the Fourth Amendment lacks an explanation of reasonableness and does not provide a remedy for its violation); *see also* Clancy, *supra* note 48, at 990 (acknowledging the Fourth Amendment's failure to define reasonableness).

50. *See* Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 399 (2001)

prevent its violations.[51] In a preventive effort, the Court established the exclusionary rule.[52]

B. ORIGINS OF THE EXCLUSIONARY RULE AND ITS JUSTIFICATIONS

Historically, the Court has been cautious in regulating government searches and seizures.[53] In fact, it was not until the twentieth century in *Weeks v. United States*[54] that the Court took a stance on government Fourth Amendment violations.[55] In *Weeks*, the Court unanimously established that the use of illegally seized evidence would directly contradict the Constitution.[56] Accordingly, this declaration marks the beginning of the exclusionary rule.[57]

(explaining that reasonableness is determined by looking at all the circumstances affecting the officer); *see also* Clancy, *supra* note 48, at 990–91 (providing that reasonableness is decided by rules and tests that the Court provide); Renée McDonald Hutchins, *Stop Terry: Reasonable Suspicion, Race, And a Proposal To Limit Terry Stops*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 883, 884 (2013) (discussing the factors that the Court set out to determine reasonable suspicion).

51. *See* Johnson, *supra* note 3, at 230 (providing that the Supreme Court has the daunting responsibility to define reasonableness under the meaning of the Fourth Amendment and to provide remedies for its violations); *see also* Clancy, *supra* note 48, at 990 (discussing the drafting of the Fourth Amendment).

52. *See* Weeks v. United States, 232 U.S. 383, 393 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (establishing that to allow illegal evidence to be admissible would render Fourth Amendment rights valueless); *see also Mapp*, 367 U.S. at 648 (acknowledging that the exclusionary rule is constitutionally required; otherwise, the Fourth Amendment would be reduced to mere words).

53. *See* Laurence A. Benner, et al., *Social-Network Theory and the Diffusion of the Search-and-Seizure Exclusionary Rule Among State Courts Between Weeks and Wolf*, 27 BYU J. PUB. L. 97, 110 (2012) (explaining that American courts were slow to implement Fourth Amendment jurisprudence); *see also* Clancy, *supra* note 48, at 991 (explaining that evidence that was illegally obtained was admissible until *Weeks*).

54. *See Weeks*, 232 U.S. at 386. Police officers and a marshal unlawfully searched Weeks' home. *Id.* at 386. The officers unlawfully seized Weeks' "books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts . . . bonds, candies, clothes, and other property" that were critical in his case. *Id.* at 387. Weeks argued that his property should be returned and excluded as evidence, considering its unlawful obtainment. *Id.* at 388.

55. *See* Benner, *supra* note 53, at 110 (noting that the exclusionary rule was not established until the early twentieth century); Clancy, *supra* note 48, at 992–93 n.110 (providing that *Weeks* marked the creation of the exclusionary rule).

56. *See Weeks*, 232 U.S. at 393 (acknowledging that the justice system's efforts to eradicate crime are praiseworthy, but those efforts cannot override the principles established by the framers); *see also* Johnson, *supra* note 3, at 231 (noting that *Weeks* sought to prevent police misconduct that defies the Constitution).

57. Benner, *supra* note 53, at 111 (noting that the Court enunciated the exclusionary rule in *Weeks*). *See generally Weeks*, 232 U.S. at 391–92 (establishing that the effect of the Fourth Amendment is to limit the courts and federal officials from invading citizens' privacy).

It was nearly fifty years later, in *Mapp v. Ohio*,[58] when the Court took another turn in Fourth Amendment jurisprudence.[59] The Court not only expanded the exclusionary rule to the states, but also pronounced three justifications for the application of the rule: constitutional privilege,[60] judicial integrity,[61] and deterrence.[62] Particularly, deterrence has been attributed to the exclusionary rule's necessity,[63] despite critics' disparagement.[64] By implementing adverse consequences for violations of Fourth Amendment rights, police officers will be dissuaded from engaging in such misconduct in the future.[65]

58. *See* Mapp v. Ohio, 367 U.S. 643, 643 (1961). Three Cleveland police officers unlawfully obtained evidence after searching the defendant's home. *Id.* at 643–44. The defendant sought to exclude the evidence under the exclusionary rule. *Id.* at 645, 671. The prosecution argued that the exclusionary rule was not applicable to states. *Id.* at 645–46.

59. *See* Benner, *supra* note 53, at 101 n.13, 117 (noting that the Iowa rejected the exclusionary rule until *Mapp*). *See generally Mapp*, 367 U.S. at 654–55 (holding that the Fourth Amendment is enforceable against the states under the Fourteenth Amendment Due Process Clause).

60. *See Mapp*, 367 U.S. at 655–56 (acknowledging the right to privacy as the most important constitutional privilege); *see also Weeks*, 232 U.S. at 391 (establishing that the officer's unlawful search violated the constitutional privilege of privacy).

61. *See Mapp*, 367 U.S. at 659 (acknowledging that the Court's integrity will be jeopardized if it fails to "observe its own laws, or worse, its disregard of the [Constitution]"); Elkins v. United States, 364 U.S. 206, 222–23 (1960) (citations omitted) (arguing that if the government breaks the law then "it breeds contempt for [the] law").

62. *See Mapp*, 367 U.S. at 656 (pronouncing the justifications of the exclusionary rule); *see also* Matthew Allan Josephson, *To Exclude or Not to Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 180 (2009) ("[T]he exclusionary rule originally served the dual role of deterring police misconduct and maintaining the criminal justice system's integrity."); *see also Deterrence*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Deterrence*] ("The act or process of discouraging certain behavior, particularly by fear[.]").

63. *See* Terry v. Ohio, 392 U.S. 1, 12 (1968) (acknowledging that the exclusionary rule's primary function is deterrence by discouraging unlawful police conduct); *see also Deterrence*, *supra* note 62 ("The act or process of discouraging certain behavior, particularly by fear[.]").

64. *See, e.g.*, Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1609 (2012) (proposing to replace the deterrence model with a warrant requirement); Perrin, *supra* note 31, at 755 ("The exclusionary rule works better as a means of preserving judicial integrity than as a method of deterring police misconduct.").

65. *See Mapp*, 367 U.S. at 680 (Harlan, J., dissenting) (providing that the exclusionary rule's aim is to penalize past official misconduct, and thus, deterring such conduct in the future); *see also* Johnson, *supra* note 3, at 257 (recognizing that when the deterrence justification is not valued, then there could be constitutionally disastrous results); *Elkins*, 364 U.S. at 217 (explaining that the rule's purpose is to "compel respect for the constitutional guaranty . . . by removing the incentive to disregard it").

C. THE ROOT OF ALL EVIL: TERRY V. OHIO

Prior to 1968, the Court upheld citizens' privacy interests by requiring that officers provide a substantial showing of probable cause[66] or a warrant to justify searches and seizures.[67] However, in a groundbreaking decision, the Supreme Court in *Terry v. Ohio*[68] introduced the "reasonable suspicion"[69] standard.[70] *Terry* grants police officers the authority to "stop and frisk"[71] citizens based on their suspicion, provided that the encounter is

66. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 97 (1964) (explaining that subjective good faith does not amount to probable cause); *see also Probable Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014) [hereinafter *Probable Cause*] ("A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."). An officer's subjective good faith alone is not the test for probable cause. *Beck*, 379 U.S. at 97. Probable cause "amounts to more than a bare suspicion but less than evidence that would justify a conviction." *Probable Cause*, *supra*.

