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COMMENT

LACK OF "PURPOSEFULNESS" & "FLAGRANCY" OR SIMPLY TURNING A BLIND EYE TO THE CURRENT STATE OF AFFAIRS?: THE NEED FOR STATISTICAL DATA

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INTRODUCTION

It is not an uncommon tale: a person of color is pulled over or stopped by a law enforcement officer, not because of a traffic infraction or any legal violation, but because of the color of his skin.[1] Although aware that he has not committed a crime and that the stop is illegal, he complies when the officer asks for identification because he has been taught that the alternative may cost him his life.[2] Do not become another Philando Castile, another Michael Brown.[3] Be compliant; keep your hands up; do not give them a reason to shoot.[4] The officer then takes the identification and runs a warrant check. The officer finds an outstanding warrant for an unpaid parking ticket and promptly arrests the individual.

[1] THE LEADERSHIP CONFERENCE, RESTORING A NAT'L CONSENSUS: THE NEED TO END RACIAL PROFILING IN AMERICA, 1, 11 (2011), https://web.archive.org/web/20110630084904/http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf.

[2] *See* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing W. E. B. DU BOIS, THE SOULS OF BLACK FOLK (1903); JAMES BALWDIN, THE FIRE NEXT TIME (1963); TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015)).

[3] Jasmine C. Lee & Haeyoun Park, *In 15 High-Profile Cases Involving Deaths of Blacks, One Officer Faces Prison Time*, N.Y. TIMES (last updated Dec. 7, 2017), https://www.nytimes.com/interactive/2017/05/17/us/black-deaths-police.html.

[4] *See* TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015).

From there, the officer searches the individual, his car, and belongings where the officer finds incriminating evidence of a crime unrelated to the purpose for which the individual was stopped. Should this evidence be admitted into court when the initial stop was illegal? The intuitive response is no because if that evidence is admissible, what is to stop police officers from stopping an individual who is walking into a store to search his person, or waking an individual up in the middle of the night to search his home? It feels like an attack on a person's way of life, an attack on the freedoms guaranteed by the Constitution. It seems inherently wrong to allow such a thing to happen; yet with the Supreme Court's recent decision in *Utah v. Strieff*,[5] this is the reality that the United States finds itself.

What a person does in the privacy of her home, what she carries on her person as she walks down the street, the conversations she has on her phone while in a secluded area are all very personal, private matters. If individuals were constantly subjected to random government intrusion, a person's behavior would look vastly different than its current manifestation. The right to privacy and to be free from unreasonable searches and seizures is of such high importance in the United States that it was codified in the Fourth Amendment of the Constitution.[6] Yet in the more than 225 years since its ratification, the courts have continued to narrow an individual's Fourth Amendment rights.[7]

The Fourth Amendment protects one's right to be free from "unreasonable searches and seizures."[8] The judiciary has worked to enforce this prohibition against unreasonable searches and seizures by requiring courts to exclude evidence obtained by unconstitutional police conduct.[9] This remedy to cure Fourth Amendment violations is known as the exclusionary rule.[10] Nevertheless, the exclusionary rule is subject to many exceptions, one of which is the attenuation doctrine.[11] Since its articulation as a three-prong test in 1975,[12] federal circuits have disagreed on

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[5] *Strieff*, 136 S. Ct. 2056.

[6] U.S. CONST. amend. IV.

[7] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586 (2006) (holding that a violation of the knock and announce rule does not require suppression); Terry v. Ohio, 392 U.S. 1 (1986) (holding that a brief stop initiated for the purpose of potentially criminal behavior is constitutional so long as it is supported by reasonable suspicion); Nix v. Williams, 467 U.S. 431 (1984) (holding that evidence is properly admitted if it would have inevitably been discovered had no constitutional violation taken place).

[8] U.S. CONST. amend. IV.

[9] *Strieff*, 136 S. Ct. at 2059.

[10] *Id.* at 2061.

[11] *Id.*

[12] Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

how to apply the test.[13] The test looks at three factors to determine whether evidence has been purged of its original taint: (1) the amount of time that has elapsed between the illegal search or seizure and the time the disputed evidence is found; (2) the presence of intervening circumstances between the illegal search or seizure and the procurement of the disputed evidence; and (3) "particularly significant," the purpose and flagrancy of the law enforcement official's misconduct.[14] With its decision in *Utah v. Strieff*, the Supreme Court set forth the method by which to apply the attenuation doctrine and declared that evidence obtained during an illegal stop is nonetheless admissible if the officer discovers that the stopped individual has a valid outstanding arrest warrant, regardless of why the warrant was issued.[15] The Court reasoned that the discovery of the arrest warrant attenuated or diminished the connection between the illegal stop and the discovery of evidence.[16]

This Comment argues that the Court misapplied the attenuation doctrine in *Strieff*, specifically in its application and interpretation of the language "purposeful and flagrant" and explores the possible implications of this decision.[17] First, Section I explains the Fourth Amendment and the basic principles of law regarding searches and seizures, including the exclusionary rule and attenuation doctrine. Then, Section II examines the circuit court split prior to *Utah v. Strieff* and how each circuit interpreted the language "purposeful and flagrant." Finally, Section III analyzes the issues with the Supreme Court's interpretation of "purposeful and flagrant" in *Utah v. Strieff* and proposes a solution, which would require the examination of statistical data to determine whether an officer's misconduct is purposeful and flagrant. The use of statistics will allow the courts to more easily justify their holdings as being consistent with the reality of the social sphere; furthermore, parties would be afforded a much more methodical approach to proving purposefulness and flagrancy.

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[13] 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, 237-38 (2016).

[14] *Strieff*, 136 S. Ct. at 2062 (internal quotation marks omitted); *Brown*, 422 U.S. at 603-04.

[15] *Strieff*, 136 S. Ct. at 2059.

[16] *Id.*

[17] *Id.* at 2063.

I. THE FOURTH AMENDMENT & EXCLUSIONARY RULE

A. THE FOURTH AMENDMENT

The Fourth Amendment, passed by Congress on September 25, 1780, and ratified on December 15, 1791,[18] reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[19]

This section begins by defining what constitutes a search or a seizure, continues by addressing the reasonableness inquiry, and concludes by explaining *Terry* stops and the requirement of reasonable suspicion.

1. Searches & Seizures

The Fourth Amendment prohibits unreasonable searches and seizures of people and their property.[20] A search occurs when a person's subjective expectation of privacy, which society must be willing to consider objectively reasonable, is infringed upon.[21] Thus, a search within the meaning of the Fourth Amendment is a government intrusion into one's reasonable or legitimate expectation of privacy.[22] A search by a government entity of an individual with anything less than a legitimate expectation of privacy is not a search subject to the protections of the Fourth Amendment.[23]

Freedom from unreasonable searches is increasingly valued in a world where vast amounts of information can easily be accessed with a press of a button.[24] In February 2016, Apple fought against a federal court order requiring the company to create a backdoor for its iPhones' operating system that would allow the government to access information

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[18] *Amendment IV*, NAT'L CONST. CTR, https://constitutioncenter.org/interactive-constitution/amendments/amendment-iv (last visited Feb. 5, 2018).

[19] U.S. CONST. amend. IV.

[20] *Id.*

[21] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[22] Illinois v. Caballes, 543 U.S. 405, 408-09 (2005).

[23] *Id.*

[24] *See* Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. TIMES (Feb. 17, 2016), https://www.nytimes.com/2016/02/18/technology/apple-timothy-cook-fbi-san-bernardino.html.

on a previously locked and encrypted cell phone.[25] The phone belonged to the deceased shooter of the 2015 San Bernardino terrorist attack, in which 14 people were killed and 22 others were seriously injured.[26] Although the FBI was able to access the information on the phone by other means,[27] Apple argued that complying with the order would "undermine the very freedoms and liberty our government is meant to protect."[28]

Under the Fourth Amendment, a seizure is the "meaningful interference with an individual's possessory interest" in property,[29] or restraint on an individual's liberty such that "a reasonable person would . . . believe[ ] he [i]s not free to leave."[30] Similar to the requirement that an individual must have a legitimate expectation of privacy in order for a search to be subject to the protections of the Fourth Amendment, an individual challenging a seizure under the Fourth Amendment must have a reasonable expectation of privacy in his or her use of the property seized.[31] Thus, seizure of abandoned property cannot be subject to a Fourth Amendment challenge.[32]

Further, a seizure of a person occurs if, after taking into account the totality of the circumstances surrounding the alleged seizure, a reasonable person would be under the impression that he or she is not free to ignore the officer's request or to leave.[33] Such a seizure may be effectuated by means of physical restraint or by a show of authority such that a person's liberty is restrained.[34] Thus, a consensual encounter between a law enforcement officer and an individual is not a seizure for the purposes of the Fourth Amendment.[35] Finally, the Fourth Amendment only protects against unreasonable searches and seizures effectuated by government employees acting as an agent of the state, not against unreasonable searches and seizures effectuated by private citizens.[36]

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[25] Tim Cook, *A Message to Our Customers*, APPLE (Feb. 16, 2016), https://www.apple.com/customer-letter/.

[26] *Everything We Know About the San Bernardino Terror Attack Investigation So Far*, L.A. TIMES, http://beta.latimes.com/local/california/la-me-san-bernardino-shooting-terror-investigation-htmlstory.html (last visited Feb. 2, 2018).

[27] Alina Selyuhk, *A Year After San Bernardino And Apple-FBI, Where Are We On Encryption?*, NPR (Dec. 3, 2016), https://www.npr.org/sections/alltechconsidered/2016/12/03/504130977/a-year-after-san-bernardino-and-apple-fbi-where-are-we-on-encryption.

[28] Cook, *supra* note 25.

[29] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[30] Florida v. Royer, 460 U.S. 491, 502 (1983) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

[31] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[32] United States v. Welbeck, 145 F.3d 493, 498 (2d Cir. 1998).

[33] Kaupp v. Texas, 538 U.S. 626, 629 (2003).

[34] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[35] *See id.* at 20 n.16.

[36] Walter v. United States, 447 U.S. 649, 656 (1980).

2. Reasonableness

The Fourth Amendment only prohibits searches and seizures that are deemed unreasonable.[37] In determining what is reasonable, the Supreme Court gives great weight to the "essential interest in readily administrable rules."[38] Thus, a complex process to determine what is reasonable would not suffice because of its inability to be easily implemented. Additionally, what is reasonable depends upon the totality of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.[39] Accordingly, the constitutional reasonableness of a search or seizure is a fact-specific determination despite the fact that it is an entirely legal issue.[40]

To determine the reasonableness of a search or seizure, a court will balance two factors: first, the public interest in conducting the search or seizure as a means of promoting a legitimate government interest and, second, an individual's right to and expectation of security or privacy, free from arbitrary interference by law enforcement.[41] Effectively, the court weighs the intrusion into an individual's Fourth Amendment rights against the government's need for the search or seizure.[42] To be reasonable, the search or seizure must ordinarily be based on an individualized suspicion of wrongdoing.[43] Further, an officer's subjective intent or motivation for conducting a search or seizure, whether motivated by a legitimate government purpose or as a means of achieving a less legitimate and more improper purpose, has no bearing on whether the search or seizure was reasonable and, therefore, legal.[44] Thus, reasonableness is, in fact, an objective standard.

While the Fourth Amendment protects a person's right to be free from unreasonable searches or seizures, the Court has held that brief stops initiated for the purpose of investigating "possibly criminal behavior," known as *Terry* stops, are constitutional so long as they are supported by reasonable suspicion.[45] Reasonable suspicion is present when an officer observes "unusual conduct" that leads him to reasonably believe, as a result of his experience as an officer, that criminal activity

[37] Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602, 619 (1989).

[38] Virginia v. Moore, 553 U.S. 164, 175 (2008) (quoting Atwater v. Lago Vista, 532 U.S. 318, 347 (2001)).

[39] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[40] Ornelas v. United States, 517 U.S. 690, 695-98 (1996).

[41] Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

[42] United States v. Knights, 534 U.S. 112, 118-19 (2001).

[43] City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

[44] Brigham City v. Stuart, 547 U.S. 398, 404 (2006).

[45] Terry v. Ohio, 392 U.S. 1, 22, 30-31 (1968).

may be occurring.[46] The officer must have "specific and articulable facts" that would reasonably allow a stop for the purpose of investigation to occur.[47]

B. THE EXCLUSIONARY RULE

When a search or a seizure is found to be unreasonable and thus, illegal, the evidence obtained during that search or seizure is subject to the exclusionary rule.[48] The exclusionary rule prohibits the introduction of both tangible and testimonial evidence obtained during an unreasonable search or seizure.[49] However, the exclusionary rule does not apply in all cases where a Fourth Amendment violation has occurred.[50] The Supreme Court has laid out the circumstances in which the exclusionary rule applies:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[51]

Thus, the benefits of the exclusion must outweigh its costs, which typically manifests itself in the possibility of allowing guilty and potentially dangerous individuals go free.[52] Given these high costs, an individual seeking exclusion has a relatively high burden to meet.[53] Additionally, an exception exists whereby evidence obtained in violation of the Fourth Amendment may not be excluded if an officer acted in "good faith."[54] When an officer acts reasonably and in "good faith," the officer will continue to act the same way in future, similar circumstances.[55] Accordingly, when an offer acts in "good faith," the exclusionary rule has no deterrent effect,[56] unlike the case in which an officer acts in bad faith.

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[46] *Id.* at 30.

[47] *Id.* at 21.

[48] *See* Murray v. United States, 487 U.S. 533, 536 (1988).

[49] *Id.*

[50] Herring v. United States, 555 U.S. 135, 140 (2009) (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).

[51] *Id.* at 144.

[52] *Id.* at 141.

[53] *Id.*

[54] United States v. Peltier, 422 U.S. 531, 538 (1975).

[55] Stone v. Powell, 428 U.S. 465, 540 (1976).

[56] *Id.*

Thus, the exclusionary rule serves as a powerful deterrent of police misconduct.[57]

1. Fruit of the Poisonous Tree

The exclusionary rule applies not only to evidence that is found as a direct result of an illegal search or seizure, but also to evidence secondary or derivative in nature obtained as a result of information gained from an illegal search or seizure.[58] This doctrine, known as "the fruit of the poisonous tree," states that the illegality that taints and, therefore, precludes the admission of direct evidence found as a result of an illegal search or seizure, also taints and precludes the admission of any secondary evidence found.[59] Thus, the implications of a single unlawful search or seizure may be far reaching.

2. The Attenuation Doctrine

Although the "fruit of the poisonous tree" doctrine generally excludes evidence that is a result of an illegal search or seizure, an exception to that doctrine arises when the evidence obtained is considered far removed from the original illegality.[60] The reasoning is that evidence may be so far removed so as to be purged of the original taint, rendering the evidence admissible.[61] Since its articulation in *Brown v. Illinois* in 1975,[62] the attenuation doctrine, as it is commonly known, requires that a court consider three factors when determining whether the evidence in dispute has been purged of the original taint: (1) the amount of time that has elapsed between the illegal search or seizure and the time the disputed evidence is found; (2) the presence of intervening circumstances between the illegal search or seizure and the procurement of the disputed evidence; and (3) "particularly significant," the purpose and flagrancy of the law enforcement official's misconduct.[63] The test evaluates the causal connection between the official's unconstitutional act and the subsequent discovery of evidence.[64]

As more time passes between the initial misconduct and the discovery of evidence, it becomes more likely that the first factor will favor

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[57] *Herring*, 555 U.S. at 139-40.

[58] 6 Search & Seizure § 11.4 (5th ed. 2017); 1 Federal Trial Handbook: Criminal § 33:8 (4th ed. 2017).

[59] Segura v. United States, 468 U.S. 796, 804 (1984).

[60] *Id.* at 805.

[61] *Id.*

[62] Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

[63] Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016) (internal quotation marks omitted).

[64] *Id.* at 2061.

attenuation.[65] Attenuation in such a situation is favored because the more time that has passed between the two events, the longer the taint from the initial misconduct has the ability to dissipate. Additionally, the presence of an intervening circumstance that interrupts the causal connection between the illegal misconduct and the discovery of evidence also favors attenuation.[66] When there exists an intervening circumstance, the circumstance blocks the initial illegality from reaching the newly discovered evidence.[67]

However, what qualifies as an intervening circumstance is much less clear and has led to conflicting interpretations. For example, the Court in *Brown* found that the reading of a defendant's *Miranda* rights was not considered an intervening circumstance of significance.[68] Yet the Court found in another case that when a confession is "an act of free will [sufficient] to purge the primary taint of the unlawful invasion," it may be considered an intervening circumstance.[69] In *Wong Sun*, for example, defendant was released on his own recognizance after being arrested in connection with narcotics distribution charges.[70] Several days later, defendant voluntarily went to the office of the Narcotics Bureau to give a statement.[71] The Court held that connection between the arrest and the subsequent statement had "become so attenuated as to dissipate the taint."[72]

Finally, the more purposeful and flagrant an officer's misconduct is, the more likely the evidence will be found to be inadmissible.[73] The final factor is necessary because the purpose of the exclusionary rule is to deter officer misconduct, and the more purposeful and flagrant the misconduct, the more necessary deterrence becomes.[74]

In *Brown*, defendant Richard Brown's motion to suppress was denied in connection with a charge of murder.[75] Three officers arrested Brown at gunpoint outside of his apartment without a warrant or probable cause.[76] The arresting officers conceded that they arrested Brown for

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[65] *Id.* at 2062.

[66] *Id.* at 2061.

[67] *See* United States v. Green, 111 F.3d 515, 517 (7th Cir. 1997).

[68] *Brown*, 422 U.S. at 604.

[69] Wong Sun v. United States, 371 U.S. 471, 486 (1963). This Comment later addresses in detail how the circuit courts determined whether the existence of a warrant was considered an intervening circumstance prior to the decision in *Utah v. Strieff*.

[70] *Id.* at 475.

[71] *Id.* at 491.

[72] *Id.* (internal quotation marks omitted).

[73] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

[74] *Id.*

[75] Brown v. Illinois, 422 U.S. 590, 596 (1975).

[76] *Id.* at 591.

the purpose of questioning him as part of an investigation into the murder of a man Brown was acquainted.[77] During the fourteen hours he was held in custody by the officers, Brown was warned of his *Miranda* rights and eventually made incriminating statements regarding the murder of his acquaintance.[78] The first incriminating statement was made approximately one hour after Brown was arrested,[79] while the second incriminating statement was made approximately seven hours after his arrest.[80]

Applying the factors previously laid out, the Court held that the lower courts erred in deeming the evidence admissible.[81] First, the Court reasoned that an insignificant amount of time had passed between the illegal arrest and Brown's first confession, weighing in favor of inadmissibility.[82] Next, the Court found that there had been "no intervening event of significance whatsoever,"[83] holding that the reading of *Miranda* rights "alone and per se" cannot always make the act of confession attenuated enough from the original taint to render admissibility.[84] Finally, evaluating the final factor, the Court found that the officer misconduct "had a quality of purposefulness" in that "the impropriety of the arrest was obvious, . . . the two detectives . . . repeatedly acknowledge[ing], in their testimony, that the purpose of their action was 'for investigation' or for 'questioning[,]'" therefore weighing in favor of inadmissibility.[85] The Court found that the manner in which the officers arrested Brown was "calculated to cause surprise, fright, and confusion."[86] As a result, the evidence should have been suppressed given that all factors weighed against attenuation.[87]

II. "PURPOSEFUL AND FLAGRANT"

A. PRIOR TO *UTAH V. STRIEFF*: A CIRCUIT COURT SPLIT

Prior to its 2016 decision in *Utah v. Strieff*, the Supreme Court had not addressed whether the attenuation doctrine applied in a situation where a valid arrest warrant is discovered after an unlawful investigatory stop but before the discovery of incriminating evidence, nor had it ad-

[77] *Id.* at 592.
[78] *Id.* at 594-95.
[79] *Id.* at 594.
[80] *Id.* at 595-96.
[81] *Id.* at 605.
[82] *Id.* at 604.
[83] *Id.*
[84] *Id.* at 603.
[85] *Id.* at 605.
[86] *Id.*
[87] *Id.*

dressed how to apply it if it was warranted.[88] However, at the lower level, circuit and state courts differed on how the attenuation doctrine should be applied where a valid arrest warrant was found after an unlawful investigatory stop but before the discovery of incriminating evidence.[89] Namely, courts differed on whether to consider the discovery of a valid arrest warrant an intervening circumstance.[90] Additionally, the courts also took different approaches on whether to consider the officer's initial misconduct purposeful or flagrant, whether or not that determination should weigh in favor of attenuation, and what weight to give the factor.[91]

1. "Purposeful & Flagrant" Among Courts That View an Arrest Warrant as an Intervening Circumstance Sufficient to Attenuate the Connection Between the Initial Misconduct and the Discovery of Evidence

The Seventh and Eighth Circuits held that the discovery of an arrest warrant is an intervening circumstance that attenuates the taint of the original illegal stop.[92] When applying the *Brown* test, these courts placed great emphasis on the second factor, the existence of intervening circumstances.[93] As a result, the courts deemphasized both (i) the temporal proximity between the illegal stop and the discovery of evidence and (ii) the purposefulness and flagrancy of the law enforcement officer's misconduct.[94]

In *United States v. Faulkner*, for example, the Eighth Circuit affirmed the denial of defendant's motion to suppress drugs found during a traffic stop.[95] Faulkner and his girlfriend had been pulled over for an alleged traffic violation.[96] While pulled over, the officer discovered that Faulkner had an outstanding arrest warrant.[97] Faulkner was then arrested pursuant to the warrant.[98] During a search incident to arrest, officers found a large amount of cash on his person and a drug dog was subse-

[88] Johnson, *supra* note 13, at 238.

[89] *Id.* at 237.

[90] *Id.* at 237-38.

[91] *See, e.g.,* United States v. Faulkner, 636 F.3d 1009 (8th Cir. 2011); United States v. Green, 111 F.3d 515 (7th Cir. 1997).

[92] *See Faulkner*, 636 F.3d at 1014-17; *Green*, 111 F.3d at 521-23.

[93] Johnson, *supra* note 13, at 238-39.

[94] *Id.* at 239.

[95] *Faulkner*, 636 F.3d at 1012.

[96] *Id.* at 1013.

[97] *Id.*

[98] *Id.*

quently called in.[99] After the dog alerted officers to drugs in the car, defendant admitted that half of the drugs were his and the rest belonged to his co-conspirator.[100] Claiming that he did not commit a traffic violation and was thus illegally stopped, Faulkner filed a motion to suppress the evidence recovered and the statements he made regarding his culpability.[101]

Applying the *Brown* test, the Eighth Circuit Court of Appeals reasoned that the discovery of the arrest warrant was considered an intervening circumstance per the second factor and thus weighed in favor of attenuation.[102] In evaluating the temporal proximity between the illegal stop and the discovery of evidence, the court stated that when the intervening circumstance is the discovery of an arrest warrant, the "first factor . . . is less relevant."[103]

Finally, in determining whether the officer's misconduct was purposeful and flagrant, the court acknowledged that the third factor is the "most important factor" because it directly corresponds to the function of the exclusionary rule, deterring police misconduct.[104] Nevertheless, the court stated that the application of the exclusionary rule does not serve its purpose if the conduct, although improper, was not committed with the intention of "benefit[ting] the police at the expense of the suspect's protected rights."[105] Given this, the court looked at "whether the impropriety of the misconduct was obvious or whether the official knew that his conduct was improper but engaged in it anyway and whether the misconduct was committed in the hopes that something might turn up."[106] The court reasoned that, although Faulkner disputed the stop, the traffic violation was a close call and the officer's decision to stop Faulkner was not a flagrant violation of Faulkner's Fourth Amendment rights.[107] Thus, the court held that the discovery of the arrest warrant was an intervening circumstance, which sufficiently attenuated the connection between the illegal stop and the discovery of evidence.[108] As a result, Faulkner's motion to suppress was correctly denied.[109]

Similarly, in *U.S. v. Green*, the Seventh Circuit Court of Appeals held that discovery of an arrest warrant was an intervening circumstance

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[99] *Id.* at 1013-14.
[100] *Id.* at 1014.
[101] *Id.*
[102] *Id.* at 1015.
[103] *Id.* (internal quotation marks omitted).
[104] *Id.* at 1016.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1016-17.
[108] *Id.* at 1014, 1017.
[109] *Id.* at 1017.

that sufficiently attenuated the taint between an illegal stop and the discovery of incriminating evidence.[110] In *Green*, the lower court denied defendant's motion to suppress in connection with charges for the possession of crack cocaine with intent to distribute and possession of a firearm by a felon.[111] Officers in *Green* noticed Green's car driving in front of them and thought they had seen Green's vehicle parked in front of the home of a wanted felon, Mark Williams, the night before.[112] The officers followed Green's car to a home and blocked the car in the driveway because they believed that the car's occupants either included the wanted man or the occupants knew about his whereabouts.[113] The officers then stopped Green and asked him and his brother, the other occupant of the car, for identification.[114] Shortly thereafter, the officers discovered an outstanding arrest warrant for Green's brother and subsequently arrested him.[115] According to the officers' testimony, Green then consented to a search of the car, during which the officers found crack cocaine and a gun.[116] Green filed a motion to suppress the cocaine and gun, arguing that both were obtained in violation of his Fourth Amendment rights.[117] Green argued that although the officers were justified in stopping them to ascertain whether Williams was in the car, once the officers realized that Williams was not present, they were required to let them go immediately.[118] By continuing to hold the gentlemen to search for outstanding warrants, the officers violated Green's Fourth Amendment rights.[119]

Applying the *Brown* factors, the Seventh Circuit found that the discovery of the arrest warrant for Green's brother was an intervening circumstance that made a "compelling case for the conclusion that the taint of the original illegality is dissipated."[120] In analyzing the temporal proximity factor, the court found that as only five minutes had elapsed between the illegal stop and the car search, the evidence weighed in favor of suppression because the amount of time was too minimal to allow for the original taint to sufficiently dissipate.[121] Nevertheless, the court

[110] United States v. Green, 111 F.3d 515, 517 (7th Cir. 1997).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 518.
[119] *Id.*
[120] *Id.* at 521-22.
[121] *Id.* at 521.

stated that the temporal proximity factor was "not dispositive on the question of taint."[122]

Finally, in analyzing the last factor, the court found that the attenuation doctrine does not serve its deterrent function when the officer's action, though erroneous, "was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights."[123] Here, the court found that the purpose of the stop was not to seek evidence against the Greens, but to obtain evidence against Williams.[124] Further, there was no evidence of bad faith on the part of the officers.[125] Thus, the purposefulness and flagrancy factor weighed in favor of attenuation. Given the above, the court held that Green was not entitled to suppression and the evidence was properly admitted.[126]

2. *"Purposeful & Flagrant" Among Courts That Do Not View an Arrest Warrant as an Intervening Circumstance Sufficient to Attenuate the Connection Between the Initial Misconduct and the Discovery of Evidence*

