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THE WRONG DECISION AT THE WRONG TIME: *UTAH V. STRIEFF* IN THE ERA OF AGGRESSIVE POLICING

*Julian A. Cook III**

“This Court has given officers an array of instruments to probe and examine you. When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.”

—Justice Sotomayor¹

ON June 20, 2016, the United States Supreme Court decided *Utah v. Strieff*,² a case that has received little public attention yet carries enormous implications. The case centered upon the exclusionary rule, which, as a general matter, provides that derivative evidence seized in violation of an individual’s Fourth Amendment rights is inadmissible at that individual’s criminal trial.³ Shortly after leaving a house that an officer suspected housed illegal narcotics activity, Strieff was stopped by an officer in the absence of reasonable suspicion.⁴ Moments later, the officer contacted police dispatch, who informed him that Strieff had an outstanding arrest warrant.⁵ Thereafter, Strieff was arrested, and a search of his person uncovered “methamphetamine and drug paraphernalia.”⁶ Given the unconstitutionality of his initial detention, Strieff argued that the exclusionary rule mandated the exclusion of evidence seized from his person.⁷

By a five to three vote, the Court rejected Strieff’s contention.⁸ It relied upon an exception to the exclusionary rule, the attenuation doctrine, and

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1. *Utah v. Strieff*, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

2. *Id.* at 2056 (majority opinion).

3. *Id.* at 2061.

4. *Id.* at 2059–60.

5. *Id.* at 2060.

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

7. *Id.*

8. *Id.* at 2064.

upheld the admission of the evidence that was recovered incident to Strieff's arrest.⁹ Despite the unconstitutionality of Strieff's initial detainment,¹⁰ the Court reasoned that the outstanding warrant constituted an intervening event—an attenuating circumstance—that sufficiently dissipated the taint from the initial illegality.¹¹

Only fifteen days after the decision in *Strieff*, the first of two prominent events occurred that, again, thrust the issue of aggressive policing back in the national spotlight. On July 5, 2016, Alton Sterling was shot and killed outside of a nearby convenience store by two officers employed by the Baton Rouge, Louisiana police department.¹² Sterling was approached by the officers after they had received a report that an individual wearing a red shirt “had pointed a gun at someone.”¹³ Sterling routinely sold CDs outside of the convenience store and was at this location at the time of the confrontation with the police.¹⁴ Videos of the confrontation show the officers on top of Sterling at the time of the shooting.¹⁵ The police reportedly removed a gun from Sterling's person at some point during the encounter.¹⁶ The owner of the convenience store stated that he had known Sterling for many years, that he was unaware of any previous violent encounters between Sterling and other individuals, that he did not know what precipitated the arrival of the police on July 5, and that the police were aggressive towards Sterling from the outset.¹⁷

The following day, on July 6, 2016, an officer shot and killed Philando Castile, who was seated in his car after being pulled over for having a broken taillight in Falcon Heights, Minnesota, which is located near St. Paul.¹⁸ A coroner's report indicated that Castile had been shot multiple

9. *Id.*

10. *Id.* at 2062–63.

11. *Strieff*, 136 S. Ct. at 2062–63.

12. Radley Balko, *Alton Sterling's Death Appears To Be Another Police Shooting That Was Both Legal and Preventable*, WASH. POST (July 6, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/07/06/alton-sterlings-death-appears-to-be-another-police-shooting-that-was-both-legal-and-preventable/?utm_term=.265cad20048f [<https://perma.cc/ES8L-4C4Z>]; Joshua Berlinger, *Alton Sterling Shooting: Homeless Man Made 911 Call, Source Says*, CNN (July 8, 2016), <http://www.cnn.com/2016/07/07/us/baton-rouge-alton-sterling-shooting/> [<https://perma.cc/ZVH5-APAX>]; Richard Fausset, *Alton Sterling Shooting in Baton Rouge Prompts Justice Dept. Investigation*, N.Y. TIMES (July 6, 2016), http://www.nytimes.com/2016/07/06/us/alton-sterling-baton-rouge-shooting.html?_r=1 [<https://perma.cc/C6V2-852F>].

13. Balko, *supra* note 12.

14. Berlinger, *supra* note 12.

15. Balko, *supra* note 12; Berlinger, *supra* note 12; Fausset, *supra* note 12.

16. Balko, *supra* note 12; Berlinger, *supra* note 12; Fausset, *supra* note 12.

17. Balko, *supra* note 12.

18. Camila Domonoske, *Minnesota Gov. Calls Traffic Stop “Absolutely Appalling at All Levels”*, NPR (July 7, 2016), <http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video> [<https://perma.cc/T7HY-LGF9>]; Matt Furber, *After Philando Castile's Killing, Obama Calls Police Shootings “an American Issue”*, N.Y. TIMES (July 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> [<https://perma.cc/LC9Y-S8GP>]; Sharan LaFraniere, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html> [<https://perma.cc/>].

