Fourth Amendment — Exclusionary Rule — Deterrence Costs and Benefits — Utah v. Strieff

Under contemporary Supreme Court precedent, the Fourth Amendment's exclusionary rule — which calls for the suppression of illegally obtained evidence — only applies when the societal benefits of applying the rule exceed the societal costs.[1] Traditionally, the Court has found that the exclusionary rule does not apply when the link between an illegal search and the evidence obtained is "sufficiently attenuated."[2] Last Term, in *Utah v. Strieff*,[3] the Supreme Court held that, "where an unconstitutional detention leads to the discovery of a valid arrest warrant" authorizing an arrest, the Fourth Amendment does not generally require suppression of evidence seized incident to that arrest.[4] To make this determination, the Court turned to *Brown v. Illinois*'s[5] multifactor attenuation test.[6] But narrowly focused adjudicatory tests like the one from *Brown* are poor instruments for the exclusionary rule's regulatory analysis. Costs and benefits can only be weighed in a broad factual context that also considers exclusionary rule precedent already in effect.

Responding to an anonymous tip about "narcotics activity" at a house in Salt Lake City, Detective Douglas Fackrell intermittently watched the home over the course of a week.[7] He noticed that the house had frequent visitors who stayed for only a few minutes.[8] During one of his stakeouts, Officer Fackrell watched Edward Strieff leave the house and walk to a nearby convenience store. Officer Fackrell followed Strieff, detained him in the store parking lot, demanded his identification, and relayed Strieff's information to dispatch to check for any outstanding warrants. Dispatch told Officer Fackrell that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found illegal drugs.[9]

After being charged with unlawful possession of methamphetamine and drug paraphernalia, Strieff moved to suppress the evidence as inadmissible fruit of the initial, illegal stop.[10] The State conceded that Officer Fackrell had violated the Fourth Amendment when he detained Strieff without a reasonable articulable suspicion, but the State

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1 *See, e.g.*, Herring v. United States, 555 U.S. 135, 140–42 (2009).
2 Segura v. United States, 468 U.S. 796, 815 (1984).
3 136 S. Ct. 2056 (2016).
4 *Id.* at 2060; *see also id.* at 2064.
5 422 U.S. 590 (1975).
6 *Strieff*, 136 S. Ct. at 2061–62.
7 *Id*. at 2059.
8 *Id.*
9 *Id.* at 2060.
10 *Id.*

argued that the evidence should be admitted because the discovery of the arrest warrant was an intervening circumstance that sufficiently attenuated the finding of drugs from the unlawful stop. At trial, the court accepted the State's argument and admitted the evidence.[11] Strieff pleaded guilty but reserved his right to appeal the denial of the suppression motion.[12] The Utah Court of Appeals affirmed,[13] but the Utah Supreme Court reversed.[14] Looking to the U.S. Supreme Court attenuation-doctrine precedent, the Utah Supreme Court found that each case "involv[ed] independent acts of criminal defendants."[15] The court held that only "a voluntary act of a defendant's free will" could break the chain of causation from illegal search to discovery of evidence.[16] The U.S. Supreme Court granted certiorari.[17]

The Court reversed. Writing for the majority, Justice Thomas[18] began with a brief overview of the Court's exclusionary rule jurisprudence, noting that the exclusionary rule only applies in cases where the deterrent benefits outweigh the costs of exclusion.[19] The majority observed that the exclusionary rule has become "the principal judicial remedy to deter Fourth Amendment violations,"[20] although there exist various exceptions to the rule's requirement that the "fruit of the poisonous tree" of the constitutional violation be excluded.[21] The exception at issue here was the attenuation doctrine, which counsels for admitting evidence where the connection between the illegal government conduct and the evidence discovered "is remote or has been interrupted by some intervening circumstance."[22]

The majority held that "the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant" and, therefore, the evidence was admissible.[23] To guide the analysis, Justice Thomas turned to

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[11] *Id.*

[12] *Id.*

[13] State v. Strieff, 286 P.3d 317, 335 (Utah Ct. App. 2012).

[14] State v. Strieff, 357 P.3d 532, 536 (Utah 2015).

[15] *Id.* at 544.