The Sixth Circuit has held that the discovery of an arrest warrant is not an intervening circumstance that breaks the causal connection between the original illegal stop and the discovery of incriminating evidence.[127] When applying the three-prong *Brown* test, the court gave equal weight to all factors.[128]

For example, in *United States v. Gross*, an officer found the defendant slumped over in his running, legally parked vehicle.[129] Upon seeing Gross, the officer blocked the vehicle and shone his spotlight on the car before approaching.[130] The officer requested Gross' information, ran a warrant check, and discovered an outstanding warrant for Gross' arrest.[131] The officer subsequently arrested Gross and found an illegal handgun during a search at the station.[132] Gross filed a motion to exclude the gun from evidence.[133] He argued that the officer blocking his vehicle

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[122] *Id.* (internal quotation marks omitted).
[123] *Id.* at 523.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See* United States v. Gross, 662 F.3d 393, 406 (6th Cir. 2011).
[128] *See id.* at 402-06.
[129] *Id.* at 396.
[130] *Id.* at 396-97.
[131] *Id.* at 397.
[132] *Id.*
[133] *Id.* at 397-98.

constituted an illegal seizure because the officer lacked probable cause.[134]

Applying the first factor, temporal proximity, the Sixth Circuit determined that little time had elapsed between the illegal seizure and the discovery of the firearm, weighing in favor of exclusion.[135] As for the second factor, the presence of intervening circumstances, the court held that the discovery of an arrest warrant when the initial stop had no legal purpose is a relevant factor, but not dispositive of whether the illegal stop and the discovery of evidence is attenuated enough to dissipate the original taint from the stop.[136] The court reasoned that:

> To hold otherwise would create a rule that potentially allows for a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a "police hunch" that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion.[137]

Here, the discovery of the outstanding arrest warrant "resulted from means that are indistinguishable from the illegal stop."[138] Thus, the initial taint had not been purged, which weighed in favor of exclusion.[139]

Finally, applying the third factor, the purposefulness and flagrancy of the misconduct, the court held that while the officer's misconduct was "disheartening" given that he had blocked in another car at least once before, the officer's stop was not effectuated in an attempt to seek evidence against Gross.[140] Additionally, there was not sufficient evidence to prove that the officer knew he lacked probable cause.[141] Thus, the purposefulness and flagrancy of the officer's misconduct did not have significant weight in the attenuation analysis.[142] Evaluating all the factors together, the court held that the discovery of the firearm and the illegal stop were not sufficiently attenuated and the motion to suppress should have been granted.[143]

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[134] *Id.* at 399.
[135] *Id.* at 406.
[136] *Id.* at 404.
[137] *Id.*
[138] *Id.* at 405.
[139] *Id.*
[140] *Id.* at 405-06.
[141] *Id.*
[142] *Id.* at 406.
[143] *Id.*

As evidenced by the decisions in *Faulkner,*[144] *Green,*[145] *and Gross*,[146] circuit courts differed greatly on whether to consider the discovery of a valid arrest warrant as an intervening circumstance sufficient to attenuate and purge the taint of the illegal stop. While the Seventh and Eighth Circuits held that the discovery of a valid arrest warrant is an intervening circumstance, the Sixth Circuit held that it did not constitute an intervening circumstance.[147]

B. *UTAH V. STRIEFF*

The primary issue the Court addressed in *Utah v. Strieff* was whether the discovery of a valid arrest warrant after an unlawful investigatory stop, but before the discovery of incriminating evidence, was attenuated enough to warrant suppression of the evidence.[148] With its decision in *Strieff*, the Supreme Court effectively settled the circuit court split. The Court, in a 5-3 decision[149] authored by Justice Thomas and joined by Chief Justice Roberts, and Justices Kennedy, Breyer, and Alito, held that the discovery of an arrest warrant after an illegal stop sufficiently attenuates the connection between the illegality of the initial stop and the discovery of incriminating evidence such that suppression is not warranted.[150] In *Strieff*, an officer stopped defendant after he was seen exiting a home that was under surveillance and whose occupants were suspected of dealing drugs.[151] The law enforcement officer asked Strieff what he was doing at the home and requested identification.[152] Upon relaying the information to a dispatcher, the officer discovered that Strieff had an outstanding warrant for his arrest as a result of a traffic violation.[153] Pursuant to the warrant, the officer arrested and searched Strieff.[154] As a result of his search, the officer found a bag of methamphetamine and drug paraphernalia.[155] Strieff moved to suppress

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[144] United States v. Faulkner, 636 F.3d 1009, 1015 (8th Cir. 2011).

[145] United States v. Green, 111 F.3d 515, 521, 522 (7th Cir. 1997).

[146] *Gross*, 662 F.3d at 405.

[147] *See Faulkner*, 636 F.3d at 1014-17; *Green*, 111 F.3d at 521-23. *Contra Gross*, 662 F.3d at 406.

[148] Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

[149] Justice Antonin Scalia passed away on February 13, 2016, four months before this case was decided, leaving eight remaining Justices and a vacant seat on the Supreme Court bench. *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. Times (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

[150] *Strieff*, 136 S. Ct. at 2064.

[151] *Id.* at 2059-60.

[152] *Id.* at 2060.

[153] *Id.*

[154] *Id.*

[155] *Id.*

the evidence discovered incident to his arrest, arguing that the evidence was the product of an unlawful investigatory stop.[156]

Applying the *Brown* factors, the Court held that the discovery of the arrest warrant sufficiently attenuated the connection between the illegal stop and the discovery of incriminating evidence.[157] Suppression, therefore, was unwarranted.[158] Similar to decisions by the lower courts in the Seventh[159] and Eighth[160] Circuits, the Court held that the existence of a valid arrest warrant was an intervening circumstance sufficient to attenuate the connection between the illegal stop and the discovery of the incriminating evidence.[161] While doing so, the Court also deemphasized the temporal proximity between the two events and the purposefulness and flagrancy of the conduct.[162]

First, the Court found that the temporal proximity factor supported exclusion of the evidence because the drugs were found only minutes after Strieff was unlawfully stopped.[163] Second, the Court found that the presence of intervening circumstances supported admissibility.[164] The Court reasoned that because the warrant was valid, predated the arrest, and was entirely unconnected to the stop, the subsequent arrest and discovery of evidence was a lawful search derived from the arrest warrant.[165]

Finally, the Court found that the purposeful and flagrant factor supported admissibility because the officer was "at most[,] negligent" and made "good-faith mistakes" prior to and during his encounter with Strieff.[166] The Court conceded that the officer's first "mistake" was that he had not observed when Strieff entered the house and therefore was unaware of how much time he had spent there.[167] Thus, the officer lacked sufficient evidence to conclude that Strieff was a "short-term visitor who may have been consummating a drug transaction."[168] Secondly, the officer erred by demanding that Strieff speak with him rather than merely asking him to do so.[169] The officer's stated purpose of the stop

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[156] *Id.*
[157] *Id.* at 2064.
[158] *Id.*
[159] United States v. Green, 111 F.3d 515, 521-23 (7th Cir. 1997).
[160] United States v. Faulkner, 636 F.3d 1009, 1014-17 (8th Cir. 2011).
[161] *Strieff*, 136 S. Ct. at 2064.
[162] *See id.* at 2062-63.
[163] *Id.*
[164] *Id.* at 2062.
[165] *Id.* at 2062-63.
[166] *Id.* at 2063.
[167] *Id.*
[168] *Id.*
[169] *Id.*

was to investigate what activities were occurring in the house and the Court stated that "[n]othing prevented [the officer] from approaching Strieff simply to ask."[170] Nevertheless, the Court stated that there was "no indication that [the] unlawful stop was part of any systemic or recurrent police misconduct."[171] The Court instead found that the stop was an "isolated instance of negligence" and that it was not a "suspicionless fishing expedition in the hope that something would turn up."[172] Further, the search itself was lawful and necessary to ensure officer safety because once the officer was authorized to arrest Strieff pursuant to the warrant, the officer was also authorized to search Strieff.[173] The Court added that "[n]either the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression."[174] Accordingly, after balancing the factors, the Court found that the discovery of methamphetamine and drug paraphernalia on Strieff was attenuated enough from the initial illegal stop to not warrant suppression.[175]

III. PURPOSEFUL & FLAGRANT: HOW THE COURT APPLIED THE *BROWN* FACTOR AND HOW IT SHOULD APPLY THE FACTOR GOING FORWARD

A. THE SUPREME COURT MISAPPLIED THE ATTENUATION DOCTRINE, PARTICULARLY IN ITS INTERPRETATION OF "PURPOSEFUL AND FLAGRANT," AND THE IMPLICATIONS ARE FAR-REACHING AND POTENTIALLY DEVASTATING

The Court in *Strieff* misapplied the attenuation doctrine factors, particularly in its interpretation of the purposeful and flagrant factor. Paralleling previous decisions by circuit courts that viewed the existence of a warrant as an intervening circumstance, the Court deemphasized the purposeful and flagrant factor, effectively dismissing it as favoring admissibility while still claiming the necessity of evaluating all three *Brown* factors. The Court took the time to lay out all three factors and apply them to the case at hand, but did not give sufficient weight to each in its analysis. Rather, the Court emphasized the presence of an intervening factor: the existence of a valid arrest warrant. However, if emphasis on a particular factor was warranted at all, the Court should have emphasized the purposeful and flagrant factor. This is because, as stated in its opin-

[170] *Id.* (internal brackets omitted).
[171] *Id.*
[172] *Id.* at 2063-64 (internal quotation marks omitted).
[173] *Id.* at 2063.
[174] *Id.* at 2064.
[175] *Id.* at 2063.

ion, the factor "reflects th[e] rationale [that the exclusionary rule exists to deter police misconduct] by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant."[176]

Here, the Court made a determination regarding the purposefulness and flagrancy of the officer's actions without any in depth reasoning or evidence to provide support for its statements. In doing so, the Court set a dangerous precedent that has implications that are both far-reaching and potentially devastating to the personal liberties guaranteed by the Constitution. Although Strieff is a white man, the consequences of this decision reach far beyond him and are likely to have the most devastating impact on communities of color. As Justice Sotomayor stated in a passionate dissent, joined in part by Justice Ginsburg, "The white defendant in this case shows that anyone's dignity can be violated . . . ."[177]

By finding that the officer's actions were not "a part of any systemic or recurrent police misconduct,"[178] the Court implies that it either misunderstands the realities of the social and political atmosphere plaguing the nation's communities of color or it is ignorant of the numerous incidents of police misconduct and killings that have occurred within the last few years.[179] As stated by Justice Kagan in her dissent, which was joined by Justice Ginsburg, "[T]he majority is less willing to see [the] problem for what it is."[180] In 2016, 963 people were shot and killed by police and in 2017, that number rose to 987 deaths.[181] Of those 963 deaths in 2016, 631 of those people were not fleeing the scene, and in 2017, of the 987 people killed, 597 occurred when the suspect did not attempt to flee the scene.[182] Further, many of the illegal stops effectuated by police officers are "the product of institutionalized training procedures."[183] In this case, as pointed out by Justice Sotomayor, the officer did not suspect that

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[176] *Id.*

[177] *Id.* at 2070 (Sotomayor, J., dissenting).

[178] *Id.* at 2063 (majority opinion).

[179] *See Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2017/ (last visited Feb. 19, 2017); *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Jan. 22, 2018). This is particularly interesting given that the majority opinion is authored by Justice Clarence Thomas, the only sitting African American Justice on the Supreme Court while the impassioned dissent was authored by the Court's only sitting Latin American Justice, Justice Sonia Sotomayor.

[180] *Strieff*, 136 S. Ct. at 2072 (Kagan, J., dissenting).

[181] *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Jan. 22, 2018); *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2017/ (last visited Jan. 22, 2018).

[182] *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Jan. 22, 2018); *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2017/ (last visited Jan. 22, 2018).

[183] *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

Strieff had done anything wrong; he unfortunately happened to be the first person to leave a house that the officer believed was the source of drug trafficking.[184]

By claiming that the officer was "at most[,] negligent,"[185] the Court invites officer misconduct. As noted by Justice Kagan, with the Court's decision in *Strieff*, an officer who wants to stop an individual for investigative reasons but is lacking the necessary reasonable suspicion may now stop that individual and "[s]o long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution."[186] The Court dismissed this very argument by Strieff, stating that it "think[s] that . . . [continued or increased officer misconduct] is unlikely."[187] Yet the Court provides no justification for this statement, only that it is not persuaded by Strieff's arguments.[188] The Court implies that when an officer has acted negligently, the deterrent effect of the exclusionary rule does not outweigh its "substantial social costs."[189] However, as noted by Justice Sotomayor, negligent officers are "perhaps the most in need of education" and the exclusion of evidence illegally obtained gives them an "incentive to err on the side of constitutional behavior."[190] Here, the officer's stop was "calculated to procure evidence,"[191] a clear indication that the stop was purposeful. Further, as noted by Justice Kagan, "[t]he impropriety of the stop was obvious."[192] The Court offers no information on how similar decisions dismissing officer misconduct have shaped the likelihood of future misconduct.

The Court goes on to state that "such wanton conduct would expose officers to civil liability,"[193] as if such civil suits have not already been filed with the result being that officer misconduct still persists at an alarming rate.[194] Such civil suits are "expensive, time-consuming, not

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[184] *Id.* at 2065.

[185] *Id.* at 2063 (majority opinion).

[186] *Id.* at 2074 (Kagan, J., dissenting).

[187] *Id.* at 2064 (majority opinion).

[188] *Id.*

[189] *Id.* at 2061.