67. *See* Hutchins, *supra* note 50, at 884–85 (explaining *Terry* birthed the legality of stop and frisk); *see also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 661–62 (1994) (explaining that prior to *Terry*, evidence would be excluded if the officer did not have probable cause).

68. *See Terry*, 392 U.S. at 24; *see also* Harris, *supra* note 67, at 659. In *Terry*, an experienced (plain clothed) officer, Martin McFadden, observed two men, Terry and Chilton, outside of a store. *See Terry*, 392 U.S. at 5–6. The men were pacing back and forth, which was suspicious to McFadden. *Id.* at 6. Their behavior suggested to the officer "that they were planning for a daylight armed robbery." Harris, *supra* note 67, at 661. A third man, Katz, joined the two. *Terry*, 392 U.S. at 6. McFadden approached the men and identified himself as an officer. *Id.* at 6–7. After asking for their names, the officer received a mumbled response. *Id*. at 7. McFadden then spun Terry around and proceeded to pat him down, finding a concealed weapon. *Id.* McFadden then searched Chilton, and found a concealed weapon as well. *Id*. However, no gun was retained from Katz. *Id*. At trial, Terry moved to suppress the evidence, claiming the officer did not have probable cause to arrest the men before he patted them down for weapons. *Id.* at 7–8, 11.

69. *See Terry*, 392 U.S. at 21 (explaining that a reasonable suspicion points to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"); *see also* Melanie McFarland, *'Dateline' gives a shocking look at racial profiling*, SEATTLE PI (Apr. 8, 2004, 10:00 PM), http://www.seattlepi.com/ae/tv/article/Dateline-gives-a-shocking-look-at-racial-1141812.php (explaining that it is difficult to decipher "where reasonable suspicion ends and targeted harassment begins").

70. *See Terry*, 392 U.S. at 9–10 (acknowledging that the question presented in *Terry* had never been addressed by the Court before); *see also* Harris, *supra* note 67, at 661 (explaining that *Terry* "broke new ground" in the Court's Fourth Amendment jurisprudence); Hutchins, *supra* note 50, at 886 (explaining that for the first time the Court determined in certain instances, officers can stop citizens for something less than probable cause).

71. *See Stop-and-Frisk*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A police officer's brief detention, questioning, and search of a person for a concealed weapon when the officer reasonably suspects that the person has committed or is about to commit a crime."); *see also Stop and Frisk Statute*, MERRIAM-WEBSTER LAW DICTIONARY, https://www.merriam-webster.com/legal/stop%20and%20frisk%20statute (last visited Dec. 9, 2017) (allowing police officers to stop anyone without an arrest warrant based on reasonable suspicion).

brief.[72] Considering the political climate,[73] the Court introduced a balancing test to justify its ruling.[74]

The Court considered the interests of police officers' safety and effective crime prevention as well as citizens' interest in privacy and security.[75] Based on officers' need of protection and the limited nature of the stop and seizure, the Court granted officers the power to search and seize citizens by showing less than probable cause.[76] Critics have categorized *Terry* as the Court's "first step toward the slow erosion of Fourth Amendment rights[;]" the root of all evil.[77]

72. *See Terry*, 392 U.S. at 30 (holding that an officer may conduct a search of an individual if he: (1) observes unusual conduct that leads he or she to reasonably believe that criminal activity may be ahead; and (2) fears the individual may be armed or dangerous); Harris, *supra* note 67, at 660–61 (explaining that in *Terry*, for the first time, the Court "allowed searches and seizures in traditional on-the-street encounters between police and citizens with less than probable cause"); Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 328–29 (1994) (explaining that *Terry* stands for the proposition that an officer can stop and frisk individuals as long as it is a brief encounter and the officer has reasonable articulable suspicion).

73. *See Terry*, 392 U.S. at 23–24 n.21 (considering police officers' safety to justify its holding); Hutchins, *supra* note 50, at 892–93 (explaining that racial dynamics in America played a role in the *Terry* decision). In *Terry*, the Court explained that an officer's reasonable fear for his or her safety and others should be considered in a reasonable suspicion analysis. *Terry*, 392 U.S. at 27. With the civil rights movement in full swing, the country was experiencing social unrest when *Terry* was decided. *See* Hutchins, *supra* note 50, at 892–93. An increase in white police officers patrolling Black communities provided for intense race relations. *Id.* at 887. As such, many race riots broke out across the nation in response to police brutality. *Id.*

74. *See* Harris, *supra* note 67, at 662 (explaining that *Terry* adapted the balancing of interests test from *Camara v. Municipal Court*, in which the Court balanced "the state's asserted need for the search and seizure against the invasion of individual privacy"); *see also* Hutchins, *supra* note 50, at 902 (noting that the Court's balancing test has opened the door to police misconduct); WARRANTLESS SEARCH LAW DESKBOOK, *Terry v. Ohio* and *Sibron v. New York* § 11:3, Westlaw (database updated Nov. 2016) [hereinafter WARRANTLESS SEARCH] (explaining that the Court balanced law enforcement's interest in crime prevention against an individual's interest in freedom of movement).

75. *See Terry*, 392 U.S. at 26 (explaining that neutralizing police danger in conducting investigations and individuals' right of privacy is the proper balance); *see also* Harris, *supra* note 67, at 684 (noting that commentators advocate for changing the *Terry* balancing test); Hutchins, *supra* note 50, at 895 (noting that the Court did not believe the exclusionary rule served as deterrence to police misconduct; thus, it decided to tip the balance scale in favor of police safety and crime prevention); WARRANTLESS SEARCH, *supra* note 74 (providing that *Terry* balanced the government's interest in crime prevention with the individual's personal interests to move freely).

76. *See Terry*, 392 U.S. at 23–24 (explaining that it would be unreasonable to subject an officer to unnecessary risks simply because he or she lacks probable cause); *see also* Harris, *supra* note 67, at 662 (discussing an officer may rely on his experience and particular facts); Hutchins, *supra* note 50, at 895 (explaining that *Terry* evaluated the reasonableness of the stop despite the officer's lack of probable cause); WARRANTLESS SEARCH, *supra* note 74 (explaining that because of the quick action required in on-the-spot observations, officers are not subject to warrants or probable cause requirements).

77. Hutchins, *supra* note 50, at 885 (explaining that *Terry* was the first to degrade Fourth

III. ARGUMENT

A. TREND OF GRAVE EFFECTS ON FOURTH AMENDMENT RIGHTS

If *Terry* is the first step in the demise of Fourth Amendment rights, then *Strieff* signals the last days are near.[78] Predictably, *Strieff*'s ruling follows a series of Supreme Court decisions, including *Whren v. United States*[79] and *Atwater v. City of Lago Vista*,[80] which narrow the definition of illegal police conduct and broaden police discretion.[81]

As seen in *Whren*, if a police officer has probable cause to make a traffic stop, then the stop is justified regardless of the officer's subjective

Amendment rights); *see also Terry*, 392 U.S. at 38 (Douglas, J., dissenting) (arguing that giving police officers greater power than a magistrate judge, who issue warrants, will lead down a "totalitarian path").