[16] *Id.* at 536.

[17] *Strieff*, 136 S. Ct. at 2060.

[18] Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito.

[19] *Strieff*, 136 S. Ct. at 2061.

[20] *Id.*

[21] *Id.* (quoting Segura v. United States, 468 U.S. 796, 804 (1984)).

[22] *Id.* Addressing the threshold question of whether the attenuation doctrine applies at all when law enforcement discovers a preexisting arrest warrant, the majority disagreed with the Utah Supreme Court and found that the attenuation doctrine is not limited to circumstances where a defendant's independent act severs the causal chain. *Id.*

[23] *Id.* at 2063.

three factors from a 1975 Supreme Court decision, *Brown v. Illinois*.[24] The first factor of "temporal proximity" favored Strieff because "Officer Fackrell discovered drug contraband on Strieff's person only minutes after the illegal stop."[25] But the Court found that "[i]n contrast, the second factor, the presence of intervening circumstances, strongly favor[ed] the State."[26] Here, the majority looked to *Segura v. United States*,[27] where agents had illegally searched and seized an apartment and its occupants while awaiting the issuance of a valid search warrant.[28] Although the independent-source doctrine was the exception to the exclusionary rule in that case, the majority found that "the *Segura* Court suggested that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"[29] Because the valid warrant "predated Officer Fackrell's investigation, and . . . was entirely unconnected with the stop,"[30] arresting Strieff "was independently compelled by the pre-existing warrant."[31] The third factor, "the purpose and flagrancy of the official misconduct," also favored the State because "Officer Fackrell was at most negligent."[32] Justice Thomas noted that "there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct" and that the evidence pointed to the stop being "an isolated instance of negligence."[33] Accordingly, the two factors in favor of the State outweighed the one in favor of Strieff, and the exclusionary rule did not apply.

Justice Sotomayor dissented,[34] finding it to be a "remarkable proposition" that a warrant's existence should forgive police officers who unlawfully stop someone "on a whim or hunch,"[35] and then "exploit[]

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[24] *Id.* at 2061–62. Because the State conceded that Officer Fackrell did not have reasonable articulable suspicion to stop Strieff, the Court assumed without deciding that Officer Fackrell had violated the Fourth Amendment. *Id.* at 2062.

[25] *Id.* at 2062.

[26] *Id.*

[27] 468 U.S. 796 (1984).

[28] *Id.* at 799–802.

[29] *Strieff*, 136 S. Ct. at 2062 (quoting *Segura*, 468 U.S. at 815).

[30] *Id.*

[31] *Id.* at 2063. Officer Fackrell's subsequent discovery of contraband on Strieff's person resulted from a lawful search incident to the arrest. *Id*.

[32] *Id.* The majority found that Officer Fackrell had made two good faith errors. First, he did not see how long Strieff had been at the house and therefore narrowly missed having reasonable articulable suspicion that Strieff had purchased drugs in the home. Second, "Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so." *Id.*

[33] *Id.*

[34] Justice Sotomayor was joined by Justice Ginsburg as to all but Part IV of the opinion.

[35] *Strieff*, 136 S. Ct. at 2067 (Sotomayor, J., dissenting).

[the] illegal stop to discover" drugs.[36] The discovery of the warrant was not "some intervening surprise that [Officer Fackrell] could not have anticipated."[37] Utah's database had hundreds of thousands of outstanding warrants, and Salt Lake County already faced the "potential for civil liability" due to the size of this backlog.[38] The discovery of the warrant "was part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.'"[39]

Justice Sotomayor attacked the majority's application of the *Brown* factors. She criticized the Court's reliance on precedent from an independent-source case because Officer Fackrell's "illegal conduct . . . was essential to his discovery of an arrest warrant."[40] And she faulted the majority for excusing the officer's "good-faith mistakes," since the Fourth Amendment does not excuse officers for "not know[ing] any better."[41] Astounded by the majority's contention that the unlawful stop was an isolated incident, the dissent declared that "nothing about this case is isolated."[42] Cities including Ferguson, Missouri, routinely stop citizens — "on the street, at bus stops, or even in court — for no reason other than 'an officer's desire to check whether the subject ha[s] a municipal arrest warrant pending.'"[43] Justice Sotomayor detailed the policies of New York City's controversial stop and frisk program to show that these stops are not isolated moments of negligence but institutionally ingrained practices.[44]

In the last part of her dissent — which no other Justice joined — Justice Sotomayor argued that "unlawful 'stops' have severe consequences."[45] Addressing the public at large, she outlined the conse-

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[36] *Id.* at 2066.

[37] *Id.*

[38] *Id.* (quoting INST. FOR LAW & POLICY PLANNING, SALT LAKE COUNTY CRIMINAL JUSTICE SYSTEM ASSESSMENT 6.7 (2004)).

[39] *Id.* (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

[40] *Id.* at 2067.

[41] *Id.* at 2067–68.

[42] *Id.* at 2068. "Outstanding warrants are surprisingly common." *Id.* For example, these warrants issue when traffic tickets go unpaid or when "a person on probation drinks alcohol or breaks curfew." *Id.* "The States and Federal Government maintain databases with over 7.8 million outstanding warrants," and this number fails to capture the many municipal warrants that exist across the country. *Id.*

[43] *Id.* (quoting CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 17 (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/8CQS-NZ9F]).

[44] *Id.* at 2069. Because the Utah Supreme Court found it to be "routine procedure" or "common practice" for the Salt Lake City police to run warrant checks on illegally detained pedestrians, *id.* (quoting State v. Topanotes, 76 P.3d 1159, 1160 (Utah 2003)), Justice Sotomayor faulted the majority for not showing how this case was isolated and for not providing "guidance for how a defendant can prove that his arrest was the result of 'widespread' misconduct." *Id.*

[45] *Id.*

quences of the Court's modern Fourth Amendment jurisprudence. Police offers can stop you pretextually for a "minor, unrelated, or ambiguous" infraction[46] and "ask for your 'consent' to inspect your bag or purse without telling you that you can decline."[47] If the officer thinks you could be dangerous, he can frisk you.[48] For even a minor offense, like driving without a seatbelt, the officer can take you to jail, "fingerprint you, swab DNA from the inside of your mouth," and strip search you.[49] Even if you're innocent, you'll have an arrest record and experience the "civil death" of having this detail show up on background checks conducted by landlords, employers, and others.[50] Drawing on more than a century of literature chronicling government and law enforcement's unequal treatment of people of color, Justice Sotomayor signaled that, although Strieff is a white man, "people of color are disproportionate victims of this type of scrutiny."[51] Justice Sotomayor contended that the majority opinion "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[52] Those targeted by police are "the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. . . . Until their voices matter too, our justice system will continue to be anything but."[53]

Justice Kagan wrote a brief, separate dissent.[54] She invoked the justification for the exclusionary rule, noting that "[s]uppression is necessary when, but only when, its societal benefits outweigh its costs."[55] The rule's benefits, she explained, are conforming police conduct to the Fourth Amendment's requirements while the rule's costs are "in many cases . . . to release a criminal without just punishment."[56]

Following the path of the majority opinion, Justice Kagan acknowledged the same three *Brown* factors but concluded that discovering the arrest warrant did not attenuate the connection between the illegal arrest and detection of drugs.[57] For the first factor, Justice Kagan agreed with the majority that "temporal proximity" leaned in

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[46] *Id.*
[47] *Id.* at 2070.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* (citing TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015); MICHELLE ALEXANDER, THE NEW JIM CROW 95–136 (2010); JAMES BALDWIN, THE FIRE NEXT TIME (1963); W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903)).
[52] *Id.* at 2071.
[53] *Id.*
[54] Justice Kagan was joined by Justice Ginsburg.
[55] *Strieff*, 136 S. Ct. at 2071 (Kagan, J., dissenting).
[56] *Id.*
[57] *Id.* at 2071–72.

favor of Strieff.[58] For the purposefulness of conduct factor, Justice Kagan found Officer Fackrell's constitutional violations to be "a calculated decision, taken with so little justification that the State has never tried to defend its legality."[59] Justice Kagan analyzed the factor of intervening circumstances within the context of "the tort law doctrine of proximate causation."[60] A circumstance can be considered intervening only if it cannot be foreseen.[61] But Officer Fackrell's "discovery of an arrest warrant . . . was an eminently foreseeable consequence of stopping Strieff."[62] In fact, it was "routine procedure" to check for a warrant for this very purpose.[63] Discoveries of these warrants after illegal stops are not "bolts from the blue" but "the run-of-the-mill results of police stops" and therefore are not intervening circumstances.[64] Justice Kagan lamented that, because the majority misapplied *Brown*, law enforcement's "incentive to violate the Constitution thus increases," which is "exactly the temptation the exclusionary rule is supposed to remove."[65]

Under modern precedent, the exclusionary rule's sole justification is a cost-benefit analysis: in a given case the rule can be applied only if the resulting societal benefits exceed the societal costs. To decide if the exclusionary rule applied in *Strieff*, the Court looked to *Brown*'s attenuation test. But this test doesn't fit the contemporary rationale behind the exclusionary rule. To weigh the costs and benefits of applying the exclusionary rule accurately, the Court must look to a broader factual context that recognizes baseline policies already in effect — including Supreme Court precedent. But the *Brown* test primarily examines the adjudicative facts of the case at hand. By avoiding a broader exclusionary rule analysis, the Court risks arriving at holdings that contradict the fundamental rationale behind the rule.

The Supreme Court has found that the exclusionary rule is only justified when the benefits of applying the rule outweigh the costs, but this has not always been the Court's understanding. As the Court acknowledged the year after *Brown*, the "debate within the Court on the exclusionary rule has always been a warm one."[66] The Court's seminal decision in *Mapp v. Ohio*,[67] which applied the exclusionary

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[58] *Id.* at 2071.

[59] *Id.*

[60] *Id.*

[61] *See* State v. Strieff, 357 P.3d 532, 544–45 (Utah 2015).

[62] *Strieff*, 136 S. Ct. at 2073 (Kagan, J., dissenting).

[63] *Id.* Building on Justice Sotomayor's reporting of the existence of many warrants on the books, Justice Kagan noted that California, Pennsylvania, and New York have millions of outstanding warrants. *Id.*

[64] *Id.*

[65] *Id.* at 2074.

[66] United States v. Janis, 428 U.S. 433, 446 (1976).

[67] 367 U.S. 643 (1961).

rule to the states, justified the rule largely on grounds of judicial integrity and individual rights.[68] *Brown* itself was decided the Term after *United States v. Calandra*,[69] the case in which the Court first controversially weighed the costs and benefits of applying the exclusionary rule to grand jury proceedings.[70] In *Brown*, a concurring opinion preferred to focus on the exclusionary rule's costs and benefits,[71] but the majority affirmed the exclusionary rule's purpose of "protect[ing] Fourth Amendment rights" by both deterring illegal police conduct and preserving judicial integrity.[72] Over the next forty years, the Court stripped away the exclusionary rule's justification either as an individual right or as a means of ensuring judicial integrity.[73] The Court recently affirmed: "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search. . . . The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."[74] And as the Court affirmed in *Strieff*, the exclusionary rule is a justifiable deterrent only when the resulting benefits outweigh the resulting costs.[75]

Four decades after its creation, the *Brown* test poorly fits the exclusionary rule's contemporary cost-benefit rationale. Although a three-factor test that looks to the adjudicative facts of the case at bar may be appropriate as an adjudicative remedy, the modern exclusionary rule is explicitly and exclusively regulatory. The Court now understands the exclusionary rule not as an individual right but as a forward-looking regulatory decision.[76] And as the Office of Management and Budget instructs agencies making similar regulatory decisions, "you cannot conduct a good regulatory analysis according to a formula."[77] For cost-benefit analysis, the Office of Management and Budget has found that three elements are required. One must explain how the consequences of a rule link to the expected benefits.[78] One must "[i]dentify

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[68] *Id.* at 660 ("Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him . . . and, to the courts, that judicial integrity so necessary in the true administration of justice."); *see also* Weeks v. United States, 232 U.S. 383, 398 (1914).

[69] 414 U.S. 338 (1974).

[70] *Id.* at 349–52.

[71] Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part).

[72] *Id.* at 599 (majority opinion).

[73] *See* Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 316–19 (1993); Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 630–38 (2014).

[74] Davis v. United States, 564 U.S. 229, 236–37 (2011) (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).

[75] *Strieff*, 136 S. Ct. at 2061; *see also id.* at 2071 (Kagan, J., dissenting).

[76] *Id.* at 2061 (majority opinion); *see also id.* at 2071 (Kagan, J., dissenting).

[77] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4: REGULATORY ANALYSIS 3 (2003), http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf [https://perma.cc/N6AG-W9QG].

[78] *Id.* at 2.

the expected undesirable side-effects and ancillary benefits of the proposed regulatory action and the alternatives."[79] And one must clearly draw a baseline: "the best assessment of the way the world would look absent the proposed action."[80] None of these three necessary elements are part of the *Brown* test, because multifactor tests confined to the facts of the case at bar simply don't measure future costs and benefits. To conform with their underlying rationale, exclusionary rule tests should look forward in time to measure the impact of applying the rule. But tests like *Brown* only look backward to the facts of the case at hand.

Importantly, precedents like *Brown* are not neutral substitutes for the Court's contemporaneous cost-benefit analysis because these precedents affect a crucial measurement within cost-benefit analysis: the baseline assessment of current conditions. Prior Fourth Amendment decisions don't just crystallize certain principles: each exclusionary rule decision bends the limits of legally sanctioned police action and thus adjusts the baseline circumstances that should inform subsequent analysis. In this way, the effects of Fourth Amendment jurisprudence are an especially clear example of Professor Laurence Tribe's reflection that "[e]ach legal decision restructures the law itself, as well as the social setting in which law operates, because . . . the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself."[81] The Court often looks to adjudicatory tests found in prior cases to answer novel questions about the costs and benefits of applying the exclusionary rule. But the costs and benefits are not static. Prior cases change the procedures allowed by law and thus change the baseline of how the world would look absent the exclusionary rule's application in a new situation.

With this in mind, Justice Sotomayor's litany of the many civil liberties intrusions the courts have allowed in recent decades is not just fodder for op-eds[82] but is also an articulation of the current criminal procedure baseline. Only with a baseline assessment of the effects of existing policy can the Court accurately weight the costs and benefits of applying the exclusionary rule in new factual circumstances. The current baseline for legal pedestrian stops — reasonable articulable

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[79] *Id.* at 3.

[80] *Id.* at 15.

[81] Laurence H. Tribe, Essay, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 8 (1989).

[82] *See, e.g.*, Matt Ford, *Justice Sotomayor's Ringing Dissent*, THE ATLANTIC (June 20, 2016), http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922 [https://perma.cc/QXW2-YPYC]; *see also* John O. McGinnis, *The Jurisprudence of Empathy Bursts the Bounds of Proper Procedure*, LIBR. L. & LIBERTY (June 22, 2016), http://www.libertylawsite.org/2016/06/22/the-jurisprudence-of-empathy-bursts-the-bounds-of-proper-procedure [https://perma.cc/LPV9-EUAP] (contending that Justice Sotomayor's "impassioned" passages "do not belong in this Supreme Court reporter").

suspicion — is already a low standard to meet. A police officer can find reasonable articulable suspicion when a person reaches into his or her waistband,[83] makes a "furtive" gesture, has a bulge in a pocket,[84] waves strangely at a police officer,[85] enters a building without a keycard, spits on the sidewalk,[86] turns away from police in an area that police claim (without evidence) is a high-crime area,[87] and more.[88] If Strieff had been stopped in a vehicle instead of on foot, then the stop would be all but guaranteed to be legal because traffic infractions are ubiquitous.[89]