[190] *Id.* at 2068 (Sotomayor, J., dissenting) (internal quotation marks omitted) (quoting United States v. Johnson, 457 U.S. 537, 561 (1982)).

[191] *Id.* at 2066.

[192] *Id.* at 2072 (Kagan, J., dissenting) (internal brackets omitted).

[193] *Id.* at 2064 (majority opinion).

[194] *See* Alan Feuer, *In Police Misconduct Lawsuits, Potent Incentives Point to a Payout*, N.Y. TIMES (Aug. 16, 2016), http://www.nytimes.com/2016/08/17/nyregion/police-misconduct-lawsuit-settlements.html; *Fatal Force*, THE WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (last visited Jan. 22, 2018).

readily available, and rarely successful."[195] Additionally, most cases that are successful rarely have plaintiffs who have "collected more than nominal damages."[196] Although the vast majority of officers are not ill-willed, there exists "widespread racial disparity in stop, citation, search, and arrest rates."[197] Additionally, in a study on the racial disparities in police traffic stops, it was found that the bar for searching black and Hispanic drivers is lower than for searching white drivers.[198] These statistics are indicative of the fact that people of color are "disproportionate victims" of the "indignity" of these types of illegal stops.[199]

The discovery of an outstanding arrest warrant should not be viewed as an intervening circumstance that attenuates the connection between the illegal stop and the unearthing of incriminating evidence because the evidence ought to still be considered "fruit of the poisonous tree," therefore rendering the evidence inadmissible. It is inherently wrong to allow the admissibility of evidence to depend on a supposed luck of the draw. As noted by Justice Sotomayor, the States and Federal Government have documented over 7.8 million outstanding warrants, "the vast majority of which appear to be for minor offenses," a number that likely fails to capture that actual amount of outstanding warrants in the country.[200] In the town of Ferguson, Missouri, with a population of only 21,000, 16,000 individuals had outstanding warrants against them.[201] At the time of Strieff's arrest, Utah had over 180,000 misdemeanor warrants in its database.[202] Thus, the officer's discovery of the warrant was "not some intervening surprise that he could not have anticipated."[203] By holding that the discovery of an arrest warrant is an intervening circumstance sufficient to attenuate the connection between an illegal stop and the discovery of incriminating evidence, ill-willed officers will have nothing to deter them from stopping any person on the street that they deem fit for

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[195] Hudson v. Michigan, 547 U.S. 586, 610 (2006) (Breyer, J., dissenting) (internal quotation marks omitted).

[196] *Id.*

[197] Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States* 1, 15 (Stan. Open Policing Project, Working Paper, 2017), https://5harad.com/papers/traffic-stops.pdf.

[198] *Id.*

[199] Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (citing MICHELLE ALEXANDER, THE NEW JIM CROW 96-136 (2015)).

[200] *Id.* at 2068 (citing DEP'T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 46, 55, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

[201] *Id.* (citing DEP'T. OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 46, 55, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

[202] *Id.* at 2066.

[203] *Id.*

harassment in the hopes of finding an outstanding warrant to justify their stop and subsequent arrest and search. Additionally, as a result of this decision, impoverished communities will likely be disproportionately affected due to the fact that warrants are issued for violations as minor as failing to pay a fine.[204]

Finally, the Court completely ignores the fact that while deterrence is an important reason to suppress evidence, it is not the only reason suppression should be warranted. Officer misconduct that goes unpunished generates a feeling of uneasiness among the general public and creates an atmosphere of distrust and fear.[205] Officers are given a great deal of deference and power in regards to their interactions with the general public. If they are not held accountable for their actions but are still tasked with protecting and serving a population who fears them, the efficiency and effectiveness of law enforcement officers are destined to decline.[206]

B. CONSULTING STATISTICAL DATA IS THE PROPER APPROACH TO DETERMINE WHETHER A LAW ENFORCEMENT OFFICER'S MISCONDUCT IS "PURPOSEFUL AND FLAGRANT"

Although one may disagree with the Court's outcome in *Utah v. Strieff*, lower courts may still apply the attenuation doctrine to future cases similarly situated and reach a more just outcome. To properly apply the attenuation doctrine, the lower courts should consider and integrate statistical data provided by the parties into their opinions to provide support for their holding, specifically when analyzing the purposeful and flagrant factor of the *Brown* attenuation doctrine's three-factor test. This will not only provide for more transparent reasoning and an increase in the likelihood that courts will come to a just outcome, but could also help relieve the uneasiness felt by the general public after a controversial decision, such as that in *Utah v. Strieff*.

While the Supreme Court has not specifically defined the terms "purposeful" or "flagrant," Merriam Webster defines "purposeful" as having a purpose such that an action is intentional,[207] and "flagrant" as

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[204] *Id.* at 2064.

[205] OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE: AN INTERNAL AFFAIRS PROMISING PRACTICES GUIDE FOR LOCAL LAW ENFORCEMENT (2009), http://www.theiacp.org/portals/0/pdfs/buildingtrust.pdf.

[206] *See* Brief of the ACLU and the Nat'l Ass'n of Crim. Def. Lawyers as Amici Curiae in Support of Respondent at 6, Utah v. Strieff, 136 S. Ct. 2056 (2016) (No. 14-1373), 2016 WL 403751.

[207] *Purposeful*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/purposeful (last visited Feb. 20, 2018).

"conspicuously offensive" and "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality."[208] Further, the Court states that to be flagrant, a violation must be "more severe . . . than the mere absence of proper cause for the seizure."[209] What makes something obvious or more severe, however, is difficult to determine objectively. What is obvious seems to be a matter of opinion rather than one of fact. Thus, flagrancy is a subjective matter that requires explanation and, if possible, quantification. The best way to demonstrate or quantify flagrancy is to use statistical data as support for one's statements.

Additionally, although the Supreme Court has not defined "purposeful or flagrant," the Second Circuit, Eighth Circuit, and Tenth Circuit have consistently held that police misconduct rises to the level of purposeful or flagrant when there are two elements present.[210] First, the impropriety of the conduct must be obvious or the officer knew at the time that his conduct was improper or unconstitutional yet engaged in it anyway.[211] Second, the "the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.'"[212]

The majority opinion in *Utah v. Strieff* never explicitly overruled the use of statistical information by parties to provide support for their arguments. The Court merely neglects to use these powerful tools in support of its reasoning for its opinion. Instead, the majority appears to operate on an intuition-based system about whether the officer's illegal conduct rose to a level deemed flagrant. Similar to how the standard for determining what is reasonable is based on the totality of the circumstances, the standard for flagrancy should be grounded in the same principle. By considering statistics provided by the parties, courts can place officer misconduct in the broader context of society at large. For example, to prove that an officer's misconduct is purposeful or flagrant, a party may bring in data that shows how often a particular police department's stops are not supported by reasonable suspicion or data showing an officer's history of stopping individuals who have subsequently complained about being stopped without cause. Thus, courts should allow parties to submit and rely on statistical data to support their arguments and the courts

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[208] *Flagrant*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/flagrant (last visited Nov. 20, 2016).

[209] *Strieff*, 136 S. Ct. at 2064.

[210] United States v. Murphy, 703 F.3d 182, 192 (2d Cir. 2012) (quoting United States v. Fox, 600 F.3d 1253, 1261 (10th Cir. 2010) (quoting United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006))).

[211] *Id.*

[212] *Id.* (quoting United States v. Fox, 600 F.3d 1253, 1261 (10th Cir. 2010) (quoting United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006))).

should consider that persuasive evidence of purposeful and flagrant conduct by the law enforcement officer. When decisions are based solely on intuition or broad statements without explanation or reasoning, one is less likely to view the decision as well reasoned. By considering statistical data and using those numbers to form a basis for their opinions, courts would make their reasoning more transparent and heighten the legitimacy of their decisions. Still, the impetus is on the parties to bring such data to the courts' attention.

The effectiveness of such an approach can be seen in Justice Sotomayor's impassioned dissent in *Utah v. Strieff*. Rather than making dismissive, blanket statements, Justice Sotomayor uses statistics to lend support to her statements and force the majority to take notice.[213] To provide support for her contention that the discovery of an arrest warrant for an individual who is unlawfully stopped is not an unforeseeable event, Justice Sotomayor cites the 180,000 misdemeanor warrants in Utah's database.[214] In defending her contention that outstanding warrants are not only common in Utah but also in the nation, Justice Sotomayor cites a number of reports that quantify the number of people with arrest warrants for particular types of violations, such as when a person with a traffic ticket misses a fine payment or when a person on probation drinks alcohol or breaks curfew.[215] Finally, to prove that law enforcement officers often use outstanding warrants as a reason to stop people without cause, Justice Sotomayor references investigative reports by the Justice Department that show just that.[216]

Suggesting that courts use statistical data to provide support for their decisions that an officer's conduct is flagrant, does not equate to requiring an officer who has illegally stopped an individual and subsequently found an outstanding arrest warrant to let that individual go free. Rather, the use of statistical data would help to draw the line between what ought to be considered admissible evidence and what is not. This Comment does not contest that an officer has the right to search an individual pursuant to a lawful arrest to guarantee his safety. What the officer may not do, however, is use whatever evidence has been found on that individual to charge him or her with a crime for which he or she was not originally arrested.

While lower courts must rule in accordance with the case law set forth by the Supreme Court, lower courts may be able to distinguish the facts in *Strieff* from those in future cases. Although *Strieff* settles the

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[213] *See Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting).
[214] *Id.*
[215] *Id.* at 2068.
[216] *Id.*

question of whether the discovery of a warrant is considered an intervening circumstance sufficient to attenuate the connection between the illegality of the initial stop and the discovery of the incriminating evidence, the case does not mandate a method of arguing for or against attenuation based on the "purposeful and flagrant" factor. Thus, parties should set forth statistical data in their briefs to prove such purposefulness and flagrancy. Additionally, should lower courts encounter cases that are factually similar to *Utah v. Strieff*, those courts may more adequately justify their holdings by considering and using the statistical data provided by the parties. This will eliminate the contention that the court's holding is not based in reality or on solid reasoning.

C. POLICE DEPARTMENTS SHOULD BE REQUIRED TO COLLECT DATA ON THE INDIVIDUALS THEY STOP, THE PURPOSE OF THE STOP, AND THE OUTCOME: THE NYPD'S STOP-AND-FRISK POLICY AS A MODEL

Although statistical data would work to defeat accusations that the Court is out of touch with the reality of the political and social sphere, sufficient statistical data does not always exist to support a finding that an officer's action is purposeful or flagrant. To aid courts and parties in the implementation of such an approach, police departments should be required to collect data on who they stop; the purpose of the stop; a description of the individual; and the outcome of the stop—whether the individual was released from temporary detention, issued a citation, or arrested.

As a result of a 2013 decision which determined that the New York Police Department's ("NYPD") implementation of their stop-and-frisk policy violated the Fourth and Fourteenth Amendment rights of minorities,[217] the NYPD has been in the process of implementing a data collection process,[218] upon which this Comment's proposal is based. According to the order, each time an NYPD officer stops an individual, the officer is required to report what occurred during the stop, including the above-mentioned description of the individual, purpose of the stop, and the outcome of the stop.[219]

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[217] Floyd v. City of New York, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

[218] *See* Al Baker, *City Police Officers Are Not Reporting All Street Stops, Monitor Says*, N.Y. TIMES, Dec. 13, 2017, https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html.

[219] Finest Message from Police Commissioner to All Commands (Mar. 2, 2015), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/20150302_finest-message-stop-frisk-pursuant-to-floyd.pdf.

While progress has been made in the two years since the beginning of the NYPD's overhaul of its stop-and-frisk policy, a court-appointed monitor overseeing the changes to the NYPD's stop-and-frisk policies found that officers were still failing to report all of the conducted stops.[220] This highlights one of the main difficulties that will arise as a result of requiring police officers to report the stops they have carried out: slow compliance. Another issue will be the cost of training officers to comply with a new data reporting policy. Still, these obstacles are a relatively small price to pay in order to ensure that citizens' constitutionally guaranteed liberties are protected.

CONCLUSION

The Court's decision in *Utah v. Strieff* is a controversial one, the consequences of which have yet to be seen but whose implications are far-reaching and potentially devastating. Prior to the Court's decision in *Utah v. Strieff*, lower courts differed on whether to consider the existence of a valid arrest warrant as an intervening circumstance relevant to the *Brown* attenuation doctrine analysis. However, with its decision in *Utah v. Strieff*, the Court effectively settled the split between circuits, holding that the existence of a valid arrest warrant is an intervening circumstance that attenuates the connection between an illegal stop and the discovery of evidence.

Still, the Court ultimately misapplied the attenuation doctrine, particularly in regards to its analysis of the "purposeful and flagrant" factor. By dismissing the officer's action as not being purposeful or flagrant and not a part of systemic or recurring police misconduct, the Court implied that it either misunderstood the plights of communities of color or was ignorant of the rampant police misconduct and killings that have plagued the nation over the last few years.

To ensure that the Fourth Amendment rights of individuals across the nation are protected, it is necessary for lower courts to reexamine its analysis and application of the attenuation doctrine and the purpose of the exclusionary rule. To do this effectively, courts should use statistical data provided by the parties to decide whether an officer's misconduct is purposeful or flagrant. In doing so, parties would make their arguments stronger and courts would provide more transparency and insight into their decision making processes, heightening their legitimacy.

Finally, police departments should be required to collect data on the stops they effectuate because this is the best way to aid courts and parties

[220] Baker, *supra* note 218.

in implementing this new approach. Although implementation of such a process may be initially slow and costly, it is a small price to pay to ensure citizens' constitutional rights are protected.