AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Criminal Justice/Search and Seizure

**Utah v. Strieff, \_\_ U.S. \_\_** (2016)

*Edward Strieff visited a resident that Office Douglas Fackrell of the Salt Lake City police force suspected was a site for drug transactions. After Strieff left the house, Fackrell stopped him, asked for identification and asked a police dispatcher to see whether Fackrell had any outstanding warrants. When the dispatcher reported that Strieff had an outstanding warrant, Fackrell arrested Strieff and conducted a search incident to that arrest which revealed that Strieff possessed illegal drugs. The trial court rejected Strieff’s motion to exclude the drugs as a product of an unconstitutional search, but that decision was reversed by the Utah Supreme Court. Utah appealed to the Supreme Court of the United States.*

*The Supreme Court of the United States reinstated Strieff’s conviction by a 5-3 vote. Justice Clarence Thomas’s majority opinion found that the presence of an outstanding warrant was an intervening circumstance that attenuated Fackwell’s unconstitutional decision to stop Strieff and that Fackwell’s unconstitutional behavior was not flagrant. All three opinions in* Utah v. Strieff *agree on that whether a search in those circumstances is constitutional depends on the time between the search and the discovery of evidence, whether intervening circumstances explain the discovery of the evidence and whether the police conduct was flagrant. How do Justices Thomas, Sotomayor and Kagan apply those standards? Where do they agree and disagree? Who has the better of the argument? Thomas claims that the exclusionary rule will not deter negligent behavior? Why does he make that claim? Why do Justices Sotomaypr and Kagan disagree? Who has the better of the argument? The majority opinion characterizes the police behavior in this case as an isolate incident. The dissents see such behavior as systematic. How do these understandings influence the opinions and who has the better of this argument?*

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

To enforce the Fourth Amendment's prohibition against “unreasonable searches and seizures,” this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

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Under the Court's precedents, the exclusionary rule encompasses both the “primary evidence obtained as a direct result of an illegal search or seizure” and, relevant here, “evidence later discovered and found to be derivative of an illegality,” the so-called “ ‘fruit of the poisonous tree.’” But the significant costs of this rule have led us to deem it “applicable only ... where its deterrence benefits outweigh its substantial social costs.”  “Suppression of evidence ... has always been our last resort, not our first impulse.”

We have accordingly recognized several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source.. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”

. . . . The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions. . . . The three factors articulated in *Brown v. Illinois* (1975), guide our analysis. First, we look to the “temporal proximity” between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search.  Second, we consider “the presence of intervening circumstances.”  Third, and “particularly” significant, we examine “the purpose and flagrancy of the official misconduct.” . . .

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless “substantial time” elapses between an unlawful act and when the evidence is obtained.  Here, however, Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop. . . .

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. . . . In this case, the warrant was valid, it predated Officer Fackrell's investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. . . . Officer Fackrell's arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell's safety.

Finally, the third factor, “the purpose and flagrancy of the official misconduct,” also strongly favors the State. The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. . . . But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

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Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

. . . .Strieff argues . . . that Officer Fackrell's conduct was flagrant because he detained Strieff without the necessary level of cause (here, reasonable suspicion). But that conflates the standard for an illegal stop with the standard for flagrancy. For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure. Neither the officer's alleged purpose nor the flagrancy of the violation rise to a level of misconduct to warrant suppression.

Second, Strieff argues that, because of the prevalence of outstanding arrest warrants in many jurisdictions, police will engage in dragnet searches if the exclusionary rule is not applied. We think that this outcome is unlikely. Such wanton conduct would expose police to civil liability. And in any event, the *Brown* factors take account of the purpose and flagrancy of police misconduct. Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins [in part], dissenting.

. . . . This case 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. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

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It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When “lawless police conduct” uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. . . .

This “exclusionary rule” removes an incentive for officers to search us without proper justification.  It also keeps courts from being “made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.”  When courts admit only lawfully obtained evidence, they encourage “those who formulate law enforcement polices, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.”  But when courts admit illegally obtained evidence as well, they reward “manifest neglect if not an open defiance of the prohibitions of the Constitution.”

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. . . . We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were “intervening circumstances,” and whether the purpose or flagrancy of the misconduct was “calculated” to procure the evidence. *Brown v. Illinois* (1975). These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a “backlog of outstanding warrants” so large that it faced the “potential for civil liability.”  The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited. App. 17.

The warrant check, in other words, was not an “intervening circumstance” separating the stop from the search for drugs. It was part and parcel of the officer's illegal “expedition for evidence in the hope that something might turn up.”  Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

. . . . The majority likewise misses the point when it calls the warrant check here a “ ‘negligibly burdensome precautio[n]’ ” taken for the officer's “safety.” Remember, the officer stopped Strieff without suspecting him of committing any crime. By his own account, the officer did not fear Strieff. . . .

. . . [T]he Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence.  Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an “incentive to err on the side of constitutional behavior.”