Modern Fourth Amendment jurisprudence is explicitly regulatory, but its rules have not yet caught up with its rationale. From a regulatory perspective, the exclusionary rule's primary, direct cost is not criminals escaping conviction. Instead, the exclusionary rule's primary cost is the difference in marginal cost between producing convictions secured through *legal* searches and seizures and producing convictions secured through *illegal* searches and seizures. In the present case, the cost of applying the exclusionary rule would be the cost for law enforcement to shift from suspicionless stops to stops with reasonable articulable suspicion. Of course, if five Justices had signed Justice Kagan's opinion, Edward Strieff would have gone free even though he had committed a crime. But the modern exclusionary rule looks beyond the case at bar to the societal effects of applying the rule. If the Court had applied the exclusionary rule, evidence stemming from the discovery of an arrest warrant after an illegal stop would be excluded in future cases, and police would adjust their behavior. Under these

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[83] Morgan v. United States, 121 A.3d 1235, 1237–38 (D.C. 2015); *see also Get Your Hands Out of Your Pants! . . . Or the Police Can Stop and Frisk You*, PUB. DEFENDER SERV. FOR D.C.: D.C. CRIM. L. BLOG, http://www.pdsdc.org/professional-resources/criminal-law-blog/criminal-law-post/pds-criminal-law-blog/2015/08/07/get-your-hands-out-of-your-pants!-or-the-police-can-stop-and-frisk-you [https://perma.cc/273X-BB84].

[84] Darius Charney, *Requiem for a Suspicious Bulge*, CTR. FOR CONST. RTS. (March 23, 2016), http://ccrjustice.org/home/blog/2016/03/23/requiem-suspicious-bulge [https://perma.cc/X4F7-MREP].

[85] *See* United States v. Arvizu, 534 U.S. 266, 270–71 (2002).

[86] Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (July 11, 2010), http://www.nytimes.com/2010/07/12/nyregion/12frisk.html [https://perma.cc/7RW9-SDGJ].

[87] *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000); *see also* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1591 (2008) ("The high-crime area designation is hardly ever empirically supported with factual evidentiary proof.").

[88] *See also* Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 385 (2001); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 405 (2003).

[89] *See* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 252 (2010) (noting that "[i]t never takes longer than three or four blocks of following [a] car" to find a legally justified reason to stop the car).

conditions, Officer Fackrell would not illegally detain people, arrest those with outstanding warrants, and search them incident to arrest only to watch those possessing contraband escape conviction time and time again. Rather, he would wait until he had a reasonable articulable suspicion, *legally* detain people, arrest those with outstanding warrants, search them incident to arrest, and secure convictions. For each case, the costs and benefits of applying the exclusionary rule are a comparison between the future effects of requiring police to secure convictions consistent with the Fourth Amendment — as presently understood and enforced — and the effects of allowing police to secure convictions inconsistent with the Fourth Amendment. With *Strieff*, given the baseline of how easy it is for law enforcement to find a reasonable articulable suspicion to justify stopping someone, the resulting cost of applying the exclusionary rule and requiring reasonable articulable suspicion would have been slight.

The Court's doctrinal approach in *Strieff* either masks the actual cost-benefit rationale behind the decision or saves the Court from balancing costs and benefits altogether. This tendency by the Court to address novel constitutional questions by retreating to ill-fitting doctrinal frameworks mirrors a trend Professor Mark Tushnet has found in First Amendment cases.[90] Tushnet has identified a "judicial pathology": once a formula for deciding a question has been established, the Supreme Court has a tendency to adjudicate novel constitutional questions by shoehorning the analysis into this preexisting formula.[91] In some cases, the Supreme Court arrives at "counter-intuitive results from the perspective of almost any foundational theory of the First Amendment" by judging a current case by looking only to a categorical rule and not the justifications behind that rule.[92] As Tushnet argues, this "trope reflects . . . a fear of judgment."[93]

In *Strieff*, the majority ostensibly found that the costs of applying the exclusionary rule exceeded the benefits. For five Justices, the boost to the efficacy of suspicionless stops must have been more societally valuable than diminished Fourth Amendment protection, increased incentive for police to abuse their discretion, and heightened justifiable distrust of police in minority and poor neighborhoods. But if the majority had publicly weighed those considerations, their opinion would have better conformed to the exclusionary rule rationale, would have more meaningfully contributed to our constitutional discourse, and would have forthrightly addressed criticisms of the fragile and suspect integrity of our criminal justice system.

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[90] Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103 (2012).
[91] *Id.* at 124.
[92] *Id.*
[93] *Id.* at 114.