78. *See, e.g.*, Waimberg, *supra* note 34 (explaining that parts of the *Strieff* decision could come to be the death of the exclusionary rule); Joe Wolverton, II, *Supreme Court Deals Another Body Blow to the Fourth Amendment*, THE NEW AM. (July 13, 2016), http://www.thenewamerican.com/usnews/constitution/item/23620-supreme-court-deals-another-body-blow-to-the-fourth-amendment (discussing that the Supreme Court decision in *Strieff* delivers another blow to the Fourth Amendment); TB, *Utah v. Strieff: legalizing illegal stops*, CT CRIM. L. (June 21, 2016), https://criminalopinions.wordpress.com/2016/06/21/utah-v-strieff-legalizing-illegal-stops/ (arguing that the Supreme Court has continued to gut the exclusionary rule).

79. Whren v. United States, 517 U.S. 806 (1996). In *Whren*, the Court addressed whether it was unreasonable to stop a motorist for a minor traffic violation. *Id.* at 808–09. Two undercover police officers, patrolling a "high crime" area, became suspicious after witnessing a truck, occupied by two young males, parked at a stop sign for 20 seconds. *Id.* at 808. After the officers sought to investigate why the driver was parked for an unusual amount of time, the truck turned suddenly without signaling. *Id.* The officers followed the truck and pulled alongside to inform the driver to pull over. *Id.* When the officer approached the vehicle, he saw in plain view two bags of crack cocaine, thus, giving him the right to arrest the suspects. *Id.* at 808–09. Defendants argued that the traffic stop was illegal, and thus, the evidence should be suppressed. *Id.* at 809.

80. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). "Gail Atwater was driving her pickup truck in Lago Vista, Texas." *Id.* at 323–24. Her two children, ages three and five, were in the vehicle as well. *Id.* at 323. Neither Atwater nor her children were wearing a seatbelt. *Id.* at 323–24. An officer noticed the violation and proceeded to pull Atwater over. *Id.* at 324. Atwater claimed the officer approached her and yelled she was going to jail. *Id.* The officer signaled for backup and asked for her driver's license and insurance documentation. *Id*. After a friend arrived to take Atwater's children, the officer arrested her. *Id*.

81. *See, e.g.*, Heien v. North Carolina, 135 S. Ct. 530, 534 (2014) (holding that evidence will not be suppressed if the search is made on a reasonable mistake of law); Herring v. United States, 555 U.S. 135, 137 (2009) (holding that evidence will not be suppressed if the search was based on the officer's negligence); Hudson v. Michigan, 547 U.S. 586, 591 (2006) (citations omitted) (noting that the exclusionary rule should only be applied when the benefits of deterrence outweigh its substantial social costs); *Whren*, 517 U.S. at 817–18 (holding that evidence will not be suppressed if the search is based on a pre-textual traffic stop).

intentions for stopping the motorist.[82] Thus, the Court's unanimous[83] decision puts a stamp of approval on racial profiling.[84] The Court makes it clear that an officer's pre-textual reason for stopping a motorist, such as race or gender, has no bearing on a Fourth Amendment probable cause analysis.[85] Therefore, *Whren* gives new meaning to what is reasonable behavior by law enforcement.[86] Likewise, the Court's ruling in *Atwater* provides for a similar redefining of police discretion.[87]

In *Atwater*, the Court held that the Fourth Amendment has no limitations on a police officer's discretion to make custodial arrests,[88] even

82. *See Whren*, 517 U.S. at 813, 818 (disregarding the argument that the "multitude of applicable traffic and equipment violations" is so large and difficult to obey that "virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop"); Jennifer R. Walters, United States v. Whren: *The U.S. Supreme Court Determines the Constitutional Reasonableness of Pretextual Traffic Stops and Tips the Scales in Favor of Law Enforcement*, 19 T. JEFFERSON L. REV. 247, 248 (1997) (explaining that a police officer's true intention to investigate a more serious crime is irrelevant as long as he or she witnesses a traffic violation).

83. *Whren*, 517 U.S. at 807 (providing a unanimous decision); *see* Tamara F. Lawson, *Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 847 (2010) ("In *Whren*, "[t]here was not even a dissenting opinion."); Walters, *supra* note 82, at 279 (noting that the unanimity of the Court's decision in *Whren* is a "reminder of the relative conservatism of the justices" regarding law enforcement).

84. *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007–08 (2010) (explaining that *Whren* illustrates the obstacles lawyers face if they want to bring about social change and prevent racial profiling); *see also* Ronner, *supra* note 2, at 393 (explaining that the law encourages racial profiling through its decisions).

85. *See Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *see also* Margaret M. Lawton, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 917, 925 (2008) (explaining that the Court rejected the petitioner's argument that the stop was pretextual).

86. *See* WILLIAM E. RINGEL, SEARCHES AND SEIZURES ARRESTS AND CONFESSIONS § 11:15, Westlaw (2d ed.) (database updated June 2017) (explaining that searches are reasonable when there is probable clause regardless of whether the officer has other motives); Brian J. O'Donnell, Note, Whren v. United States: *An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 208, 229 (1997) (explaining that *Whren* was the Court's first case in which it directly addressed a pretext issue).

87. *See* Atwater v. City of Lago Vista, 532 U.S. 318, at 323–24, 326 (2001) (explaining that an officer has the discretion to make an arrest for minor violations such as failure to have on a seatbelt); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 329, 341–42 (2002) (discussing Justice O'Connor's dissent in *Atwater* to explain that broad police discretion creates "grave potential for abuse").

88. *See* New York v. Belton, 453 U.S. 454, 461 (1981) (noting that when a driver is subjected to a lawful custodial arrest, his or her vehicle can be subjected to a search that does not violate the Fourth Amendment); *see also* Frase, *supra* note 87, at 331(explaining that a custodial arrest is one that leads to an individual being taken into custody or to jail by a police officer).

for minor infractions.[89] As opposed to issuing a citation for misdemeanors, officers are given a vast range of discretion to make unnecessary arrests.[90] Accordingly, *Atwater* carries substantial potential for abuse.[91] Officers are empowered by the Court's ruling to arrest individuals for minor traffic offenses in order to investigate more serious crimes, of which they lack the legal basis to do so.[92]

At first glance, both *Whren* and *Atwater* appear to be uncontroversial by stating clear and concise rules.[93] However, after an in-depth view, it becomes clear that these decisions have grave effects on Fourth Amendment rights.[94] Now, the Court's recent decision in *Strieff* leads to the same conclusion.[95] In *Strieff*'s dissenting opinion, Justice Sotomayor states that anyone's body is "subject to invasion while courts excuse the

89. *See* Jason M. Katz, Note, Atwater v. City of Lago Vista*: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment*, 36 AKRON L. REV. 491, 493–95 (2003) (arguing that search and seizures are usually reserved for the actions of murderers, robbers, and drug dealers, but now a seatbelt violation can result in an arrest); *see also* Frase, *supra* note 87, at 331 (explaining that *Atwater* stands for the proposition that the Fourth Amendment places no limitations on police discretion to make custodial arrests).

90. S*ee* Frase, *supra* note 87, at 332–33, 371 (arguing that *Atwater* encourages unnecessary and disproportionate arrests, along with searches and hardships); *see also* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 249–51 (1989) (noting that some states require issuance of a citation for minor offenses).

91. Frase, *supra* note 87, at 332–33 (explaining that the potential for abuse is great because almost every driver violates a minor traffic rule); *see also Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) (explaining that the majority's decision allows for unbounded police discretion); Salken, *supra* note 90, at 223 (explaining that because almost every adult drives, the pool of arrestees is expansive; thus, the potential of abuse is great).

92. *See* Frase, *supra* note 87, at 356 (explaining officers can use minor traffic violations as pretext to investigate other serious violations); *see also* Salken, *supra* note 90, at 248–49 (stating that eliminating arrests for minor traffic violations can assist in preventing pretextual searches).

93. *See* Lawson, *supra* note 83, at 845 ("At first blush, the *Whren* decision appears to make good, seemingly uncontroversial, law."); *see also* Frase, *supra* note 87, at 340 (explaining that the Court announced a "bright line arrest powers rule" similar to *Whren*).

94. *See Atwater*, 532 U.S. at 363–64 (O'Connor, J., dissenting) (explaining that an arrest hinders individual rights of liberty and privacy); *see also* Lawson, *supra* note 83, at 845–47 (asking law students whether their opinion of *Whren* changes after viewing the *Dateline* racial profiling documentary).

95. *See* Utah v. Strieff, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (explaining that the law will have grave effects on minorities); Waimberg, *supra* note 34 (explaining that *Strieff* gives an incentive to police officers to find an arrest warrant).

violation of . . . rights."[96] Consequently, Blacks and lower socioeconomic individuals will be gravely affected.[97]

B. UTAH V. STRIEFF PRESENTS A LOOPHOOLE AROUND FOURTH AMENDMENT RIGHTS

1. Nationwide Attention to Police and Civilian Encounters

With millions fastened to their television screens, hip hop artist Kendrick Lamar graced the 2016 Grammy stage with his controversial record, "Alright."[98] Lamar, accompanied by mock-inmates, African dancers and drummers, and a massive blazing bonfire, provided a powerful message to viewers of the current state of Black America.[99]

> When you know, we been hurt, been down before, nigga
> When our pride was low, lookin' at the world like, "where do we go, nigga?"
> And we hate Popo,[100] wanna kill us dead in the street for sure, nigga[101]

96. *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting) (arguing that the Court's ruling implies citizens are not a part of a democracy, but rather subjects of a "carceral state"); Erwin Chemerinsky, *Everything Changed: October Term 2015*, 19 GREEN BAG 2D 343, 346 (2016) (noting that both Justices Sotomayor and Kagan argue that *Strieff* gives police officers the incentive to conduct stops knowing that there is an outstanding warrant).

97. *See* Katherine A. Macfarlane, *Predicting* Utah v. Streiff*'s Civil Rights Impact*, 126 YALE L.J. F. 139, 147 (2016) (explaining that detainments for warrant checks are common especially amongst people of color); *see also* Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, PBS (Apr. 29, 2014), http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/ (noting that police officers stop and search people of color for no reason whatsoever).

98. *See* Spencer Kornhaber, *Deconstructing Kendrick Lamar's Grammys Performance*, THE ATLANTIC (Feb. 16, 2016), http://www.theatlantic.com/entertainment/archive/2016/02/kendrick-lamars-new-song-grammys-performance-review/462939/ (explaining that Kendrick Lamar's performance calls for a "conversation for the entire nation"); Matt Wilstein, *Kendrick Lamar Delivers Powerful Black Lives Matter-Inspired Grammys Performance*, THE DAILY BEAST (Feb. 15, 2016), http://www.thedailybeast.com/articles/2016/02/15/kendrick-lamar-delivers-powerful-black-lives-matter-inspired-grammys-performance.html (noting conservative politicians would not think highly of Kendrick Lamar's Grammy performance); *see also* Joe Coscarelli, *Kendrick Lamar on the Grammys, Black Lives Matter and His Big 2015*, N.Y. TIMES (Dec. 29, 2015), http://www.nytimes.com/2016/01/03/arts/music/kendrick-lamar-on-a-year-of-knowing-what-matters.html?_r=0 ("[T]he song, 'Alright,' which earned four nominations, has become the unifying soundtrack to Black Lives Matter protests nationwide.").

99. *See* Kornhaber, *supra* note 98 (noting that the use of fire may have caused viewers to think of riots and bombings in American history); *see also* Lilly Workneh, *Here's What You Should Know About The State of Black America*, HUFFINGTON POST (May 17, 2016), http://www.huffingtonpost.com/entry/state-of-black-america-2016_us_573a72e2e4b060aa781b180f (providing that Black America is falling behind).

100. *See* BBC, *'Silent bomber' couple jailed for London terror plot* (Dec. 30, 2015),

With protests and demonstrations sweeping across the nation, Kendrick Lamar is just one of the many artists,[102] activists,[103] and every day citizens[104] who have been outraged by the current state of police interactions with Black communities.[105] This is especially true considering that many of the interactions have been with unarmed Black men.[106]

http://www.bbc.com/news/uk-england-35198500 (noting that "popo" is a term used for police officer); *see also* Kornhaber, *supra* note 98 (finding it noteworthy that Lamar did not include the line "We hate po-po" in his performance).

101. *Kendrick Lamar Lyrics*, AZLYRICS.COM, http://www.azlyrics.com/lyrics/kendricklamar/alright.html (last visited Dec. 9, 2017) (providing the full lyrics to "Alright"); *See Alright*, GOOGLE PLAY MUSIC, https://play.google.com/music/preview/Twh256vo253qhbhbnxkckb5beoi?lyrics=1&utm_source=google&utm_medium=search&utm_campaign=lyrics&pcampaignid=kp-lyrics (last visited Dec. 9, 2017) (providing the lyrics to Kendrick Lamar's song "Alright").

102. *See, e.g.*, Brittany Spanos & Sarah Grant, *Songs of Black Lives Matter: 22 New Protest Anthems*, ROLLING STONE (July 13, 2016), http://www.rollingstone.com/music/pictures/songs-of-black-lives-matter-22-new-protest-anthems-20160713 (noting that Beyoncé, Blood Orange, Macklemore, and Usher are among the many artists who have lent their crafts to speak against injustices); *see also* Lisa Respers France, *Why the Beyoncé controversy is bigger than you think*, CNN (Feb. 24, 2016), http://www.cnn.com/2016/02/23/entertainment/beyonce-controversy-feat/ (noting that Beyonce's "Black Panther-esque" Super Bowl halftime performance caused controversy).

103. *See, e.g.*, Charise Frazier, *Weekend Protests Sweep Across The Nation*, NEWSONE, http://newsone.com/3478891/weekend-protests-sweep-across-the-nation/ (last visited Dec. 9, 2017) (noting that Black Lives Matters activist, DeRay McKesson, was among over 100 protestors arrested during Baton Rouge demonstrations); Alex Altman, *The Short List – Black Lives Matter*, TIME, http://time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/ (last visited Dec. 9, 2017) (explaining that eleven activists met with Hillary Clinton to confront Clinton on injustices facing Black communities).

104. *See, e.g.*, Phil Helsel, *'I'm Not Shy': Charlotte Girl Zianna Oliphant Discusses Emotional Speech to City Council*, NBC NEWS (Sept. 27, 2016), http://www.nbcnews.com/news/us-news/i-m-not-shy-charlotte-girl-gives-emotional-speech-race-n655776 (sharing how a tearful nine-year-old, Zianna Oliphant, addressed the Charlotte City Council with concerns on racism and policing); Julie Turkewitz, *Protest Started by Colin Kaepernick Spreads to High School Students*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/national-anthem-protests-high-schools.html?_r=0 (providing that high school football players in Aurora joined the Colin Kaepernick inspired protest by taking a knee during the singing of the national anthem).

105. *See, e.g.*, Mercy Benzaquen, et al., *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES, http://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html (last updated Aug. 19, 2017) (explaining that video footage of police encounters with Black men and women, such as Keith Scott, Terence Crutcher, and Eric Garner, have sparked public outrage); Frazier, *supra* note 103 (explaining that after police officers shot unarmed Black men, Alton Sterling and Philando Castille, protests erupted in Baton Rouge, St. Paul, Atlanta, Miami, D.C., Los Angeles, and New York); Tyler, *supra* note 24 (noting that the decision in *Strieff* comes at a time when there is nationwide attention on police and civilian interactions).

106. *See* Wesley Lowery, *Study finds police fatally shoot unarmed black men at disproportionate rates*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-

Due to constant media coverage, it is no secret that Blacks have received the brunt of the criminal justice system's injustices.[107] "From initial contacts with police, including stops, detentions, searches, and arrests, through prosecution at trial, and finally, at the sentencing phase, [Blacks] suffer from severe disproportional representation."[108] Instead of providing relief to an already tense state, *Strieff* creates another obstacle for Black communities by establishing that an arrest warrant will dissipate the taint of an illegal stop.[109]

In a majority opinion written by Justice Clarence Thomas, the Court reasoned that the officer's search was lawful because the suspect had an arrest warrant.[110] Furthermore, there was no indication from the Court that

at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html (finding that Black men account for 40% of the unarmed people fatally shot by police officers); Tyler, *supra* note 24 (noting that currently many of the Black men who have encountered police offices have been unarmed).

107. *See, e.g.*, Andrew Kahn & Chris Kirk, *What It's Like to Be Black in the Criminal Justice System*, SLATE (Aug. 9, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/08/racial_disparities_in_the_criminal_justice_system_eight_charts_illustrating.html (noting that Black Americans are more likely to have their cars searched, be arrested for drug use, and be jailed while awaiting trial); Ronald Weich & Carlos Angulo, *Racial Disparities in the American Criminal Justice System*, *in* RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 185, 186–87, CITIZENS' COMMISSION ON CIVIL RIGHTS (Dianne M. Piché et al. eds., 2002) (explaining that the criminal justice system is not ideal as minorities are disproportionately targeted by law enforcement).

108. David Rudovsky, *Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices*, 39 COLUM. HUM. RTS. L. REV. 97, 101 (2007) (explaining that in a time of mass incarceration rates, young black men bear the brunt of the criminal justice system); *see also* Tamara F. Lawson, *Powerless Against Police Brutality: A Felon's Story*, 25 ST. THOMAS L. REV. 218, 224 (2013) (recognizing racial disparities amongst ex-felons); Nathan Robinson, *The Shocking Finding From the DOJ's Ferguson Report That Nobody Has Noticed*, HUFFINGTON POST (Mar. 13, 2015), http://www.huffingtonpost.com/nathan-robinson/the-shocking-finding-from-the-doj-ferguson_b_6858388.html ("After Henry Davis was brutally beaten by four Ferguson officers, he found himself charged with 'destruction of official property' for bleeding on their uniforms.").

109. *See* Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016) (disregarding the fact that the officer illegally stopped Strieff because the discovered arrest warrant made the connection between the unlawful stop and the evidence); *see also id.* at 2070 (Sotomayor, J., dissenting) (explaining that many innocent people are subject to unconstitutional searches with people of color being disproportionately affected); Tyler, *supra* note 24 (claiming that the Court made a bad decision in *Strieff*). The Court thought it was unlikely that officers would become involved in intentional misconduct after its decision. *Strieff*, 136 S. Ct. at 2064. According to the Court, officers can still be subject to civil liability. *Id.* However, the Court fails to recognize the disproportionate number of people of color who are already subject to unlawful searches. *Id.* at 2070 (Sotomayor, J., dissenting). The Court's ruling allows an officer to stop anyone at any time to verify their legal status. *Id.* Considering the current state of police interactions with pedestrians, new Supreme Court pronouncements on police power are very important. Tyler, *supra* note 24.

110. *See Strieff*, 136 S. Ct. at 2062–63 (noting that the warrant was valid and the officer had a duty to arrest Strieff upon the discovery of the warrant). Relying on *Brown v. Illinois*, 442 U.S.

the officer's action was a part of a systematic pattern of police misconduct.[111] In fact, according to the Court, it was simply an "isolated" incident.[112] However, as current events provide, there is nothing isolated about the instances of police encounters with pedestrians, especially Blacks.[113]

2. Arrest Warrants Provide Police Officers with a New Incentive to Stop Blacks & Low Socioeconomic Citizens

The decision in *Strieff* should not be underestimated.[114] Although *Strieff* will affect the liberties of millions of everyday civilians, a disproportionate number of those impacted will be Blacks and lower socioeconomic citizens.[115] Studies have shown that Blacks are arrested at a

590, 603–04 (1975), the Court analyzed the: (1) temporal proximity between the illegal stop and discovery of the evidence; (2) presence of intervening circumstances; and (3) purpose and flagrancy of the misconduct. *Id.* at 2061–62. Particularly, the Court found the third factor to be most significant. *Id.* at 2062.

111. *Strieff*, 136 S. Ct. at 2063–64 (reasoning that there was no evidence that the stop was a part of ongoing police misconduct). When evaluating the third factor, the majority explained that the exclusionary rule should be reserved for police misconduct in need of deterrence. *Id.* at 2063. The Court concluded that suppression was not necessary because the officer's actions were at most negligent. *Id.* at 2063–64.

112. *Compare Strieff*, 136 S. Ct. at 2063 (reasoning the stop was isolated and the officer, at a minimum, acted negligently), *with id.* at 2069 (Sotomayor, J., dissenting) (arguing that just because most officers act in "good faith" does not mean that unlawful stops are isolated instances of negligence).

113. *See Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny."); *see also infra* Part III-B(2) (explaining that Blacks and poverty-stricken individuals are more likely to be affected by the *Strieff* decision).

114. *See Lawyers' Committee for Civil Rights Under Law issues the following statement in response to the U.S. Supreme Court's decision in* Utah v. Strieff, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (June 21, 2016), https://lawyerscommittee.org/press-release/lawyers-committee-civil-rights-law-issues-following-statement-response-u-s-supreme-courts-decision-utah-v-strieff/ [hereinafter *Lawyers' Committee*] ("The impact of the [*Strieff*] decision should not be underestimated."); *see also* Colb, *supra* note 25 (explaining that the Court's ruling will validate an officer's suspicion-less search or seizure if the discovered evidence retrospectively justifies the officer's behavior).

115. *See Lawyers' Committee*, *supra* note 114 (explaining that millions of people will be affected by the *Strieff* decision, with a number being African Americans and other minorities); *see also* Danae Lopez, *Victory? Affirmative Action and Justice Post*-Fisher II *and* Utah v. Strieff, THE CENTURY FOUNDATION (July 6, 2016), https://tcf.org/content/commentary/victory-affirmative-action-justice-post-fisher-ii-utah-v-strieff/ (explaining that *Strieff* nearly extinguishes Fourth Amendment protection for mostly poor people of color); *see* KPCC Staff, *California traffic courts hit poor, minority drivers hardest, report finds*, S. CAL. PUB. RADIO (April 11, 2016), http://www.scpr.org/news/2016/04/11/59467/california-traffic-courts-hit-poor-minority-driver/ (stating that Blacks and low income individuals are disproportionately affected by suspended driver licenses and arrests in California).

higher rate for driving with suspended licenses for unpaid traffic tickets.[116] Furthermore, poverty-stricken individuals in these communities are usually unable to pay traffic fines.[117]

In return, judges issue trivial warrants for failing to pay such fines or appear in court.[118] Consequently, the vast majority of the 7.8 million warrants across the nation are for low-level offenses.[119] Due to the commonality of these arrest warrants, some officers engage in unlawful practices.[120] In fact, a Ferguson Report found that "officers *routinely* stop people—on the street, at bus stops, or even in court—for no reason other than 'an officer's desire to check whether the [individual] had a municipal arrest warrant pending.'"[121]

Now, this type of police misconduct is incentivized; if an arrest warrant is present, then the door to warrantless searches suddenly becomes unlocked.[122] These warrants can become a pretext to racially profile Blacks

116. *See* KPCC Staff, *supra* note 115 ("In Los Angeles County, [B]lack residents are three and a half times more likely to be arrested for failure to appear or failure to pay than [W]hite residents. . . ."); *see also* Lopez, *supra* note 115 (explaining that Blacks and other minorities in lower socioeconomic communities are targeted by police officers and are more likely to be fined).

117. *Compare* Lopez, *supra* note 115 (explaining that most targeted minorities are unable to afford traffic fines due to their socioeconomic status), *with* Greg Glod, Utah v. Strieff *doesn't give cops license to kill the Fourth*, WASH. EXAM'R (July 22, 2016), http://www.washingtonexaminer.com/utah-v.-strieff-doesnt-give-cops-license-to-kill-the-fourth/article/2597345#! (arguing that the moral of *Strieff* is to "[p]ay your traffic tickets and you should be fine").

118. *See* Allegra Kirkland, *How New York Ended Up With 1.2 Million Open Arrest Warrants*, THE SLICE (Aug. 4, 2015), http://talkingpointsmemo.com/theslice/new-york-broken-windows-arrest-warrants-begin-again (explaining that individuals miss their court dates for low-level offenses, such as riding a bike on a sidewalk, and a bench warrant is issued); Maura Dolan, *A disproportionate share of blacks and Latinos lose their driver's licenses because of unpaid tickets, study finds*, L.A. TIMES (Apr. 11, 2016), http://www.latimes.com/local/california/la-me-license-suspensions-bias-20160411-story.html (noting that judges can issue warrants for drivers who fail to appear in court or pay traffic tickets).

119. *Lawyers' Committee*, *supra* note 114 (noting that there are 7.8 million outstanding warrants nationally, and in the State of New York alone, there are 1.4 million open warrants tied to low-level offenses); *see* Utah v. Strieff, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (stating that the databases of the States and Federal Government show that there are 7.8 million outstanding warrants for mostly minor offenses).

120. *See Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (providing information on police misconduct in the Ferguson Report); Johnson, *supra* note 3, at 248 (noting the commonality of outstanding arrest warrants).

121. *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (emphasis added) (noting the disproportionate findings in the Justice Department's investigation of Ferguson, Missouri); *see* Stern, *supra* note 26 (arguing that after *Strieff*, 76% of Ferguson residents have essentially surrendered their Fourth Amendment right against unreasonable seizure because out of the 21,000 population, 16,000 residents have outstanding warrants).

122. *See* Lopez, *supra* note 115 (arguing that *Strieff* opens the door to admissible warrantless searches); *see also* Tyler, *supra* note 24 ("*Strieff* will allow officers to stop citizens on the street,

who are disproportionately subject to warrants for low-level offenses due to the socioeconomic status of many of these communities.[123] As such, *Strieff* eliminates the exclusionary rule's deterrent effect.[124] Yet, in contrast to Justice Sotomayor, the majority refuses to recognize this unjust consequence.[125]

C. WHILE POWERFUL, JUSTICE SOTOMAYOR'S DISSENT FALLS SHORT

After the Supreme Court October 2015 Term, attention did not center around the majority's decision in *Strieff*; instead, it was Justice Sotomayor's fiery dissent that made headlines.[126] Justice Sotomayor provides striking statistics, showing the large number of outstanding warrants in cities throughout the United States and officers' misconduct.[127]

demand their identification, check to see if they have any outstanding warrants (even for minor traffic infractions)[,] and, if so, then search them.").

123. *See Lawyers' Committee*, *supra* note 114 (arguing that officers should not use low-level warrants as pretext to racially profile Blacks and other minorities); *see also Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) ("Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause."); Nina Totenberg, *Evidence Found In Illegal Stops Backed By Justices, But Brings Fiery Dissent*, NPR (June 20, 2016), http://www.npr.org/2016/06/20/482879905/evidence-found-in-illegal-stops-backed-by-justices-but-brings-fiery-dissent (providing that most people in this country with open warrants are poor).

124. *See* Macfarlane, *supra* note 97, at 139 (explaining that *Strieff* is one of the several recent cases in which the Court refused to apply the exclusionary rule); Colb, *supra* note 25 (criticizing the Court's decision in *Strieff*). Prior to *Strieff*, an officer would have paused if he or she did not have reasonable suspicion out of fear that whatever evidence discovered may be suppressed. Macfarlane, *supra* note 97, at 142. Now, an officer does not have to hesitate, because if a warrant is found then any evidence will be admissible. *Id.* Thus, *Strieff* works to incentivize police misconduct. Colb, *supra* note 25.

125. *See Strieff*, 136 S. Ct. at 2064 (finding Strieff's argument unpersuasive that the prevalence of outstanding warrants in many communities will lead police officers to engage in "dragnet searches"). *But see id.* at 2070 (Sotomayor, J., dissenting) (noting the disparate impacts that the ruling in *Strieff* will have on minorities).

126. *See, e.g.*, Brianne J. Gorod, *A Strange Year at the Court*, 19 GREEN BAG 2D 369, 375–76 (2016) (claiming that Justice Sotomayor wins the award for making most news with a separate opinion); Tal Kopan, *Sotomayor in fiery dissent: Illegal stops 'corrode all our civil liberties'*, CNN (June, 21, 2016, http://www.cnn.com/2016/06/20/politics/sotomayor-supreme-court-dissent-utah-strieff/ (describing Justice Sotomayor's dissent as "fiery" and "vehement"); Ford, *supra* note 22 (explaining that Justice Sotomayor's "thundering dissent" was far "less forgiving" of the officer's actions); John Nichols, *Sonia Sotomayor's Epic Dissent Explains What's at Stake When the Police Don't Follow the Law*, THE NATION (June 20, 2016), https://www.thenation.com/article/sonia-sotomayors-epic-dissent-shows-why-we-need-people-of-color-on-the-supreme-court/ (positing that while Justice Kagan's dissent is pointed, Justice Sotomayor's raises the "loudest alarm" in addressing the impact on people of color).

127. *See Strieff*, 136 S. Ct. at 2068–69 (Sotomayor, J., dissenting). Officers stopped 52,235 pedestrians within a 4–year period and ran warrant checks on 39,308 of the pedestrians in

Justice Sotomayor challenges the majority by arguing that the majority does not explain how *Strieff* is isolated from the countless examples of police misconduct.[128] Yet, it is when Justice Sotomayor departs from the other dissenters, writing from her own professional experiences, that she specifically sheds light on the injustices plaguing minority communities.[129]

In an unprecedented boldness, Justice Sotomayor cites to the likes of W.E.B. DuBois, James Baldwin, and Ta-Nehisi Coates, all Black intellectuals who have addressed the "timeless" issue of race and policing.[130] Particularly, Justice Sotomayor discusses "the talk" that people of color have given their children, instructing them of how to act when encountered with an officer.[131] Many were thankful that a Supreme Court Justice merely recognized racial disparities.[132]

However, in the dissent's criticism of the majority's opinion, the dissent fails to address the officer's municipal duty to carry out the judicial

Newark, New Jersey. *Id.* at 2068. In New York, the New York City Police Department encouraged its officers to stop and question, then check for reasonable suspicion later. *Id.* at 2069. In Salt Lake City, officers ran warrant checks on the civilians that they stopped. *Id.* A widely followed police manual encouraged officers to run warrant checks on every driver he or she stops. *Id.*

128. *See Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (finding it striking that the Court's majority opinion insists that the police encounter in *Strieff* was an isolated event); Ford, *supra* note 22 (noting that Justice Sotomayor argued that the event was not isolated).

129. *See* Stern, *supra* note 26 (claiming that Justice Sotomayor's writing and drawing on her own professional experiences is her bravest moment); Erin Corbett, *Read Justice Sonia Sotomayor's Dissent That Passionately Points Out Black Lives Matter*, BUSTLE (June 20, 2016), https://www.bustle.com/articles/167880-read-justice-sonia-sotomayors-dissent-that-passionately-points-out-black-lives-matter (noting that part IV of Justice Sotomayor's dissent as the most important because she discusses racial disparities).

130. *See Tyler*, *supra* note 24 (explaining that in the over two hundred years of Supreme Court history, no other Justice has ever cited to African American intellectuals writing on race); Kerr, *supra* note 31 (finding it noteworthy that no other Justice joined Part VI of Justice Sotomayor's opinion, which referenced African American scholars); Adam Liptak, *In Dissents, Sonia Sotomayor Takes on the Criminal Justice System*, N.Y. TIMES (July 4, 2016), http://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html (explaining that while Justice Sotomayor quoted precedents, she also cited major works on the Black experience in the U.S.).

131. *See Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting); Tyler, *supra* note 24. For generations, black and brown parents have had to instruct their children not to run down the street and to keep their hands where they can be seen at all times. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting). These parents instruct their children as such out of fear of how an officer with a gun will react to them. *Id.* Black and brown parents attempt to teach their children how to avoid injury or death at the hands of police officers. Tyler, *supra* note 24.

132. *See* Tyler, *supra* note 24 (praising Justice Sotomayor for her appeal to humanity). *But see* Theodore Kupfer, *Justice Sotomayor's View of the Law*, NATIONAL REVIEW (June 22, 2016, 4:00 AM), http://www.nationalreview.com/article/436900/sonia-sotomayor-judicial-activism-dangerous (criticizing Justice Sotomayor's dissent for speaking on racism when none was found because Strieff was a white man).

mandate that an arrest warrant entails.[133] Justice Sotomayor leaves unanswered whether an officer should forgo this duty.[134] The disparate impact that *Strieff* poses for minorities, particularly Blacks, should be balanced with public safety.[135] Justice Sotomayor simply fails to address this need of equilibrium among the two competing interests.[136]

IV. SOLUTION

WARRANT HIERARCHY SYSTEM SHOULD BE EMPLACED

While the Court ruled that an arrest warrant is an attenuating circumstance, it should reconsider whether *all* arrest warrants are attenuating circumstances.[137] Warrants for misdemeanor offenses such as, failing to pay traffic tickets; riding a bicycle on the sidewalk; or failing to appear in court, should not result in an officer's immediate ability to search or arrest citizens.[138] Accordingly, a warrant hierarchy system should be emplaced.[139]

133. *See Strieff*, 136 S. Ct. at 2062 (quoting United States v. Leon, 468 U.S. 897, 920 n.21 (1984)) (explaining that a warrant is a judicial mandate to an officer to either conduct a search or make an arrest); U.S. Department of Justice, *Attorney General's Task Force on Violent Crime: Final Report*, NAT'L CRIM. JUST. REFERENCE SERV. (Aug. 17, 1981), https://www.ncjrs.gov/pdffiles1/Digitization/78548NCJRS.pdf (noting that an officer has a sworn duty to carry out a warrant's provision). *But see Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting) (arguing that the arrest warrant discovered by Strieff was not an "intervening circumstance").

134. *See Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (noting officers' misconduct, but not addressing the judicial mandate that a warrant requires); Kupfer, *supra* note 132 (arguing Justice Sotomayor's dissent is wrong to suggest that the "procedural integrity of the law is less important than the results it produces").

135. *See, e.g.*, Brad Heath, *Police stop pursuing nearly 79,000 fugitives*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/12/18/fugitives-crossing-state-lines/20240425/ (last visited Dec. 9, 2017) (providing that there are 330,665 fugitives in the United States who have not been pursued beyond a state border); ABC NEWS, *Thousands Run Free Despite Warrants* (Aug. 7), http://abcnews.go.com/GMA/story?id=125876&page=1 ("There are 898 homicide warrants, 273 kidnapping warrants and 565 sexual assault warrants outstanding [in Florida].").

136. *See Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (acknowledging the thousands of outstanding warrants for low-level offenses, but failing to address the number of outstanding felony warrants); *see also, e.g.*, Stern, *supra* note 26 (noting Justice Sotomayor's discussion of the thousands of arrest warrants for traffic violations).

137. *See Strieff*, 136 S. Ct. at 2062, 2064 (holding that the attenuation doctrine applies when an officer discovers an arrest warrant during an initially illegal stop); Macfarlane, *supra* note 97, at 141 (noting that there is no real deterrent to prevent police abuse of power).

138. *See supra* text accompanying note 118 (explaining that judges issue warrants for failure to pay fines that result from trivial offenses).

139. *See, e.g.*, WILLIAM H. BURGESS, III, 16 FLA. PRAC., *Sentencing* § 11:21, Westlaw (database updated Oct. 2016) (providing that Florida statute § 985.155(2)(a) allows the state

When an officer stops an individual and discovers an outstanding arrest warrant for a misdemeanor offense, the officer should make the individual aware of the warrant and issue a warning.[140] If the individual is stopped again after forty-five days of the issuance of the warning, then the officer will have the discretion to search or arrest that individual.[141]

While advocates of the *Strieff* decision are, understandably, concerned with public safety, the aforementioned proposal will not jeopardize the public.[142] Dangerous criminals will not be released back into society.[143] If an officer stops an individual and discovers an arrest warrant for a felony crime, then the officer will immediately have the authority to search or arrest that person.[144]

Applying the hierarchical approach to the earlier hypothetical, once

attorney to establish a deferred prosecution program for first-time, nonviolent juvenile offenders); WILLIAM H. BURGESS, III, 16 FLA. PRAC., *Sentencing* § 11:15, Westlaw (database updated Oct. 2016) (noting that the use of civil citations is not limited to first-time misdemeanors and may be used in up to two subsequent misdemeanors).

140. *See* Katz, *supra* note 89, at 493–95 (noting an officer has discretion to issue a traffic ticket or warning during a traffic stop); Don Murray, *New York City Bench Warrants and Arrest Warrants*, N.Y. CITY CRIM. COURT INFO. (last visited Dec. 9, 2017), http://www.queensdefense.com/warrants-new-york-city/ (providing that most people are not aware that they may have an outstanding warrant until the police are in the process of arrest).

141. *See, e.g.*, *Traffic Tickets in Maine*, DMV, http://www.dmv.org/me-maine/traffic-tickets.php (last visited Dec. 9, 2017) (noting that drivers are issued warning letters if they receive 6 points on their licenses; then, after 12 points are received, their license will be suspended); *Driver License Suspensions: Electronic Citation and Warning System (eCWS)*, TRAFFIC VIOLATION LAW FIRMS, http://www.trafficviolationlawfirms.com/Electronic-Citation-Warning-System.cfm (last visited Dec. 9, 2017) [hereinafter TRAFFIC VIOLATION] (discussing an electronic traffic citation system that allows officers to review prior issued warnings).

142. *See* Johnson, *supra* note 3, at 258–59 (explaining that the court in *Green* voiced concerns about not allowing an individual with an arrest warrant to be searched only because of an officer's illegal stop); *see also* United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997) (finding it startling to think that an officer cannot arrest or search a driver who is wanted on a warrant because the officer stopped the driver illegally).

143. *See* Johnson, *supra* note 3, at 258–59 (finding the argument of public safety to fail because most warrants are for misdemeanor crimes, and the most dangerous criminals receive priority by law enforcement); *see also, e.g.*, Brian Hooks, *Police Target 14 With Outstanding Warrants for Violent Crimes*, PATCH (May 31, 2013), http://patch.com/maryland/annearundel/police-target-14-with-outstanding-warrants-for-violent-crimes (noting that officers arrested fourteen individuals with violent crime warrants). *See generally supra* note 135 (discussing the number of fugitives in the U.S. and the number of outstanding violent warrants in Florida).

144. *See, e.g.*, United States v. Gross, 624 F.3d 309, 313 (6th Cir. 2010), *opinion amended and superseded*, 662 F.3d 393, 397 (6th Cir. 2011) (providing that the officer discovered a felony warrant after unlawfully stopping the defendant); *see also* William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 819–20 (1993) (explaining that courts have recognized the seriousness of the offense in various Fourth Amendment contexts); *supra* note 135 (providing outstanding felony warrants statistics in Florida).

the officers stop Jason and discovers an arrest warrant, the officers will first have to inform Jason of the outstanding warrant and issue a warning.[145] The officers will not have the authority to immediately search or arrest him.[146] Jason will be allotted forty-five days to resolve the warrant.[147] Thus, he is free to enjoy the movies with his friends, without having his Fourth Amendment rights violated.[148] However, if an officer happens to stop Jason after forty-five days of the issuance of the warrant and Jason has the same outstanding warrant, then the officer has the immediate authority to search or arrest him.[149] This approach will balance individual rights to be free from unreasonable searches, while also ensuring violent criminals are not free to roam the streets.[150]

The hierarchy system will provide breath to the gasping deterrence justification of the exclusionary rule.[151] Nevertheless, critics have suggested that the criminal justice system must be crushed and remade so Black lives will matter.[152] While the warrant hierarchical method will not "crush" the system, it serves, at a minimum, to alleviate or prevent officers' abuse of the *Strieff* decision.[153]

145. *See supra* text accompanying notes 2–9 (discussing a hypothetical encounter with Jason, a Black male, and police officers); *supra* text accompanying notes 138–39 (discussing a warrant hierarchy system that provide warnings when officers discover misdemeanor warrants).

146. *See supra* note 14 (explaining that once an officer discovers an arrest warrant he or she may search an individual).

147. *Compare supra* text accompanying notes 2–15 (discussing a hypothetical encounter where Jason was immediately searched and arrested after officers discovered an outstanding arrest warrant), *with supra* text accompanying notes 140–41 (proposing that citizens would be allotted forty-five days to resolve the outstanding warrant after an officer issues a citation warning).

148. *See supra* note 2 and accompanying text (explaining that Jason intended to watch a movie with friends).

149. *See supra* text accompanying notes 140–41 (noting that under the warrant hierarchy system, the officer should make the individual aware that he or she has an outstanding warrant); *see also* TRAFFIC VIOLATION, *supra* note 141 (explaining that officers are aware of warning citations through an electronic database).

150. *See supra* note 133 (recognizing that a warrant imposes a judicial mandate on officers); *supra* text accompanying note 142 (explaining that proponents of *Strieff* have concerns about public safety).

151. *See supra* note 124 and accompanying text (noting that *Strieff* incites police misconduct).

152. *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1478 (2016) (arguing that the system must be crushed and the United States must be remade); *Remarks by the President at the 50th Anniversary of the Selma to Montgomery Marches*, THE WHITE HOUSE (Mar. 7, 2015), https://www.whitehouse.gov/the-press-office/2015/03/07/remarks-president-50th-anniversary-selma-montgomery-marches (noting that it is in America's hands to remake the country to more closely align with the highest ideals).

153. *See supra* notes 107–16 and accompanying text (discussing the injustices Blacks have

V. CONCLUSION

From *Terry*, to *Whren*, to *Atwater*, to *Strieff*, the Court has chipped away at Fourth Amendment rights by favoring broad law enforcement discretion.[154] *Strieff* proves that the exclusionary rule and its deterrence effect is facing its last days.[155] The Court's poor ruling will, unfortunately, have grave consequences on Black and lower socioeconomic communities.[156] While the dissenting opinion recognizes the consequences of *Strieff*, it does not provide a viable solution.[157] In an attempt to balance both public safety concerns and protect those targeted by officers, warrants for misdemeanor crimes should not result in an officer's immediate ability to search or arrest.[158] As *Streiff* stands, it corrodes civil liberties, making it clear that Fourth Amendment rights come second to law enforcement discretion.[159]

faced due to the criminal justice system); *supra* text accompanying notes 138–42 (proposing a warrant hierarchy to alleviate the disparate impact that *Strieff* will cause).

154. *See supra* Part III.

155. *See supra* note 124 and accompanying text (explaining that *Strieff* eliminates the exclusionary rule's deterrent effect).

156. *See supra* Part III-B; *see also supra* note 115 and accompanying text (noting that a number of Blacks and other minorities will be affected by the *Strieff* decision).

157. *See supra* Part III-C.

158. *See supra* Part IV.

159. *See supra* Part III.