. . . . [N]othing about this case is isolated. Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. When a person on probation drinks alcohol or breaks curfew, a court will issue a warrant. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. . . . The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them. Ferguson Report, at 6, 55.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers “made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets.” In the St. Louis metropolitan area, 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 subject had a municipal arrest warrant pending.” In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4–year period and ran warrant checks on 39,308 of them. The Justice Department analyzed these warrant-checked stops and reported that “approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion.” Id., at ––––, n. 7.

I do not doubt that most officers act in “good faith” and do not set out to break the law. That does not mean these stops are “isolated instance[s] of negligence,” however.  Many are the product of institutionalized training procedures. The New York City Police Department long trained officers to, in the words of a District Judge, “stop and question first, develop reasonable suspicion later.”  The Utah Supreme Court described as “‘routine procedure’ or ‘common practice’ ” the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion. . . .

Writing only for myself, and drawing on my professional experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren v. United States* (1996). That justification must provide specific reasons why the officer suspected you were breaking the law,  but it may factor in your ethnicity,  where you live,  what you were wearing, and how you behaved. . . .

The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your “consent” to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand “helpless, perhaps facing a wall with [your] hands raised.”  If the officer thinks you might be dangerous, he may then “frisk” you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may “ ‘feel with sensitive fingers every portion of [your] body.. . . ’”  The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or “driving [your] pickup truck ... with [your] 3–year–old son and 5–year–old daughter ... without [your] seatbelt fastened.”  At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to “shower with a delousing agent” while you “lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.”  Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the “civil death” of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you “arrestable on sight” in the future.

This case involves a suspicionless stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone's dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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This case thus requires the Court to determine whether excluding the fruits of Officer Douglas Fackrell's unjustified stop of Edward Strieff would significantly deter police from committing similar constitutional violations in the future. And as the Court states, that inquiry turns on application of the “attenuation doctrine,” [ante, at –––](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017879536&pubNum=0000780&originatingDoc=Ifbdccd5e36e911e6b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))– —our effort to “mark the point” at which the discovery of evidence “become[s] so attenuated” from the police misconduct that the deterrent benefit of exclusion drops below its cost.  Since *Brown v. Illinois* (1975), three factors have guided that analysis. First, the closer the “temporal proximity” between the unlawful act and the discovery of evidence, the greater the deterrent value of suppression.  Second, the more “purpose[ful]” or “flagran[t]” the police illegality, the clearer the necessity, and better the chance, of preventing similar misbehavior. And third, the presence (or absence) of “intervening circumstances” makes a difference: The stronger the causal chain between the misconduct and the evidence, the more exclusion will curb future constitutional violations.  . . .

Start where the majority does: The temporal proximity factor, it forthrightly admits, “favors suppressing the evidence.” . . . Move on to the purposefulness of Fackrell's conduct, where the majority is less willing to see a problem for what it is. The majority chalks up Fackrell's Fourth Amendment violation to a couple of innocent “mistakes.”  But far from a Barney Fife-type mishap, Fackrell's seizure of Strieff was a calculated decision, taken with so little justification that the State has never tried to defend its legality. . . .

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Finally, consider whether any intervening circumstance “br[oke] the causal chain” between the stop and the evidenceThe notion of such a disrupting event comes from the tort law doctrine of proximate causation. And as in the tort context, a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away. . . . Fackrell's discovery of an arrest warrant—the only event the majority thinks intervened—was an eminently foreseeable consequence of stopping Strieff. As Fackrell testified, checking for outstanding warrants during a stop is the “normal” practice of South Salt Lake City police. In other words, the department's standard detention procedures—stop, ask for identification, run a check—are partly designed to find outstanding warrants. And find them they will, given the staggering number of such warrants on the books. So outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops—what officers look for when they run a routine check of a person's identification and what they know will turn up with fair regularity. In short, they are nothing like what intervening circumstances are supposed to be.[2](https://1.next.westlaw.com/Document/Ifbdccd5e36e911e6b86bd602cb8781fa/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3b0000015578378f8f0357201b%3FNav%3DCASE%26fragmentIdentifier%3DIfbdccd5e36e911e6b86bd602cb8781fa%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=a4e054ae4ee45fb65cfefdc1fe31a337&list=CASE&rank=1&grading=na&sessionScopeId=1d47d3007afdce8be176ba2d92255786e828e860263aa9f5317dab324238cd76&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00322039199301) Strike three.

The majority's misapplication of Brown 's three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what Fackrell did here. Consider an officer who, like Fackrell, wishes to stop someone for investigative reasons, but does not have what a court would view as reasonable suspicion. If the officer believes that any evidence he discovers will be inadmissible, he is likely to think the unlawful stop not worth making—precisely the deterrence the exclusionary rule is meant to achieve. But when he is told of today's decision? Now the officer knows that the stop may well yield admissible evidence: So 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. The officer's incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove.