STRETCHING THE ATTENUATION DOCTRINE TO ITS LIMITS: HOW THE SUPREME COURT ERRED IN *UTAH V. STRIEFF* AND WHAT CAN BE DONE TO PRESERVE THE DOCTRINE

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INTRODUCTION

In criminal law proceedings, courts apply the exclusionary rule to evidence obtained by police officers through unlawful means.[1] By doing so, law enforcement is held to a high standard when conducting investigations and cannot use the fruits of an illegal search against a defendant.[2] However, courts occasionally allow an exception to the exclusionary rule if the connection between the unlawful act and the search for evidence if intervening circumstances render the search remote enough to remove the taint of the constitutional violation.[3] This is called the attenuation doctrine.[4] Traditionally, courts have applied the attenuation doctrine narrowly and allowed law enforcement to preserve evidence as long as the intervening circumstances were unforeseeable or remote.[5] This narrow exception to the exclusionary rule served as a way of balancing the needs of law enforcement with citizens' Fourth Amendment protections.[6]

Unfortunately, the limits of the attenuation doctrine drastically expanded in 2016 when the Supreme Court issued its opinion in *Utah v. Strieff*.[7] While the attenuation doctrine typically applied when an intervening circumstance or unforeseeable event occurred, the Court ruled in *Strieff* that an ordinary arrest warrant discovered during an unlawful investigatory stop could attenuate the connection between the stop and a subsequent seizure of evidence.[8] This expansion set a new precedent that could allow the existence of any arrest warrant to enable police misconduct when discovering evidence.[9]

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1 29 AM. JUR. 2D *Evidence* § 651, Westlaw (database updated Feb. 2019).

2 *See id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 136 S. Ct. 2056 (2016).

8 *Id.* at 2059, 2063–64.

9 *Id.* at 2073–74 (Kagan, J., dissenting).

Justice Sotomayor and Justice Kagan each dissented, arguing that it was an affront to citizens' civil rights and that the arrest warrant was not an unforeseeable circumstance that could attenuate the link between an unlawful investigatory stop and the seizure of evidence incident to an arrest.[10]

This Note analyzes *Utah v. Strieff* and argues that the Court erred in finding that an arrest warrant attenuates the connection between an unlawful investigatory stop and the seizure of evidence. Thereafter, this Note proposes a limited application of the attenuation doctrine to arrest warrants discovered in between an unlawful investigatory stop and the seizure of evidence incident to an arrest. Part I discusses what the attenuation doctrine is and how it has applied in a number of court cases. Part II provides the background facts of *Utah v. Strieff*, along with a summary of the Court's opinion and the dissents authored by Justice Sotomayor and Justice Kagan. Part III follows by analyzing the merits of the case and argues that Justice Sotomayor's and Justice Kagan's dissents would have resulted in a correct outcome for the case. Lastly, Part IV considers the implications of the Court's flawed decision that an arrest warrant is a sufficient intervening circumstance to merit attenuation. Rather than dismissing the doctrine's application, this Part proposes judging arrest warrants based on their nature or character to determine whether the attenuation doctrine should apply and the implications of this proposal. Part IV then concludes by arguing that courts should adopt this narrow application of the attenuation doctrine in order to maintain the exclusionary rule's integrity, minimize police misconduct, ensure proportionality in retributive criminal punishment, and recognize the disparity between the number of individuals with outstanding misdemeanor warrants versus felony warrants.

I. UNDERSTANDING THE ATTENUATION DOCTRINE

When the Founding Fathers wrote the Fourth Amendment, they drafted it with the purpose of protecting persons and their effects from unreasonable, warrantless search and seizures.[11] Yet the Fourth Amendment is silent on what should become of evidence seized by a police officer during an unlawful search.[12] Because admitting illegally obtained evidence would inherently violate the Fourth Amendment, the Supreme Court created the exclusionary rule in *Weeks v. United States*[13] to suppress illegally obtained evidence from being used to convict an individual of a crime in federal court.[14] Since then,

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10 *Id.* at 2066 (Sotomayor, J., dissenting); *id.* at 2073 (Kagan, J., dissenting).

11 U.S. CONST. amend. IV.

12 *See id.*; James L. Buchwalter & Anne E. Melley, Annotation, *Construction and Application of Fourth Amendment Exclusionary Rule–Supreme Court Cases*, 68 A.L.R. Fed. 2d 303, § 2 (2012).

13 232 U.S. 383 (1914).

14 *Id.* at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be

the Supreme Court incorporated the exclusionary rule in *Mapp v. Ohio*[15] to apply in state criminal cases, and as of today, it remains a cornerstone of deterring police misconduct.[16]

Despite the exclusionary rule protecting individuals' rights under the Fourth Amendment, its reach is not absolute.[17] Multiple exceptions exist wherein illegally obtained evidence can still be used to convict an individual of a crime.[18] Following *Mapp*'s expansion of the exclusionary rule's application, the Supreme Court has since recognized the good-faith exception to the rule, which allows the admission of evidence when a police officer relies on a defective search warrant or manifests a reasonable belief that his actions were legal.[19] Additionally, the Court recognized the independent-source doctrine, which allows the admission of evidence when a law enforcement agent discovers the evidence independently from his misconduct.[20] Finally, the Supreme Court recognizes another exception to the exclusionary rule in criminal law: the attenuation doctrine.[21]

While illegally obtained evidence—so-called "fruit of the poisonous tree"—is generally suppressed in courts, the attenuation doctrine permits its admission in some instances.[22] The attenuation doctrine holds that this evidence, or fruit, is admissible when the connection between unlawful police action and the seizure of the evidence is so distant or remote that the taint of a constitutional violation is nullified.[23] Determining whether the attenuation doctrine should apply requires application of the three-factor balancing test in *Brown v. Illinois*.[24] This requires analyzing (1) the temporal proximity of an unlawful action by the police and the seizure of evidence, (2) the presence of intervening circumstances, and (3) the existence of any purposeful or

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secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); *see also* Buchwalter & Melley, *supra* note 12, § 2.

15 367 U.S. 643 (1961).

16 Buchwalter & Melley, *supra* note 12, §§ 2, 4, 22.

17 *See* AM. JUR. 2D, *supra* note 1.

18 Buchwalter & Melley, *supra* note 12, §§ 2, 22–24.

19 United States v. Leon, 468 U.S. 897, 922 (1984); *id.* at 927 (Blackmun, J., concurring); 68 AM. JUR. 2D *Searches and Seizures* § 195, Westlaw (database updated Feb. 2019) (stating that the good-faith exception applies when it appears that a police officer has reasonable knowledge of whether his actions are legal and he "exercise[s] reasonable professional judgment").

20 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Gary D. Spivey, Annotation, *"Fruit of the Poisonous Tree" Doctrine Excluding Evidence Derived from Information Gained in Illegal Search*, 43 A.L.R.3d 385, § 7(a) (1972) (stating that the independent source doctrine applies when evidence found during unlawful police activity is discovered during a lawful investigation that is unconnected to the illegal action); Brent D. Stratton, *The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 J. CRIM. L. & CRIMINOLOGY 139, 140 (1984).

21 AM. JUR. 2D, *supra* note 1.

22 *Id*.

23 *Id.*

24 422 U.S. 590 (1975).

flagrant misconduct by a police officer.[25] In other words, courts apply the attenuation doctrine when (1) substantial time has passed between unlawful conduct and a search, (2) something unforeseen and beyond the police officer's control separated the events, and (3) the police officer's misconduct was minor.[26] Generally, courts have limited the scope of intervening circumstances to a defendant's voluntary actions, such as giving an uncoerced confession, providing evidence, or threatening force against a police officer, when determining whether the attenuation doctrine should apply.[27] But this standard substantially changed with the advent of *Utah v. Strieff*.

II. THE FACTS AND OPINIONS OF *UTAH V. STRIEFF*

A perplexing issue lies in the heart of *Utah v. Strieff*: Should the attenuation doctrine apply when a police officer performs an unlawful stop of a person, finds out that there is an outstanding warrant to arrest this person for a minor crime, and seizes evidence incident to the arrest?[28] This was the difficult question the Court had to consider to determine whether the evidence obtained against Edward Strieff was admissible to convict him of a crime.[29] While all of the Justices of the Court considered the issue under the *Brown v. Illinois* test, their analyses resulted in conflicting outcomes.[30] As summarized below, the majority ruled that the attenuation doctrine applied, meaning that evidence against Mr. Strieff was admissible, while Justice Sotomayor and Justice Kagan dissented, each arguing that the warrant did not attenuate the link between the unlawful stop and the seizure of evidence.[31]

A. *The Facts*

In *Utah v. Strieff*, the South Salt Lake City Police Department received an anonymous report of drug dealing in a house.[32] In response to this tip

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25 *Id.* at 603–04.

26 *See id.* at 603–05.

27 *E.g.*, Taylor v. Alabama, 457 U.S. 687, 692–94 (1982) (holding that the attenuation doctrine does not apply when a confession is obtained from inadmissible evidence resulting from an illegal arrest); State v. Bailey, 338 P.3d 702, 715 (Or. 2014) (holding that the attenuation doctrine does not apply when police officers, without reasonable suspicion, obtain evidence from a person after detaining him and finding an arrest warrant on his record); *see also* AM. JUR. 2D, *supra* note 1.

28 136 S. Ct. 2056, 2059 (2016).

29 *Id.* at 2061.

30 *Compare id.* at 2061–63, *with id.* at 2066–67 (Sotomayor, J., dissenting), *and id.* at 2071–73 (Kagan, J., dissenting).

31 *Compare id.* at 2063 (majority opinion), *with id.* at 2066–67 (Sotomayor, J., dissenting), *and id.* at 2071–73 (Kagan, J., dissenting).

32 *Id.* at 2059.

Officer Douglas Fackrell decided to investigate and conducted surveillance outside of the house over the course of a week.[33] During the times he observed the house, Officer Fackrell came to believe drug dealing was taking place because he saw several visitors enter the house and then exit only a few minutes later.[34]

At some point during his observations, Officer Fackrell noticed Mr. Strieff leave the house and walk to a nearby convenience store.[35] Although he had not seen Mr. Strieff enter the house earlier, Officer Fackrell decided to detain him for identification and find out what was going on.[36] After Officer Fackrell obtained Mr. Strieff's identification card, he contacted a police dispatcher who reported that there was an outstanding arrest warrant for Mr. Strieff for an unpaid parking ticket.[37] Based on the dispatcher's information, Officer Fackrell immediately arrested Mr. Strieff and conducted a search incident to the arrest, which produced a bag of methamphetamine and other drug paraphernalia.[38]

Following this interaction, the state of Utah charged Mr. Strieff with the unlawful possession of methamphetamine and drug paraphernalia.[39] In response, Mr. Strieff moved to suppress the evidence since he believed it had been obtained from an unlawful investigatory stop.[40] The prosecution argued that the discovery of a valid arrest warrant acted as an attenuating circumstance between the stop and the search.[41] The trial court agreed with the prosecution and admitted the evidence on the grounds that the warrant served as an "extraordinary intervening circumstance" and that there was no flagrant misconduct by Officer Fackrell.[42]

After the suppression hearing, Mr. Strieff pleaded guilty to the possession of a controlled substance and appealed his case.[43] Although the Utah Court of Appeals affirmed the trial court's decision, the Utah Supreme Court reversed the judgment.[44] In ruling for Mr. Strieff, the Utah Supreme Court reasoned that only a defendant's voluntary actions, such as confessing or consenting to a search, could "sufficiently break[] the connection between an illegal search and the discovery of evidence."[45] Officer Fackrell's discovery of a valid arrest warrant did not meet this standard, and therefore the court

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33 *Id*.

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

35 *Id*. at 2060.

36 *Id*.

37 *Id*.; *id.* at 2064 (Sotomayor, J., dissenting).

38 *Id*. at 2060 (majority opinion).

39 *Id*.

40 *Id*.

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

42 *Id*. (quoting United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006) (citation omitted)).

43 *Id*.

44 *Id*.

45 *Id*. at 2060 (quoting *State v. Strieff*, 357 P.3d 532, 536 (Utah 2015)).

concluded that the evidence should have been suppressed.[46] Thereafter, the United States Supreme Court granted certiorari to determine "how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant."[47]

B. *The Majority's Opinion*

The Supreme Court reversed the Utah Supreme Court's decision and held that the discovery of an arrest warrant attenuates the connection between an unlawful investigatory stop and evidenced seized incident to an arrest.[48] Justice Thomas, writing for the Court, applied the three-factor test from *Brown v. Illinois* to determine "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person."[49] The three factors the Court depended on to answer this question were: (1) the "temporal proximity" between the unconstitutional investigatory stop and "the discovery of evidence, [in order] to determine how closely the discovery . . . followed the unconstitutional search"; (2) "the presence of intervening circumstances"; and (3) "the purpose and flagrancy of the official misconduct."[50]

First, the Court found that temporal proximity favored suppressing the evidence because "substantial time" had not passed between the investigatory stop and the seizure of evidence from Mr. Strieff.[51] Regarding the second factor, the Court found that the existence of intervening circumstances favored admitting Utah's evidence against Mr. Strieff.[52] In reaching this conclusion, the Court compared the case to *Segura v. United States*.[53] In *Segura*, New York Drug Enforcement Task Force agents suspected that the occupants of an apartment were dealing cocaine and conducted a limited security search before their warrant was authorized.[54] The *Segura* Court ruled that evidence from an illegal search is admissible when the information supporting a warrant is unconnected to the search and is already known by the agent.[55]

Determining that *Segura* was sufficiently similar, the Court held that this principle applied to *Strieff*.[56] Specifically, because *Segura* suggested that

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46 *Strieff*, 136 S. Ct. at 2060.
47 *Id*.
48 *Id*. at 2059.
49 *Id*. at 2061–62 (citing Brown v. Illinois, 422 U.S. 590, 603–04 (1975)).
50 *Id*. at 2062 (quoting *Brown*, 422 U.S. at 603–04).
51 *Id*. (citing Kaupp v. Texas, 538 U.S. 626, 633 (2003) (per curiam)).
52 *Strieff*, 136 S. Ct. at 2062.
53 468 U.S. 796 (1984).
54 *Segura*, 468 U.S. at 799–800.
55 *Id*. at 813–14.
56 *Strieff*, 136 S. Ct. at 2062 (comparing the case to *Segura*, 468 U.S. at 815).

the existence of a valid warrant attenuates the connection between unlawful conduct and the seizure of evidence, the arrest warrant for Mr. Strieff was a sufficient intervening circumstance.[57] Therefore, the existence of the warrant favored admitting the evidence against Mr. Strieff, since the arrest and search were independent ministerial acts compelled by a preexisting warrant.[58]

As for the third factor, "the purpose and flagrancy of the official misconduct," the Court also found that this factor favored admission.[59] Courts recognize that the exclusionary rule is meant to deter police misconduct, so the attenuation doctrine can only apply when a police officer's conduct is neither purposeful nor flagrant.[60] In applying this standard, the Court found that even if Officer Fackrell had acted negligently, his misconduct had not risen to the level of "purposeful or flagrant."[61] Rather, the Court noted that Officer Fackrell had committed two good-faith mistakes: (1) he could not have concluded that Mr. Strieff was a short-term visitor because Officer Fackrell had not seen Strieff enter the house, and (2) he had demanded that Mr. Strieff stop to speak with him.[62] Instead, the Court stated that Officer Fackrell should have just asked Mr. Strieff if he had seen any suspicious activities in the house.[63] However, because the stop was a good-faith error, his conduct thereafter was lawful according to the Court.[64] Furthermore, requesting Mr. Strieff's identification and running a warrant check had been a lawful action by Officer Fackrell as well because it was a "'negligibly burdensome precaution[n]' for officer safety."[65] Combined with there being no recurring misconduct by Officer Fackrell, this incident was an isolated negligent action performed under the scope of a legitimate investigation.[66] Altogether, because the second and third factors of the *Brown v. Illinois* test favored the state, the arrest warrant effectively broke the causal chain between the discovery of evidence and the unlawful investigatory stop.[67] Thus, the attenuation doctrine applied and the evidence was admissible at trial to convict Mr. Strieff.[68]

The Court was unpersuaded by Mr. Strieff's counterarguments that Officer Fackrell had acted flagrantly and that allowing the attenuation doctrine to apply to warrants would encourage dragnet surveillance.[69] Mr. Strieff

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57 *See id.*
58 *Id.* at 2062–63.
59 *Id.* at 2063 (quoting *Brown*, 422 U.S. at 604).
60 *Id.*
61 *Id.*
62 *Strieff*, 136 S. Ct. at 2063.
63 *Id.*
64 *Id.*
65 *Id.* (quoting Rodriguez v. United States, 135 S. Ct. 1609, 1616 (2015)).
66 *Id.*
67 *Id.*
68 *Strieff*, 136 S. Ct. at 2063.
69 *Id.* at 2064.

began by arguing that the attenuation doctrine was inapplicable because Officer Fackrell had acted purposefully and flagrantly and thus lacked reasonable suspicion to detain him.[70] The Court disagreed with this first point because it determined that Officer Fackrell had not been fishing for evidence of wrongdoing; he had been conducting a legitimate investigation of what was going on inside the house.[71] Additionally, although Officer Fackrell lacked proper cause to stop Mr. Strieff, the Court did not think that this amounted to flagrant police misconduct.[72]

Second, Mr. Strieff argued that if the exclusionary rule was not applied due to the attenuation doctrine in situations where a warrant is discovered after an illegal search, then the result would encourage police to conduct dragnet searches due to the prevalence of outstanding warrants.[73] The Court did not find this argument compelling because it did not believe that police officers would risk civil liability for their actions, and there had been no evidence of dragnet surveillance readily apparent from the altercation.[74] With no persuasive counterarguments made by Mr. Strieff, the Court reversed the decision of the Utah Supreme Court and held that the discovery of an arrest warrant attenuated the link between an unlawful investigatory stop and the evidence seized incident to the arrest by Officer Fackrell.[75]

C. *Justice Sotomayor's and Justice Kagan's Dissents*

Justice Sotomayor and Justice Kagan authored separate dissenting opinions, both arguing that the existence of an arrest warrant did not attenuate the link between the unlawful investigatory stop and the drug paraphernalia seized incident to the arrest.[76] Both of their dissents took a similar approach to analyzing the case by applying the three-factor test from *Brown v. Illinois*.[77] Justice Sotomayor then diverged from Justice Kagan, after conducting the necessary analysis, and discussed the policy implications of applying the attenuation doctrine whenever an arrest warrant is discovered during an unlawful investigatory stop.[78]

Beginning with temporal proximity, both Justices found that this factor did not favor admitting the evidence to convict Mr. Strieff of drug possession.[79] In particular, Justice Kagan found that the immediacy of the events

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70 *Id*.
71 *Id*.
72 *Id*.
73 *Id*.
74 *Strieff*, 136 S. Ct. at 2064.
75 *Id*.
76 *See id.* (Sotomayor, J., dissenting); *id.* at 2071 (Kagan, J., dissenting).
77 *Compare id.* at 2066 (Sotomayor, J., dissenting), *with id*. at 2071–72 (Kagan, J., dissenting).
78 *Compare id.* at 2069–71 (Sotomayor, J., dissenting), *with id*. at 2073–74 (Kagan, J., dissenting).
79 *Id*. at 2066 (Sotomayor, J., dissenting); *id.* at 2072 (Kagan, J., dissenting).

from the stop to the discovery of a warrant to the search incident to the arrest favored suppressing the evidence.[80] Second, neither dissenting Justice considered the discovery of the warrant to be a sufficient intervening circumstance to justify attenuation.[81] On this point, Justice Kagan based her decision on the tort theory of intervening circumstances in relation to proximate causation; meaning that a circumstance is intervening only when it *unforeseeably* follows a police officer's misconduct.[82]

Similarly, Justice Sotomayor considered the discovery of the arrest warrant to be "part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.'"[83] Justice Sotomayor also found that the Court's comparison to *Segura* was inappropriate, since that case encompassed facts that were too dissimilar from *Utah v. Strieff*.[84] Thus, from Justice Sotomayor's and Justice Kagan's perspectives, the second factor of the *Brown v. Illinois* test also favored suppressing the evidence.[85]

As for the "purpose and flagrancy of the official misconduct,"[86] Justice Sotomayor and Justice Kagan had much to say about the majority obfuscating the nature of the detention, arrest, and search of Mr. Strieff. Justice Sotomayor began by criticizing the Court for reducing the unlawful investigatory stop and warrant check to a "'negligibly burdensome precaution[n]' taken for the officer's 'safety.'"[87] Justice Sotomayor noted that there was no apparent safety concern: Officer Fackrell did not fear for his life or suspect that Mr. Strieff might attack him.[88] Instead, Officer Fackrell was using a warrant check to find evidence of criminal wrongdoing when he detained Mr. Strieff without cause.[89]

Both Justices were also wary of the Court construing Officer Fackrell's conduct as good-faith mistakes.[90] Justice Kagan particularly noted that the majority construed Officer Fackrell's actions as innocent mistakes to absolve him of wrongdoing.[91] The dissenting Justices found that the detention and warrant check by Officer Fackrell amounted to illegally fishing for evidence because he had stopped Mr. Strieff without cause when he could not determine whether drugs were being sold in the house.[92]

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

81 *Id*. at 2066 (Sotomayor, J., dissenting); *id*. at 2073 (Kagan, J., dissenting).

82 *Id*. at 2072–73 (Kagan, J., dissenting).

83 *Id*. at 2066 (Sotomayor, J., dissenting) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

84 *Id*. at 2067 (citing Segura v. United States, 468 U.S. 796, 814 (1984)).

85 *Id*. at 2066–67; *id.* at 2073 (Kagan, J., dissenting).

86 *Strieff*, 136 S. Ct. at 2063 (majority opinion) (quoting *Brown*, 422 U.S. at 604).

87 *Id.* at 2067 (Sotomayor, J., dissenting) (invoking the same language from *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015), quoted by the majority).

88 *Id.*

89 *See id.* (citing *Rodriguez*, 135 S. Ct. at 1615).

90 *See id.* at 2067–68; *id*. at 2072 (Kagan, J., dissenting).

91 *See id.* at 2072 (Kagan, J., dissenting).

92 *Strieff*, 136 S. Ct. at 2067 (Sotomayor, J., dissenting); *id.* at 2072 (Kagan, J., dissenting).

Finally, Justice Sotomayor found it troubling that the majority considered Officer Fackrell's misconduct to be an isolated incident to further separate it from purposeful or flagrant misconduct.[93] To Justice Sotomayor, the majority did not adequately document what made this case an isolated instance of misconduct, given that states and the federal government have over 7.8 million outstanding warrants on record and that stops to check for warrants usually lack reasonable suspicion.[94] For these reasons, Justice Sotomayor and Justice Kagan both found that the purposefulness and flagrance of the misconduct supported suppressing the evidence against Mr. Strieff.[95]

Justice Sotomayor concluded her dissent by discussing the policy implications of allowing an arrest warrant to attenuate the connection between an unlawful investigatory stop and the seizure of evidence incident to an arrest.[96] In considering the consequences of unlawful stops, Justice Sotomayor reflected that the Court's judgment would condone police officers targeting citizens arbitrarily and without reasonable suspicion.[97] Referencing a number of cases, Justice Sotomayor lamented that the majority's decision increased the list of reasons a police officer could provide for detaining someone.[98] With more justifications for detaining someone, a police officer could treat those with outstanding arrest warrants as second-class citizens by forcing them to stop, demanding consent to a search without informing them of their right to refuse, and arbitrarily treating them as dangerous criminals.[99] Justice Sotomayor thought that allowing a warrant to act as an attenuating circumstance conferred significant power on police officers, from enabling them to stop a person without reasonable suspicion to exerting total control over them by bringing them to jail.[100] To Justice Sotomayor, the Court's holding that the evidence was admissible against Mr. Strieff despite the presence of an investigatory stop without proper justification, validated that a person's body was subject to an invasion of privacy.[101] Therefore, Justice Sotomayor found it necessary to dissent, believing that the evidence against Mr. Strieff was inadmissible in court to convict him.[102]

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

94 *Id.* at 2068–69.

95 *See id.* at 2066–67; *id.* at 2072 (Kagan, J., dissenting).

96 *See id.* at 2069–71 (Sotomayor, J., dissenting).

97 *Id.* at 2069.

98 *Strieff*, 136 S. Ct. at 2069–70 (Sotomayor, J., dissenting); *see also* United States v. Sokolow, 490 U.S. 1, 6–7 (1989) (suggesting that what a person is wearing can be reasonable grounds for detention); United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (holding that a person's ethnicity can provide reasonable grounds for detention).

99 *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

100 *Id.*

101 *Id.*

102 *Id.* at 2071.

III. HOW THE MAJORITY ERRED AND WHAT THE DISSENTERS GOT RIGHT

That the majority and dissenters employed the same analysis to determine whether the attenuation doctrine should apply in *Utah v. Strieff* and reached very different conclusions is interesting, to say the least. While the majority and the dissenters were certainly correct in their assessment of temporal proximity, thereafter their commonality ends. From quickly disregarding the effect of temporal proximity to considering the arrest warrant to be separate from the unlawful stop as an intervening circumstance and downplaying Officer Fackrell's misconduct,[103] the majority erred in notable ways. From a questionable use of case law to a lack of consideration of the ramifications of allowing an arrest warrant to serve as an attenuating circumstance, the majority failed to consider a number of points that the dissenters appropriately addressed.

A. *Temporal Proximity*

Regarding the first factor of the *Brown v. Illinois* test, temporal proximity, both the majority and the dissenting Justices are correct. While none of the Justices went beyond stating that attenuation is favored when "substantial time" has not elapsed between an unlawful act and the collection of evidence,[104] several cases help clarify this standard. In situations where as little as five minutes had passed between an unlawful traffic stop and the search of a car, courts have held that a subsequent search was unreasonable and yielded illegal evidence.[105] Even when evidence was obtained less than two hours after an improper arrest, the Supreme Court has found that evidence should be suppressed.[106] Altogether, these cases suggest that temporal proximity focuses on a very brief period of time.[107] With only a matter of minutes elapsing between Officer Fackrell unlawfully stopping Mr. Strieff and finding drug paraphernalia on him,[108] it is apparent that the majority and dissenters both reached the proper conclusion in regard to temporal proximity.

Where the *Strieff* majority began to err was when it glossed over temporal proximity and its support of suppression, in favor of the other factors

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103 *Id.* at 2062–63 (majority opinion).

104 *See id.* at 2062; *id.* at 2072 (Kagan, J., dissenting).

105 *See, e.g.*, United States v. Green, 111 F.3d 515, 521, 524 (7th Cir. 1997) (holding that evidence had been tainted by an illegal stop but intervening circumstances cleansed otherwise inadmissible evidence).

106 *E.g.*, Brown v. Illinois, 422 U.S. 590, 592, 604–05 (1975).

107 *See id.*; *Green*, 111 F.3d at 521.

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

comprising the *Brown v. Illinois* test.[109] Surprisingly, while a number of courts have concluded that temporal proximity favors suppression rather than attenuation, they have not indicated whether the taint of an unlawful action remains with the evidence a police officer obtained.[110] Rather, many courts have chosen to overlook temporal proximity in favor of only weighing the merits of an intervening circumstance against the purposefulness or flagrancy of a police officer's misconduct under the *Brown v. Illinois* balancing test.[111] This is the approach the majority seemed to adopt in *Utah v. Strieff*—an approach that inappropriately disregarded temporal proximity.[112] Temporal proximity is no less important as a factor than whether an arrest warrant is a sufficient intervening circumstance.[113] Temporal proximity is the factor that links the unlawful action to the seizure of evidence.[114] Examining whether substantial time has passed is imperative to seeing how a police officer's actions influence what evidence is collected and the manner in which it is seized.[115] There is a notable difference between *Segura*, in which police officers entered an apartment to conduct a limited security search before receiving their warrant and then performed a full search a day later pursuant to the warrant, and an unlawful stop that leads within minutes to a search incident to an arrest due to an outstanding warrant.[116] One can infer from *Segura* that enough time had passed between the unlawful limited search and the authorized search to dissipate the wrongdoing, whereas a span of minutes could not have removed the wrongdoing that flowed from the unlawful detention by Officer Fackrell.[117] Therefore, the majority acted improperly by acknowledging, but largely overlooking, temporal proximity as an important factor.

B. *Intervening Circumstances*

The majority further erred in its analysis when it concluded that the arrest warrant was an intervening circumstance that sufficiently broke the

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109 *See id.* at 2062–63. The Court relegated its analysis of the first factor to four sentences and then spent the next eight paragraphs discussing the other two factors. *Id.*

110 *See* Merry C. Johnson, *Discovering Arrest Warrants During Illegal Traffic Stops: The Lower Courts' Wrong Turn in the Exclusionary Rule Attenuation Analysis*, 85 MISS. L.J. 225, 239 (2016) (citing United States v. Simpson, 439 F.3d 490, 495 (8th Cir. 2006); State v. Frierson, 926 So. 2d 1139, 1144 (Fla. 2006)).

111 *See Brown*, 422 U.S. at 603–04; Johnson, *supra* note 110, at 239–40 (discussing *Green*, 111 F.3d at 521).

112 *See Strieff*, 136 S. Ct. at 2062–63; Johnson, *supra* note 110, at 239.

113 *See* Johnson, *supra* note 110, at 238–39.

114 *See id.* at 247.

115 *See id.*

116 *Compare Strieff*, 136 S. Ct. at 2062, *with* Segura v. United States, 468 U.S. 796, 800–01 (1984).

117 *Compare Strieff*, 136 S. Ct. at 2062, *with Segura*, 468 U.S. at 800–01.

connection between the unlawful detention and the evidence seized from Mr. Strieff.[118] A circumstance is intervening and sufficient to break a connection when "it is so distinct from the threshold Fourth Amendment violation that it can be said that the challenged evidence is not a product of 'exploitation' of the illegality but [is] instead the result of 'means sufficiently distinguishable to be purged of the primary taint.'"[119]

Based on this definition, Justice Sotomayor was correct in her assessment that the discovery of the outstanding warrant "was part and parcel of the officer's illegal 'expedition for evidence in the hope that something might turn up.'"[120] The warrant check naturally flowed from Officer Fackrell illegally stopping Mr. Strieff because Officer Fackrell demanded more than information about what was happening in the house—he also demanded Mr. Strieff present identification, which led to the discovery of the warrant.[121] Even though the majority attempted to justify its decision by noting that the arrest warrant existed prior to Officer Fackrell's investigation to separate the search from the unlawful stop, this contradicts subsequent considerations by the majority.[122] By suggesting that the warrant check was a "negligibly burdensome precaution[n]," the majority implied that a warrant check is a regular procedure when a police officer conducts a stop or detention.[123] Therefore the warrant check was part of the overall unlawful stop by Officer Fackrell and was not a sufficient intervening circumstance to break the causal chain.[124]

The Court's invocation of case law was also suspect in that it attempted to justify the arrest warrant acting as a sufficient intervening circumstance. *Segura* is a poor comparison to what occurred in *Utah v. Strieff* because the unlawful preliminary search in *Segura* did not affect subsequent procurement of a warrant and the discovery of drug contraband during a later full search.[125] There are far more comparable cases that the majority could have cited when it examined the altercation between Officer Fackrell and Mr. Strieff.[126]

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118 *See Strieff*, 136 S. Ct. at 2062.

119 State v. Strieff, 357 P.3d 532, 541 (Utah 2015) (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)), *rev'd*, 136 S. Ct. 2056 (2016).

120 *Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

121 *See id.* at 2060 (majority opinion).

122 *See id.* at 2062–63.

123 *See id.* at 2063 (quoting Rodriguez v. United States, 135 S. Ct. 1609, 1616 (2015)) (alteration in original).

124 *See id.* at 2066 (Sotomayor, J., dissenting); *id.* at 2072–73 (Kagan, J., dissenting); *Strieff*, 357 P.3d at 544–45.

125 *Compare Strieff*, 136 S. Ct. at 2062, *with* Segura v. United States, 468 U.S. 796, 815 (1984).

126 *E.g.*, United States v. Green, 111 F.3d 515, 524 (7th Cir. 1997) (holding that the discovery of an arrest warrant attenuated the link between unlawfully detaining a person and seizing evidence from their car); State v. Moralez, 300 P.3d 1090, 1094 (Kan. 2013) (holding that unlawfully detaining someone to perform a warrant search did not attenuate the connection between the conduct and seizure of evidence); State v. Gardner, 984 N.E.2d 1025, 1030 (Ohio 2012) (holding that an outstanding arrest warrant for a traffic violation does not attenuate the connection between unlawful detainment and the seizure of

Multiple jurisdictions have analyzed the impact of an arrest warrant on an unlawful stop by a police officer, and while each of them reached different conclusions,[127] considering these cases would have helped the majority properly determine whether the warrant was a valid intervening circumstance under the attenuation doctrine.

C. *Purposeful or Flagrant Misconduct*

Regardless of whether the arrest warrant for Mr. Strieff amounted to an intervening circumstance, Officer Fackrell's misconduct heavily weighed against finding the attenuation doctrine applicable. The majority's views on what constitutes purposeful or flagrant misconduct are questionable, given that the majority reduces Officer Fackrell's actions to a combination of negligence and good-faith mistakes.[128] Courts have found that a police officer's misconduct is purposeful or flagrant when "the impropriety of the official's misconduct was obvious or the official knew . . . that his conduct was likely unconstitutional but engaged in it nevertheless; and . . . the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.'"[129] Considering Officer Fackrell's conduct and statements, it appears that he should have known, or that it had been obvious, that he was performing an unlawful action in pursuit of finding more information about drug dealing inside the house.[130] Although the majority posits that the altercation was isolated and that Officer Fackrell's lack of reasonable suspicion did not constitute flagrancy, this does not mean he acted reasonably while investigating the house.[131] Officer Fackrell admitted that the purpose of stopping Mr. Strieff was to investigate what was occurring in the house and that he had no basis or suspicion to stop Mr. Strieff, beyond seeing him exit the house.[132] This indicates that Officer Fackrell should have reasonably known that his actions were unconstitutional since he only had a hunch that the house harbored drug dealers.[133] Consequently, that means Officer Fackrell acted purposefully and flagrantly, making the attenuation doctrine inapplicable.[134]

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evidence); State v. Bailey 338 P.3d 702, 715 (Or. 2014) (holding that the discovery of a warrant does not necessarily attenuate the connection between an unlawful detention and the seizure of evidence).

127 *Compare Green*, 111 F.3d at 521, 524, *with Moralez*, 300 P.3d at 1094, *Gardner*, 984 N.E.2d at 1030, *and Bailey*, 338 P.3d 712–13.

128 *See Strieff*, 136 S. Ct. at 2063.

129 United States v. Simpson, 439 F.3d 490, 496 (8th Cir. 2006) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

130 *See Strieff*, 136 S. Ct. at 2067–68 (Sotomayor, J., dissenting); *Simpson*, 439 F.3d at 496.

131 *Strieff*, 136 S. Ct. at 2063–64; *see Simpson*, 439 F.3d at 496.

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

133 *See id.*; *Simpson*, 439 F.3d at 496.

134 *See Strieff*, 136 S. Ct. at 2066 (Sotomayor, J., dissenting); *id.* at 2072 (Kagan, J., dissenting); *Simpson*, 439 F.3d at 496.

The majority further erred by inferring good-faith mistakes to excuse Officer Fackrell's misconduct and by finding that the attenuation doctrine applied in this situation.[135] Established under *United States v. Leon*,[136] the good-faith exception makes unlawfully obtained evidence admissible when a police officer's beliefs or actions while acting under the law are objectively reasonable.[137] The personal or subjective beliefs of a police officer are irrelevant when determining if the good-faith exception applies; the standard is what a reasonable person would have believed.[138] Based on this standard, it is difficult to say that Officer Fackrell's behavior was objectively reasonable. Officer Fackrell only saw Mr. Strieff exit the house, which did not support his suspicion of regular brief entry by visitors to obtain drugs.[139] From his periodic surveillance of the house, Officer Fackrell only had a hunch of what might be happening inside.[140] But because Officer Fackrell lacked reasonable suspicion, his demand that Mr. Strieff stop and present identification[141] demonstrated conduct that was excessive instead of objectively reasonable. Perhaps if Officer Fackrell only asked Mr. Strieff if he knew what was going on, then the altercation might have ended differently. But as it stands, Officer Fackrell's actions were questionable enough that a reasonable person would have reconsidered absolving him of the purposefulness and flagrancy of his misconduct.

D. *The Policy Implications of the Attenuation Doctrine Covering All Arrest Warrants*

Justice Sotomayor presented an interesting contrast from the majority, properly concluding that legitimizing improper conduct would allow police officers to behave unconstitutionally during investigations or detentions.[142] Although the majority quickly disregarded Mr. Strieff's counterargument that extending the attenuation doctrine's coverage to all outstanding arrest warrants would condone police officers to conduct dragnet surveillance and obtain any evidence they desire,[143] this combined with Justice Sotomayor's dissent leaves something to consider. There is an assumption in society that law enforcement will consistently abide by the rules when conducting an

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135 *See Strieff*, 136 S. Ct. at 2063; *id.* at 2067–68 (Sotomayor, J., dissenting).

136 468 U.S. 897 (1984).

137 *Id*. at 927 (Blackmun, J., concurring); *see* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 493–94 (2006).

138 Taslitz, *supra* note 137, at 492–93.

139 *Strieff*, 136 S. Ct. at 2060, 2063.

140 *See id.* at 2059.

141 *Id*. at 2059–60.

142 *See id.* at 2069 (Sotomayor, J., dissenting).

143 *See id.* at 2064 (majority opinion).

investigation.[144] Even when police officers go beyond the scope of their authority and make a mistake or act with malicious intent, they can defend their actions on a number of grounds.[145] Under the expanded scope of the attenuation doctrine, they can provide less-than-satisfactory reasons as long as a warrant is present to absolve themselves of wrongdoing.[146] But this is an expansion of the attenuation doctrine that is unacceptable.

Whether a police officer's unlawful conduct was intentional or a mistake, they should not benefit from the fruit of the poisonous tree. Courts previously limited the attenuation doctrine's application to circumstances outside the control of police officers for a reason—to dissuade misconduct in pursuit of evidence beyond the scope of an investigation.[147] To do otherwise and allow the attenuation doctrine to apply in situations akin to *Strieff* will essentially guarantee more instances of police officers conducting sloppy investigations or detaining someone for the sole purpose of finding a warrant on their record and conducting a search for evidence.[148]

Simultaneously, this will result in the Fourth Amendment rights of individuals shrinking, since their ability to argue that a police officer lacked reasonable suspicion or probable cause can be overlooked by the mere presence of an arrest warrant.[149] Thus the final part of Justice Sotomayor's opinion is worth considering since it highlights the expansion of law enforcement's authority over time and alludes to the repercussions of applying the attenuation doctrine to all arrest warrants discovered during an unlawful investigatory stop.[150]

IV. HOW THE ATTENUATION DOCTRINE SHOULD APPLY TO AN ARREST WARRANT

The classification of an outstanding warrant as an intervening circumstance that attenuates the connection between an unlawful stop and the seizure of evidence creates an uncertain future for the treatment of citizens or suspects. With the majority making such an endorsement of arrest warrants under the attenuation doctrine, it is difficult to reconcile this position with the scope of the Fourth Amendment. At what point can the unlawful actions of a police officer be justified on the basis of public safety before the

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144 *See, generally* U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (2003), https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf.

145 *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884–85 (1975); Adams v. Williams, 407 U.S. 143, 147 (1972).

146 *See, e.g.*, *Strieff*, 136 S. Ct. at 2060, 2064.

147 *See generally* Spivey, *supra* note 20.

148 *See* State v. Bailey, 338 P.3d 702, 715 (Or. 2014).

149 *See Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

150 *See id.* at 2069–71.

protection provided by the Fourth Amendment is irreparably harmed? If warrants are going to attenuate the link between an unlawful action and the seizure of evidence, then courts should adopt a balanced approach that weighs the concerns of law enforcement against those of citizens.

Because the discovery of an arrest warrant is part of normal law enforcement procedure, since it is "part and parcel" to an investigatory stop, courts should consider applying the attenuation doctrine only when the warrant is of a serious nature or character.[151] What constitutes a warrant of that magnitude? A mere misdemeanor or infraction, such as an unpaid parking ticket, like Mr. Strieff's case, would not be sufficient. Rather, the warrant must be for a more serious offense, like assault, murder, or another violent felony. The warrant should be so distinct from an unlawful investigatory stop that it substantially outweighs a police officer's misconduct. Based on Justice Kagan's reasoning that intervening circumstances are, under the *Brown v. Illinois* test, a concept arising under tort law, determining whether the attenuation doctrine applies should involve judging whether the nature of an arrest warrant amounts to something unforeseeable or a superseding cause.[152] Assuming a police officer discovers an outstanding arrest warrant, the seriousness of the prior crime should guide whether the warrant was an unforeseeable factor that separates it from the impropriety of conduct for the purposes of the *Brown v. Illinois* test's second factor[153] With this revised standard, courts can still apply the *Brown v. Illinois* test to determine whether admission or suppression of evidence is appropriate. In doing so, courts can maintain the integrity of the exclusionary rule, minimize police misconduct, and ensure that retributive criminal punishment remains proportional in light of the disparity between outstanding felony warrants and misdemeanor warrants.[154]

A. *The Effect on Temporal Proximity*

Under the revised standard of judging an arrest warrant on its merits, temporal proximity would not be affected when courts consider the attenuation doctrine in the context of unlawful investigatory stops. Since temporal proximity merely involves considering how much time passed between an unlawful police action and the seizure of evidence, it is unaffected if the scope of the attenuation doctrine is limited to warrants for serious crimes.

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151 *Id.* at 2066.

152 *Id.* at 2072–73 (2016) (Kagan, J., dissenting); *see also* 21 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES: PROXIMATE CAUSE REQUIREMENT IN NEGLIGENCE ACTION § 101.06(4)(b) (2019) [hereinafter PERSONAL INJURY].

153 *Cf.* PERSONAL INJURY, *supra* note 152, § 101.06(4)(b) (discussing how the magnitude of an event relates to foreseeability in the context of legal causation).

154 *See* Buchwalter & Melley, *supra* note 12, § 2.

Nonetheless, courts should not disregard temporal proximity as an important part of the attenuation doctrine, as the majority in *Utah v. Strieff* appeared to do.[155] Measuring the time between unlawful conduct and the seizure of evidence undoubtedly indicates how police officers' actions affect the remainder of an investigatory stop with an individual.[156] Ignoring this factor does nothing besides favor law enforcement when a court considers admitting or suppressing evidence.[157] Thus, analyzing temporal proximity under this new, limited standard for arrest warrants would largely be the same as any other case involving the attenuation doctrine.[158]

B. *The Effect on Intervening Circumstances*

The revised consideration of intervening circumstances under the *Brown v. Illinois* test creates an interesting middle ground between the majority's ruling and the dissents of Justice Sotomayor and Justice Kagan.[159] Whereas the majority believed that the discovery of a warrant separated the seized evidence from the unlawful detention while the dissenters did not,[160] judging the warrant on its merits could help distinguish it from the unlawful nature of an investigatory stop. The entire point of evaluating intervening circumstances under the *Brown v. Illinois* test is to determine whether an unforeseeable event or action took place that was far removed from any police misconduct.[161] Judging arrest warrants on their nature or character would separate a warrant check from being considered a normal part of police procedure during an investigatory stop. If an arrest warrant amounts to a superseding cause—that is, the arrest warrant is for a serious crime such as assault, murder, or other violent felony—then it would be a sufficient intervening circumstance for a court to apply the attenuation doctrine. That way, the warrant of a serious nature would separate the unlawful conduct from the seizure and justify attenuation, in the sense that the violence or harm the warrant addresses drastically differs from a police officer's misconduct.

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155 *See supra* note 109.

156 *See* Johnson, *supra* note 110, at 247.

157 *See Strieff*, 136 S. Ct. at 2062.

158 *See* Brown v. Illinois, 422 U.S. 590, 605 (1975); AM. JUR. 2D, *supra* note 1, § 651; *see, e.g.*, Buchwalter & Melley, *supra* note 12, § 21.

159 *See Strieff*, 136 S. Ct. at 2062; *id.* at 2066 (Sotomayor, J., dissenting); *id.* at 2072 (Kagan, J., dissenting); *Brown*, 422 U.S. at 604–05.

160 *See Strieff*, 136 S. Ct. at 2062–63; *id.* at 2066 (Sotomayor, J., dissenting); *id.* at 2072 (Kagan, J., dissenting).

161 *See Brown*, 422 U.S. at 604–05; AM. JUR. 2D, *supra* note 1, § 651; *cf.* PERSONAL INJURY, *supra* note 152, § 101.06(4)(b).

While considering arrest warrants on their merits may differ from how other cases treat the attenuation doctrine,[162] this alternate analysis does not generate conflict on the same scale as the majority's decision in *Utah v. Strieff*. Although courts have generally limited the attenuation doctrine's application to situations where an individual willingly confesses, provides evidence without coercion, or commits a violent act during a police investigation,[163] no major contradiction exists with the alternate suggested approach to arrest warrants. Under the majority's ruling in *Utah v. Strieff*, applying the attenuation doctrine broadly to arrest warrants creates a contradiction because it puts a procedure that is part of a standard investigatory stop on a comparable footing with an unforeseeable event beyond the control of the police officer. Judging the nature or character of a warrant to determine whether it acts as a superseding cause or amounts to a sufficient intervening circumstance at least draws a distinction from a police officer's unlawful conduct. Thus, while this alternative analysis does not neatly fit into the attenuation doctrine's previously established scope, it attempts to respect the spirit of intervening circumstances by analyzing factors beyond the control of police officers—unlike the majority's approach in *Strieff*.

C. *The Effect on Purposeful or Flagrant Misconduct*

Limiting the attenuation doctrine's applicability to arrest warrants for serious crimes would affect the weight of consideration attached to the purposefulness or flagrancy of a police officer's misconduct when determining whether the attenuation doctrine applies. While arrest warrants of a serious nature or character would generally attenuate the connection between an unlawful investigatory stop and the seizure of evidence, purposeful and flagrant misconduct could still determine whether or not evidence would be suppressed. As the majority appeared to express in *Utah v. Strieff*, the purpose and flagrancy of a police officer's misconduct is meant to act as a counterweight to an intervening event's support for attenuation.[164] Based on this, if the attenuation doctrine's applicability is limited to warrants of a serious nature then the more serious the violation attached to a warrant the more flagrant a police officer's actions would have to be to favor suppression of evidence obtained from an unlawful investigatory stop.

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162 *See, e.g.*, United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997) (performing a traditional *Brown* analysis); State v. Moralez, 300 P.3d 1090, 1094 (Kan. 2013) (considering the officers' conduct and not the nature of the warrant); State v. Gardner, 984 N.E.2d 1025, 1030 (Ohio 2012) (considering the constitutionality of the officers' actions given that they were unaware that a warrant existed); State v. Bailey 338 P.3d 702, 712–14 (Or. 2014) (limiting the *Brown* analysis to determinative of evidence admissibility from a search the discovered warrant otherwise permits).

163 *See Green*, 111 F.3d at 521; United States v. Bailey, 691 F.2d 1009, 1016–17 (11th Cir. 1982).

164 *See Strieff*, 136 S. Ct. at 2063.

Mere negligence by a police officer like Officer Fackrell would be insufficient to justify suppressing evidence and denying the attenuation doctrine's applicability. To make a compelling argument in support of suppressing evidence, a police officer would have to do more than fish for evidence without reasonable suspicion for his misconduct to invalidate the attenuation doctrine; he would have to actively threaten, intimidate, or coerce an individual. Implementing this revised approach to the attenuation doctrine would fairly balance public safety concerns with individuals' constitutional rights.[165] Evidence from an unlawful investigatory stop would only be admissible when a warrant indicates that an individual is dangerous and a police officer has not acted so flagrantly as to create a greater harm to society than the crime the individual committed.[166]

D. *Why Courts Should Limit the Attenuation Doctrine's Scope to Arrest Warrants of a Serious Nature or Character*

Rather than always allowing the attenuation doctrine to apply when a police officer discovers an arrest warrant incident to an unlawful investigatory stop, courts should limit attenuation to situations where a warrant is of a serious nature or character. There are a number of reasons why courts should adopt this narrow approach, such as maintaining the integrity of the exclusionary rule.[167] The Supreme Court specifically expanded the exclusionary rule's application to states in *Mapp v. Ohio* to deter police from going beyond their authority and violating an individual's constitutional rights.[168] While the Supreme Court allowed for recognized exceptions to the exclusionary rule, such as the attenuation doctrine, the understanding was that these instances would be rare.[169] Extending the attenuation doctrine to encompass all arrest warrants discovered during an unlawful investigatory stop inherently violates the spirit of the exclusionary rule and its respect of the Fourth Amendment.[170] Limiting the attenuation doctrine's applicability to warrants of a serious nature or character will preserve the exclusionary rule's integrity and purpose.

Another reason courts should adopt a limited approach to the attenuation doctrine's application to arrest warrants is to minimize police misconduct. Justice Sotomayor correctly notes that the scope of justifications a police officer can provide to prove reasonable suspicion before a court has

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165 *See* United States v. Leon, 468 U.S. 897, 906–08 (1984).

166 *See id.* at 906–08; Buchwalter & Melley, *supra* note 12, § 2.

167 *See* Mapp v. Ohio, 367 U.S. 643, 659–60 (1961); Buchwalter & Melley, *supra* note 12, § 2.

168 *See Mapp*, 367 U.S. at 655, 660; Buchwalter & Melley, *supra* note 12, § 2.

169 *See* Weeks v. United States, 232 U.S. 383, 393, 398 (1914) (explaining that if courts sanctioned violations of an individual's Fourth Amendment rights, its protection "is of no value . . . and [the Amendment] might as well be stricken from the Constitution").

170 *See* Buchwalter & Melley, *supra* note 12, § 2. *Contra* Utah v. Strieff, 136 S. Ct. 2056, 2064 (2016).

expanded dramatically.[171] The majority's endorsement of applying the attenuation doctrine to all arrest warrants essentially gives a police officer a rubber stamp to act however purposefully he wants, under the guise of a mistake, to discover an arrest warrant.[172] However, limiting the attenuation doctrine's coverage to arrest warrants of a serious nature ensures that inappropriate conduct will not be rewarded when the warrant is for a lesser offense.[173] Instead, it would allow courts to weigh the severity of the crime attached to a warrant against the extent of a police officer's misconduct to determine which is the greater harm to society: the actions of a criminal versus the heinousness of a police officer's actions to discover wrongdoing by any means necessary.[174] Thus, courts could disincentive police officers from acting improperly when there is a substantial chance that a warrant is for a lesser violation, such as an unpaid parking ticket.[175]

The theory of retribution in relation to criminal punishment also justifies limiting the attenuation doctrine's application to warrants of a serious nature or character.[176] In criminal law, the basis for punishment comes from two theories: utilitarianism and retributivism.[177] Whereas utilitarianism seeks to rehabilitate criminals and deter them from committing crimes in the future, retributivism holds that criminals should be punished because their actions deserve punishment for harming society.[178] However, "[i]ntegral to retributivism is the notion that punishment must be in proportion to, and to the extent of, an offender's just deserts."[179] In other words, the punishment levied against a criminal must be equal to, or on par with, the perpetrated crime.[180] On the basis of retributivism's proportional punishment principle, courts should limit the attenuation doctrine's application to warrants of a serious nature or character. Applying the attenuation doctrine to all warrants, no matter their nature or character, subjects all lawbreakers to punishment regardless of any police misconduct.[181] In doing so, this broad application conflicts with the notion of punishing lawbreakers for what they deserve, since people

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171 *Strieff*, 136 S. Ct. at 2069–70 (Sotomayor, J., dissenting).

172 *See id.*

173 *See* AM. JUR. 2D, *supra* note 1, § 651; *cf.* PERSONAL INJURY, *supra* note 152, § 101.06(4)(b) (contrasting tort law's treatment of unforeseeable intervening causes and normal events).

174 *See* United States v. Leon, 468 U.S. 897, 951 (1984) (Brennan, J., dissenting); *id.* at 974–75 (Stevens, J., dissenting).

175 *See id.* at 951 (Brennan, J., dissenting); *id.* at 974–75 (Stevens, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 604–05 (1975).

176 *See* Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 113–14 (2003).

177 *Id.*

178 *See id.* at 114 ("[Utilitarianism holds that] punishment is justified if it generates more utility, happiness, pleasure, benefit, or good consequences than disutility, suffering, pain, expense, or bad consequences.").

179 *Id.* at 127.

180 *Id.* at 127–28.

181 *But cf. id.* at 127–28 (explaining retributivism's emphasis on proportionality).

who commit minor crimes, like failing to pay a parking ticket, are treated the same as someone who commits a felony.[182] But by adopting this revised standard, courts could rectify this disregard for proportionality in punishment and ensure that anyone who breaks the law is punished appropriately when weighing his actions against any police misconduct that has occurred.

This proposal to limit the attenuation doctrine's application to arrest warrants of a serious nature or character is also supported by the staggering reality of statistical data regarding warrants. According to the Department of Justice's Bureau of Justice Statistics, there were 5,452,903 active arrest warrants on file in state warrant databases in 2014.[183] Of those warrants, 725,076 were felony warrants whereas 4,727,827 were misdemeanor warrants or for other non-felony offenses.[184] In other words, of the active arrest warrants in 2014, only 13.3% constituted felony warrants.[185]

With an overwhelming majority of arrest warrants being for lesser crimes, like petty theft, drug possession, fraud, littering, or public intoxication,[186] should courts really apply the attenuation doctrine as broadly as the majority in *Utah v. Strieff* ruled? Treating a large number of mostly nonviolent offenders the same as a significantly smaller number of individuals who have committed serious crimes or violent felonies demonstrates unfair and disproportionate treatment.[187] While each has committed some form of crime, the degree of harm done to society varies greatly.[188] Limiting the attenuation doctrine's application to only felonies and the most heinous crimes would proportionally hold accountable individuals who commit the greatest harms to society or are likely to perpetuate more violence. Therefore, given the sheer volume of active arrest warrants and the disproportionality between felonies and misdemeanors, courts should narrow the attenuation doctrine's scope to arrest warrants of a serious nature or character.

CONCLUSION

The majority's decision to apply the attenuation doctrine in *Utah v. Strieff* was a major mistake that will likely infringe on citizens' rights for

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182 *See* Utah v. Strieff, 136 S. Ct. 2056, 2064–65 (2016) (Sotomayor, J., dissenting); Christopher, *supra* note 176, at 114, 127.

183 *See* U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014 tbl.5a (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (listing the number of felony, misdemeanor, and other warrants issued in 2014 in each state).

184 *Id.*

185 *See id.*

186 *See Strieff*, 136 S. Ct. at 2066, 2068 (Sotomayor, J., dissenting); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 291–92 (2011).

187 *See* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 169 (1995).

188 *See id.*

years to come. Comparatively, Justice Sotomayor and Justice Kagan properly analyzed the case and considered several points and policy matters that the majority ignored or failed to consider when stretching the scope of the attenuation doctrine. In an ideal criminal-justice system, police officers will always act lawfully. However, time will dictate how the attenuation doctrine's broad application to arrest warrants will affect police officers' conduct. At the very least, should the Supreme Court continue to hold that the attenuation doctrine applies to the discovery of arrest warrants, then courts should reconsider the scope of this new application and refine it to only cover arrest warrants of a serious nature or character.