times.¹⁹ Diamond Reynolds, who identified herself as Castile's girlfriend, was a passenger in the car and had her four-year-old daughter in the backseat. Reynolds was recording the incident and the events after the shooting and "was streaming it live on Facebook."²⁰ The footage showed a bleeding Castile after he had been shot in the front driver's seat and the officer continuing to point his gun in the direction of the occupants of the vehicle.²¹ Reynolds stated that prior to the shooting, Castile had informed the officer that he had a gun, and that Castile, pursuant to the officer's request, was retrieving his driver's license and registration when the officer began firing his weapon.²²

These events have dissimilar underlying facts—*Strieff* involved a white defendant who was illegally stopped for narcotics possession, and Sterling and Castile involved black individuals who were killed by police officers under questionable circumstances—but they are anything but distinct.²³ Dean Erwin Chemerinsky aptly noted that "*Utah v. Strieff* was decided at a time of great social tension about policing, especially in minority communities."²⁴ Expounding upon Chemerinsky's observation, this article will demonstrate that these events are connected by much more than timing. It will discuss how *Strieff* and the Sterling and Castile incidents are linked by decades of Supreme Court jurisprudence. It will describe how since before the close of the Warren Court in 1969 the Supreme Court began a process of expanding police powers, restricting individual Fourth Amendment safeguards, and encouraging officers to engage in unconstitutional investigative practices. The article will proceed with a particularized focus upon the Supreme Court's exclusionary rule and standing jurisprudence, and its discussion of *Strieff* will take place in this broader

.cc/X78A-EKPT]; Elliott C. McLaughlin, *Woman Streams Aftermath of Fatal Officer-Involved Shooting*, CNN (July 8, 2016), <http://www.cnn.com/2016/07/07/us/falcon-heights-shooting-minnesota/> [https://perma.cc/UC4T-84DP].

19. Furber, *supra* note 18.

20. Domonoske, *supra* note 18; Furber, *supra* note 18; McLaughlin, *supra* note 18.

21. Furber, *supra* note 18.

22. Domonoske, *supra* note 18; Fuber, *supra* note 18; LaFraniere, *supra* note 18; McLaughlin, *supra* note 18; Mitch Smith, *Philando Castile's Last Night: Tacos and Laughs, Then a Drive*, N.Y. TIMES (July 12, 2016), <http://www.nytimes.com/2016/07/13/us/philando-castile-minnesota-police-shooting.html> [https://perma.cc/VN7S-PCJC].

23. The Sterling and Castile shootings prompted a statement from President Barack Obama, who commented that the nation "should be troubled by these shootings because these are not isolated incidents" and that "[t]hey're symptomatic of a broader set racial disparities that exist in our criminal justice system." David Nakamura, *Obama: "All Americans Should Be Deeply Troubled" by Recent Police Shootings*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/07/07/obama-all-americans-should-be-deeply-troubled-by-recent-police-shootings/?utm_term=.3d2daab51a21 [https://perma.cc/WDJ5-H6QV]. The impact of the shootings seemingly precipitated retaliatory and deadly shootings of five police officers in Dallas, Texas, and three in Baton Rouge, Louisiana. Manny Fernandez, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), <http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html> [https://perma.cc/UYC6-KSFM].

24. Erwin Chemerinsky, *Has the Supreme Court Dealt a Blow to the Fourth Amendment?*, ABA J. (Aug. 2, 2016), http://www.abajournal.com/news/article/chemerinsky_has_the_supreme_court_dealt_a_blow_to_the_fourth_amendment [https://perma.cc/4JFA-GAK4].

context. It will explain how the decline of the exclusionary rule and the attendant standing doctrine over the course of several decades have helped foster a culture of aggressive police practices. It will illuminate how the Court's steady expansion of police investigative authority, coupled with its increasing willingness to forgive constitutional missteps by the government, have encouraged the police to engage in unconstitutional practices and to test the outer limits of acceptable police behaviors.

When viewed in this context, *Strieff* is the latest in a series of Supreme Court cases that have implicitly encouraged aggressive police conduct.²⁵ *Strieff* is a most unfortunate and perilous expansion of the attenuated circumstances doctrine. Though accurately cast as a case that encourages unconstitutional detentions by the police,²⁶ a more apt description of *Strieff* is that it promotes *physical contact* with individuals by the police without just cause. In contrast to the Court's good faith exception and attenuated circumstances cases that preceded it, *Strieff* breaks disturbing new ground; it creates an incentive for officers to get within close proximity of individuals, to detain them unconstitutionally, and to risk unnecessary physical confrontation. At a time when officer aggression has ignited national controversy and outrage in communities (particularly minority) from coast to coast, *Strieff* delivers the wrong message at the wrong time.

Parts I and II of this article will respectively discuss the Supreme Court's standing doctrine and exclusionary rule jurisprudence from the Warren Court to the present. This review will detail the meaningful pruning of the exclusionary penalty, the substantial curtailment of the standing doctrine, and will explain why these pronouncements have had an adverse impact upon police culture and practices. Part III will propose a

25. Many academics and other commentators have been highly critical of *Strieff*. See Lawrence Friedman, *Faculty Blog: Utah v. Strieff: The Court Reminds Us That Constitutional Privacy is Essentially Meaningless*, NEW ENG. L. REV., ON REMAND: BLOG (June 29, 2016), <https://newengrev.com/2016/06/29/faculty-blog-utah-v-strieff-the-court-reminds-us-that-constitutional-privacy-is-essentially-meaningless> [https://perma.cc/7QHV-U2U3]; Orin Kerr, *Opinion Analysis: The Exclusionary Rule is Weakened But It Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), <http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/> [https://perma.cc/T82P-JFDR] (noting, *inter alia*, his agreement with Justice Kagan that the decision encourages police to effectuate suspicionless stops); Orin Kerr, *Supreme Court Construes the Exclusionary Rule Narrowly in Utah v. Strieff*, WASH. POST (June 21, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/21/supreme-court-construes-the-exclusionary-rule-narrowly-in-utah-v-strieff/> [https://perma.cc/TE8W-DUT5]; Katherine MacFarlane, *Utah v. Strieff May Shrink Civil Rights Damages and Limit Section 1983's Deterrence Potential*, AM. CONST. SOC'Y: ACS BLOG (July 12, 2016), <http://www.acslaw.org/acsblog/utah-v-strieff-may-shrink-civil-rights-damages-and-limit-section-1983%E2%80%99s-deterrence-potential> [https://perma.cc/Z9FN-J5Y5] (discussing the likely disproportionate impact of *Strieff* upon minorities as well as the diminishment of civil damages remedies that attends to the decision); The Editorial Board, *Another Hit to the Fourth Amendment*, N.Y. TIMES (June 20, 2016), http://www.nytimes.com/2016/06/21/opinion/another-hit-to-the-fourth-amendment.html?_r=0 [https://perma.cc/7Y3Z-RQN2]; Ronald Tyler, *Utah v. Strieff: A Bad Decision on Policing with a Gripping Dissent by Justice Sotomayor*, STAN. L. SCH.: LEGAL AGGREGATE BLOG (July 5, 2016), <https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor> [https://perma.cc/S7WS-C43D].

26. *Utah v. Strieff*, 136 S. Ct. 2056, 2073–74 (2016).

remedy. Specifically, it will argue for the repeal of the Court's good faith, attenuated circumstances, and inevitable discovery exceptions to the exclusionary rule, and it will advocate for an expansive third-party standing doctrine. It will emphasize the importance of persistent judicial review of police conduct and make the case that, absent meaningful and consistent judicial oversight, long-term prospects for reforming police culture and practices will be difficult to achieve. In making this argument, this article will examine the federal consent decree process. In particular, it will focus upon federal attempts at police reform in Pittsburgh, Pennsylvania, and in Cleveland, Ohio, and will explain how these experiences inform the debate about police reform and are highly instructive regarding the need for persistent and authoritative judicial oversight of police activity.

I. MAPP V. OHIO AND THE SUPREME COURT'S STANDING JURISPRUDENCE

In 1961 the Supreme Court in *Mapp v. Ohio* held that the exclusionary rule was a constitutional mandate and was, therefore, applicable to the states.²⁷ In reaching this decision, the Court reversed *Wolf v. Colorado*, which twelve years earlier held that, in the context of state criminal prosecutions in state courts, the exclusion of evidence obtained by virtue of unconstitutional searches or seizures was not mandated by the Fourteenth Amendment.²⁸ *Mapp* was a Fourth Amendment case that involved an unconstitutional search of the defendant's residence that uncovered various incriminating materials.²⁹ The recovery of these items led to the defendant's indictment, and ultimate conviction, for having knowingly possessed and "control[ed] certain lewd and lascivious books, pictures, and photographs."³⁰ *Mapp* reasoned that an exclusion mandate was necessary to give substance to the Fourth Amendment right.³¹ Without the sanction of exclusion, the Court declared that the Fourth Amendment's safeguards would constitute an empty promise.³² As the Court stated, "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."³³ It added that this result was "logical" and based upon "common sense," and that a contrary rule would "encourage disobedience to the Federal Constitution."³⁴

Of course, the sweeping decision in *Mapp* would be largely worthless if defendants did not have meaningful access to the courts to challenge the admissibility of evidence seized by the government. At the time of *Mapp*, a comparatively broad standing landscape was in place. A year earlier, in

27. 367 U.S. 643, 653–60 (1961).

28. 338 U.S. 25, 48 (1949).

29. 367 U.S. at 643.

30. *Id.* at 643–45.

31. *Id.* at 655–56.

32. *Id.*

33. *Id.* at 656.

34. *Id.* at 657.

1960, the Supreme Court in *Jones v. United States*³⁵ identified four bases upon which standing could be achieved: by demonstrating 1) a possessory interest in the challenged evidence, 2) a legitimate presence on the property that was searched, 3) a personal privacy interest, and 4) that he was the intended target of a government search.³⁶ In *Jones* the defendant challenged the admission of narcotics found in an apartment where he did not reside but was present at the time of the government search.³⁷ In finding that the defendant had standing to challenge the search of the apartment, the Court concluded that the defendant had automatic standing due to the possessory nature of the offense and because he was legitimately on the premises at the time of the government search.³⁸

In regards to automatic standing, the Court declared that the nature of the crimes charged—possessory narcotics offenses—was sufficient to afford the defendant standing. The Court explained that possession cases presented a “special problem.”³⁹ Specifically, for a defendant to establish standing in a possession case, he would have to admit to facts (ownership or a possessory interest) that linked him with the items that he had been charged with possessing.⁴⁰ This created a “dilemma”—he could elect to forgo a challenge to the admissibility of the evidence, or he could pursue such a challenge but at the price of providing the government with evidence that could be admitted against him at his criminal trial.⁴¹ Troubled by this, the Court declared: “to hold that petitioner’s failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction.”⁴² Thus, to avoid this result, defendants in such cases were conferred automatic standing to mount constitutional challenges.⁴³

The Court also found that the defendant had standing given that he was legitimately on the premises at the time of the search.⁴⁴ The Court

35. *Jones v. United States*, 362 U.S. 257 (1960).

36. *Id.* at 261–65. The following language from *Jones* is the basis for the “target” theory of standing:

In order to qualify as a “person aggrieved by an unlawful search and seizure,” one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

Id. at 261. *But see* Jefferson D. Sellers, *Standing to Raise Fourth Amendment Guarantees Against Unreasonable Searches and Seizures: Rakas v. Illinois*, 15 TULSA L. J. 85, 93 (1979) (“This directed at or target theory of standing had never expressly been held an independent basis for standing by the Supreme Court, but the language had continued to appear after *Jones*. While case law support for this theory was sparse, legal commentators had endorsed it.”).

37. 362 U.S. at 258–59.

38. *Id.* at 261–67.

39. *Id.* at 261.

40. *Id.*

41. *Id.* at 262.

42. *Id.* at 263.

43. *Jones*, 362 U.S. at 264.

44. *Id.* at 266–67.

determined that the defendant established that his presence in the apartment was with the permission of its owner.⁴⁵ In response to the government's contention that only those with more "domiciled" associations with property should have standing, the Court deemed it "ill-advised" to engage in "subtle distinctions" between classifications such as "lessee[s]," "licensee[s]," "invitee[s]," and "guest[s]."⁴⁶ To permit constitutional challenges based upon a defendant's demonstration of his legitimate presence would, in the Court's view, compromise "[n]o just interest of the Government in the effective and rigorous enforcement of the criminal law."⁴⁷

Thus, when *Mapp* was decided, the exclusionary rule was a constitutional mandate, and defendant access to the courts was comparatively expansive. But shortly thereafter, the dismantling of this comparatively broad swath of rights commenced. In the standing context, this curtailment began with *Simmons v. United States*, which was decided shortly before the close of the Warren Court era and only seven years after *Mapp*.⁴⁸

Among the issues in *Simmons* was whether the trial court properly admitted testimony from a suppression hearing given by one of the three defendants at his bank robbery trial.⁴⁹ On the day of the robbery, the police searched the residence of the mother of one of the defendants (Andrews).⁵⁰ The search produced incriminating evidence that was found inside a suitcase.⁵¹ A second defendant (Garrett) sought to suppress the evidence and, in an attempt to establish standing, testified that the suitcase "was similar to one he had owned, and that he was the owner of clothing found inside the suitcase."⁵² Garrett was unsuccessful, and his suppression hearing testimony was admitted at his trial.⁵³

The Court noted that Fourth Amendment rights are personal and can be enforced "only at the instance of one whose own protection was in-

45. *Id.* at 265.

46. *Id.* at 266.

47. *Id.* at 267.

48. *See generally* *Simmons v. United States*, 390 U.S. 377 (1968). That same year (1968), the Court passed on an opportunity to further expand the standing landscape in *Alderman v. United States*, 364 U.S. 165, 174 (1968). The case involved an illegal electronic eavesdropping that occurred in a place of business of one of three defendants. *Id.* at 167–68. The remaining two defendants contended that they had standing to contest the propriety of the electronic surveillance since the rights of the business owner had been violated. *Id.* at 174. The Court rejected this third-party standing argument. *Id.* The Court stated that it found a "substantial difference" between suppressing evidence on behalf of an individual who had "evidence illegally seized from him" versus an individual "who cannot claim this predicate for exclusion." *Id.* The Court was not persuaded that the added deterrence value attendant to allowing such third-party standing "would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 174–75.

49. 390 U.S. at 382.

50. *Id.* at 380.

51. *Id.*

52. *Id.* at 381.

53. *Id.*

fringed by the search and seizure.”⁵⁴ The Court further recognized the automatic standing precedent that had been established in *Jones* for offenses for which possession is an essential element.⁵⁵ But the Court noted that *Simmons* was not a possession case, yet presented the same conundrum that was present in *Jones*.⁵⁶ It explained that Garrett’s absence from the house at the time of the search precluded reliance upon a legitimate presence theory of standing.⁵⁷ Therefore, “[t]he only, or at least the most natural” alternative was for Garrett to testify at the suppression hearing and attempt to demonstrate an ownership interest.⁵⁸ The Court found that Garrett faced an “intolerable” dilemma—that he “either [had] to give up what he believed . . . to be a valid Fourth Amendment claim or, . . . waive his Fifth Amendment privilege against self-incrimination.”⁵⁹ Thus, the Court held that a defendant’s testimony at a suppression hearing could “not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.”⁶⁰

The advantage of the *Jones* automatic standing rule was that it enabled defendants to bring forth constitutional challenges without requiring defendants to testify. And when defendants do not take the witness stand, they can proceed to pursue constitutional claims without fear that their words will be used against them substantively or for impeachment purposes. *Simmons* continued this protection to the extent that it prohibited the substantive use of any information provided by the defendant at a suppression hearing against him at his criminal trial. But what was uncertain after *Simmons* was whether defendant testimony could be used for impeachment purposes, and this confusion persisted for several years.⁶¹ For the defendant who testified at his suppression hearing but elected not to take the stand at his trial, *Simmons* provided sufficient protection. However, the scope of protections afforded by *Simmons* for the defendant who testified at his suppression hearing and at his trial remained unclear. By undermining automatic standing, *Simmons* reintroduced the “dilemma” that was eliminated in *Jones*. For the defendant who intended to testify at his trial, or at the very least was contemplating such a tactic, *Simmons* required that a defendant, in certain jurisdictions, reconsider the decision to testify pretrial given the uncertainty regarding whether his

54. *Id.* at 389.

55. *Simmons*, 390 U.S. at 390.

56. *Id.* (“For a defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him.” *Id.* at 392–93.).

57. *Id.* at 390.

58. *Id.* at 391.

59. *Id.* at 394.

60. *Id.*

61. *United States v. Salvucci*, 448 U.S. 83, 93 n.8 (1980) (“A number of courts considering the question have held that such testimony is admissible as evidence of impeachment. *Gray v. State*, 43 Md. App. 238, 403 A.2d 853 (1979); *People v. Douglas*, 66 Cal. App. 3d 998, 136 CAL. RPTR. 358 (1977); *People v. Sturgis*, 58 Ill. 2d 211, 317 N.E. 2d 545 (1974). See also *Woody v. United States*, 126 U.S. App. D.C. 353, 354–355, 379 F.2d 130, 131–132 (Burger, J.), cert. denied, 389 U.S. 961, 88 S. Ct. 342, 19 L. Ed.2d 371 (1967).”).

or her testimony could be used for impeachment purposes.⁶²

In 1978, the Court decided *Rakas v. Illinois*,⁶³ which not only further circumscribed the standing landscape, but also enunciated the current predominant standard to establish standing.⁶⁴ *Rakas* involved a challenge to an automobile search by two individuals who did not own the vehicle, but were merely passengers.⁶⁵ The defendants asserted two bases for standing, citing *Jones* as authority.⁶⁶ First, they claimed that they had standing because they were the targets of the government investigation,⁶⁷ and second, because they were legitimately present in the vehicle.⁶⁸ The Court rejected both of these claims.⁶⁹

The Court stressed that Fourth Amendment safeguards are personal, and can be asserted only by individuals who can demonstrate that the government violated their own constitutional rights.⁷⁰ The governing standard is:

[W]hether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it . . . [and] requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.⁷¹

Thus, the Court concluded that since the defendants did not have a personal interest that was allegedly violated, their Fourth Amendment rights were not infringed.⁷² Although the Court rejected the *Jones* target and legitimate presence on the premises theories of standings (which had the effect of affording standing to third parties), the Court stopped short of overruling *Jones*.⁷³

The official demise of *Jones* finally came in 1980 in *United States v. Salvucci*.⁷⁴ The defendants were charged with unlawful possession of stolen mail.⁷⁵ The mail was discovered by the police during the execution of

62. Morgan G. Graham, *The Use of Suppression Hearing Testimony to Impeach*, 59 IND. L. J. 295, 295 (1984).

63. 439 U.S. 128 (1978).

64. Recently, the Court, in a pair of cases, *United States v. Jones*, 132 S. Ct. 945 (2012) and *Florida v. Jardines*, 133 S. Ct. 1409 (2013), held that an individual can also assert a Fourth Amendment claim by means of a trespass test. “The *Katz* reasonable-expectations test ‘has been *added to*, not *substituted for*,’ the traditional property-based understanding of the Fourth Amendment.” *Jardines*, 133 S. Ct. at 1417.

65. 439 U.S. at 129–30.

66. *Id.* at 132.

67. *Id.*

68. *Id.*

69. *Id.* at 133, 148.

70. *Id.* at 138. The Court also stated that it is more appropriate or “logical” to view the questions presented as Fourth Amendment inquiries rather than standing issues. *Id.* at 140.

71. *Rakas*, 439 U.S. at 140.

72. *Id.* at 148–49.

73. *Id.* at 142–43.

74. 448 U.S. 83, 85 (1980).

75. *Id.*

a search warrant at the home of the mother of one of the defendants.⁷⁶ The First Circuit Court of Appeals found that the defendants had automatic standing to challenge the constitutionality of the government's seizure.⁷⁷ The Supreme Court, however, overruled *Jones* finding that the bases that undergirded the decision had "eroded."⁷⁸

The Court addressed and rejected two bases for standing urged by the petitioners that were identified in *Jones*: automatic standing and an individual's possessory interest in the challenged evidence.⁷⁹ As for automatic standing, the Court reasoned, in part, that *Simmons* "eliminated" the quandary referenced in *Jones*.⁸⁰ In fact, the Court declared that *Simmons* extended its protections against self-incrimination to possession cases, such as *Jones*, and to nonpossessory offenses.⁸¹ Central to its reasoning was the *Rakas* legitimate expectation of privacy standard.⁸² According to the Court, there is nothing contradictory about a prosecutor maintaining that a defendant criminally possessed an item yet was deprived of standing to contest its seizure.⁸³ As the Court explained:

To conclude that a prosecutor engaged in self-contradiction in *Jones*, the Court necessarily relied on the unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment "standing." This assumption, however, even if correct at the time, is no longer so.

The person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation. As we hold today in *Rawlings v. Kentucky*, [448 U.S. 98 (1980)] legal possession of a seized good is not a proxy for determining whether the owner had a Fourth Amendment interest, for it does not invariably represent the protected Fourth Amendment interest.⁸⁴

This reasoning, according to the Court, similarly undercut *Jones*'s possessory interest in an item basis for standing.⁸⁵ The Court explained that an individual's possessory interest, though relevant to the *Rakas* inquiry, is "too broad a gauge" to assess Fourth Amendment standing.⁸⁶ Rather, it reiterated that the pertinent inquiry is whether a claimant can establish a reasonable expectation of privacy in the area where the search occurred.⁸⁷

76. *Id.*

77. *Id.* at 85–86.

78. *Id.* at 89, 95.

79. *Id.* at 84–85.

80. *Salvucci*, 448 U.S. at 89.

81. *Id.* at 90.

82. *Id.* at 94–95.

83. *Id.* at 90.

84. *Id.* at 90–91.

85. *Id.* at 92–93.

86. *Salvucci*, 448 U.S. at 90–93.

87. *Id.* at 92–93.

The Court sidestepped the question left open in *Simmons*—whether the government could use a defendant’s testimony from a suppression hearing for impeachment purposes.⁸⁸ The Court reasoned that the impeachment issue “more aptly relates to the proper breadth of the *Simmons* privilege, and not to the need for retaining automatic standing.”⁸⁹ The Court acknowledged that it had yet to definitively address this question.⁹⁰ However, it is now fairly settled that a defendant may be impeached at trial with his testimony given at a pretrial hearing.⁹¹

The exclusionary rule was at its zenith in 1961. Yet, only seven years after *Mapp*, which declared the exclusionary rule a constitutional mandate, and only eight years after *Jones*, which identified multiple bases by which standing could be attained, this period of comparatively broad access began to unravel. After the *Salvucci* decision in 1980, the landscape of eligible challengers to officer conduct had been substantially reduced. Of the four *Jones* standards, three have been eviscerated. Constitutional challenges by third-parties—plainly allowable pursuant to the target and legitimate presence approaches—are now gone. And individuals who had a possessory or ownership interest in an item seized but lacked a reasonable expectation of privacy in the area of the search also lack standing to pursue a constitutional challenge.

Standing is the gateway to the exclusion of evidence. If the exclusionary rule is to be effectual then individuals must have meaningful access to the courts. Absent such access, even the most robust exclusionary rule pronouncement will be severely compromised. As this section detailed, however, nineteen years after *Mapp* the standing requirements had been reinterpreted to allow only a narrow class of individuals to pursue constitutional challenges. And as Part II demonstrates, the exclusionary rule itself has gone through a significant curtailment.

II. THE DECLINE OF THE EXCLUSIONARY RULE

As noted, *Mapp* found that the exclusionary rule was a constitutional requirement.⁹² Thus, if an officer obtained evidence by virtue of an unconstitutional search or seizure, the Fourth Amendment mandated that the evidence be excluded at the defendant’s trial. The Court did not in-

88. *Id.* at 93–94.

89. *Id.*

90. *Id.*

91. 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 1:33 (4th ed. 2016). (“Pretty clearly *Simmons* does not block use of testimony by the accused in suppression motions when it is later offered to impeach his trial testimony. In *Salvucci* the Court noted that *Simmons* left this question open, and came close to approving this use. More importantly, it is settled that illegally obtained evidence can itself be offered at trial to impeach the accused if he testifies, even if taken in violation of the Fourth, Fifth, or Sixth Amendment and otherwise subject to exclusion on those grounds.”); *United States v. Mitchell*, No. 12-172, 2015 WL 5886198, at *2 (E.D. Pa. Oct 7, 2015) (noting that while the Third Circuit had yet to determine whether suppression hearing testimony could be used for impeachment purposes, every circuit that has considered the issue has approved such use).

92. *Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

corporate any balancing tests or include any other criteria to factor. *Mapp's* language was sweeping and unambiguous, its tone was passionate, and its conclusions were rooted in judicial integrity. Preservation of the public trust was paramount. The Court feared that an outcome that reflected judicial tolerance of an officer's constitutional misdeeds would breed public mistrust and produce anarchy.⁹³ As the Court stated:

As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 U.S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.⁹⁴

The Court also reasoned that exclusion was necessary in order to incentivize law enforcement to respect constitutional safeguards. The threat of exclusion, the Court declared, would discourage officer "disobedience" and would ultimately promote, as opposed to hamper, effective law enforcement.⁹⁵ The Court stated:

Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. . . . In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional

93. *Id.* at 659.

94. *Id.* at 659-60.

95. *Id.* at 657.

search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. . .

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. “However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.”⁹⁶

Mapp’s exclusion mandate and its overarching concern for judicial integrity, however, soon gave way to a revised constitutional interpretation and a new primary rationale. Already undercut by the Court’s swift retreat from the comparatively broad standing parameters delineated in *Jones*, subsequent cases have significantly retooled and weakened the exclusionary rule doctrine. As the next section explains, the exclusionary rule is no longer a constitutional rule, is applied only when significant officer deterrence can be achieved, and is subject to several exceptions that have rendered the rule a shell of its former self. The next section begins this discussion with the attenuated circumstances exception to the exclusionary rule.

A. THE ATTENUATED CIRCUMSTANCES AND GOOD FAITH EXCEPTIONS

Unquestionably, the largest crater in the exclusionary rule landscape has come by virtue of the “good faith” exception. The case that launched this exception, *United States v. Leon*,⁹⁷ and its progeny will be discussed later in this section. However, this article will initially discuss another exception to the exclusionary rule—the attenuated circumstances doctrine. Discussion of this doctrine is apt at this point not only because *Utah v. Strieff*, the Supreme Court’s most recent exclusionary rule pronouncement, is an attenuated circumstances case, but also because this exception was announced by the Warren Court only two years after *Mapp*. In *Wong Sun v. United States*,⁹⁸ the Supreme Court held that a defendant who had been arrested without probable cause, arraigned, and released on his personal recognizance, was not entitled to have statements that he made several days later during a voluntary return trip to the police station suppressed, since his remarks were attenuated from the initial illegality.⁹⁹

In the early morning hours of June 4, 1959, federal narcotics agents arrested an individual (“Hom Way”) on narcotics charges.¹⁰⁰ Way made a statement to the agents identifying an individual (“Blackie Toy”) as a per-

96. *Id.* at 657–58.

97. 468 U.S. 897 (1984).

98. 371 U.S. 471 (1963).

99. *Id.* at 491.

100. *Id.* at 473.

son from whom he had recently purchased heroin.¹⁰¹ Way's statement also linked Toy with a certain laundry business.¹⁰² At 6:00 a.m. the same day (before the store had opened), the agents arrived at that laundry, made a forcible entry, and made an arrest of James Wah Toy, the proprietor of the business.¹⁰³ Toy, in turn, made a statement in which he denied having sold heroin to Way,¹⁰⁴ but he identified another individual ("Johnny") as someone who sold narcotics, and he informed the agents where Johnny could be located.¹⁰⁵ The agents then "left immediately"¹⁰⁶ for that location and, upon arrival, entered the home and discovered an individual, Johnny Yee, located therein.¹⁰⁷ Yee gave the officers a small quantity of heroin that he pulled "from a bureau drawer."¹⁰⁸ Shortly thereafter, the officers took Yee and Toy to the narcotics bureau for questioning, whereupon Yee informed the agents that an individual ("Sea Dog") had supplied him with the heroin.¹⁰⁹ Toy informed the agents that "'Sea Dog' was Wong Sun" and then traveled with the agents to Wong Sun's residence.¹¹⁰ An agent and several other officers later "climbed the stairs and entered the apartment" and arrested Wong Sun.¹¹¹ That same day, Toy and Yee were arraigned on narcotics charges.¹¹² Wong Sun was arraigned the following day. All three defendants were released on their own recognizance.¹¹³

A few days later at the narcotics bureau, the three defendants were interrogated by one of the agents.¹¹⁴ After advising them of certain rights, the agent asked questions of each defendant, prepared a statement, and then showed the prepared statement to each defendant. Wong Sun informed the agent that the statement was accurate, but he refused to sign it.¹¹⁵

Wong Sun was indicted on federal narcotics charges.¹¹⁶ He challenged the admissibility of his statements made to the agent, arguing that they should be suppressed as the fruit of his illegal arrest.¹¹⁷ In rejecting Wong Sun's claim, the Supreme Court acknowledged the unconstitutionality of his arrest.¹¹⁸ Nevertheless, the Court found that since "Wong Sun had

101. *Id.*

102. *Id.*

103. *Id.* at 473-74.

104. A search of the location failed to uncover any illegal narcotics. *Wong Sun*, 371 U.S. at 475.

105. *Id.* at 474.

106. *Id.* at 474-75.

107. *Id.* at 475.

108. *Id.*

109. *Wong Sun*, 371 U.S. at 475.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 476.

115. *Wong Sun*, 371 U.S. at 477.

116. *Id.* at 472-73.

117. *Id.* at 478.

118. *Id.* at 491.

been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, . . . that the connection between the arrest and the statement had ‘become so attenuated as to dissipate the taint.’”¹¹⁹

The attenuated circumstances doctrine thus allows for the admission of illegally seized evidence that is the direct byproduct of a constitutional breach on the part of law enforcement. The rationale for the Court’s decision did not rest upon a finding that a direct link did not exist. Rather, the Court found that other factors—Wong Sun’s release from custody, the passage of time, and his voluntary return to the narcotics bureau—dissipated the taint from the earlier constitutional infraction.¹²⁰

Twelve years later, application of the doctrine was again at issue in *Brown v. Illinois*.¹²¹ Brown was arrested by police officers as he was walking up a rear staircase leading to the rear door of his apartment.¹²² One of the officers was already inside Brown’s residence at the time of the arrest, and a second was outside behind Brown on the staircase.¹²³ Brown was later indicted for murder.¹²⁴ After arriving at the police stationhouse, Brown was advised of his rights pursuant to *Miranda v. Arizona*.¹²⁵ Brown then made incriminating statements.¹²⁶ He unsuccessfully moved the trial court to suppress the statements as being the product of an illegal arrest.¹²⁷ The Illinois Supreme Court found that Brown’s arrest was illegal, but concluded that the provision of *Miranda* warnings “served to break the causal connection between the illegal arrest and the giving of the statements,” thus rendering the defendant’s actions a voluntary act attenuated from the original tainted conduct.¹²⁸

The Supreme Court found that Brown’s statements were the product of his illegal arrest, and that the provision of *Miranda* warnings did not attenuate the confessions from the original taint.¹²⁹ In reaching this decision, the Court stated that, for the causal link between Brown’s unconstitutional arrest and his subsequent statements to be severed, “*Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be ‘sufficiently an act of free will to purge the primary taint.’”¹³⁰ The Court rejected any suggestion that *Miranda* warnings alone could serve as a per se attenuating factor.¹³¹ To hold otherwise, the Court concluded, would “substantially

119. *Id.*

120. *Id.*

121. 422 U.S. 590, 591–92 (1975).

122. *Id.* at 592.

123. *Id.*

124. *Id.* at 596.

125. *Id.* at 594.

126. *Id.* at 594–95.

127. *Brown*, 422 U.S. at 596.

128. *Id.* at 596–97.

129. *Id.* at 605.

130. *Id.* at 602.

131. *Id.* at 602–03.

dilute[]” the exclusionary rule, would incentivize officers to disregard individual constitutional protections, and would render the Fourth Amendment an empty promise.¹³² The Court acknowledged that the provision of *Miranda* warnings is an appropriate factor to consider when assessing attenuation but declared that it was only one criterion.¹³³

The Court then noted that there was an insignificant time separation—”less than two hours”—between Brown’s illegal arrest and his incriminating remarks and that there were no meaningful “intervening event[s].”¹³⁴ Finally, it found that the actions of the officers were deliberate, making the following observations:

The imp[ro]priety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was “for investigation” or for “questioning.” The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown’s arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion.¹³⁵

The Court reversed the Illinois Supreme Court and the case was remanded.¹³⁶

132. *Id.*

133. *Brown*, 422 U.S. at 603–04 (noting “[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct” as relevant factors).

134. *Id.* at 604–05 (“[T]here was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*. We could hold Brown’s first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.”).

135. *Id.* at 605.

136. *Id.* In 1978, in *United States v. Ceccolini*, the Court again addressed an issue involving application of the attenuation doctrine. 435 U.S. 268 (1978). While in a flower store, a local police officer, in violation of the Fourth Amendment, opened an envelope that was on a counter and viewed its contents. *Id.* at 270. Inside the envelope was money and policy slips. *Id.* The flower store had been a place under surveillance by the F.B.I. for gambling related activity. *Id.* at 271. When the officer asked an employee to whom the envelope belonged, the employee named Ceccolini. *Id.* at 270. The officer did not inform the employee that he had opened the envelope and viewed its contents. *Id.* The local police department, in turn, notified the F.B.I. of its findings. *Id.* About four months later, the F.B.I. interviewed the employee about the envelope and Ceccolini. *Id.* at 272. Eventually, Ceccolini was summoned to testify before the grand jury, where he denied his involvement in gambling activities. *Id.* The employee also testified before the grand jury and contradicted Ceccolini’s claims. *Id.* Ceccolini was later indicted for perjury. *Id.* The district and circuit courts found that the employee’s testimony against Ceccolini should have been suppressed since it was the fruit of the illegal search of the envelope. *Id.* at 272–73. The Supreme Court reversed. *Id.* at 280. The Court drew a distinction between the recovery of physical versus verbal testimony. Of importance to the Court was that witnesses, unlike physical evidence, can exhibit free wills and that the exercise of this will can attenuate the taint from an earlier constitutional breach. *Id.* at 275–80. The Court stated:

The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of [the officer’s] discovery of the policy slips. Nor were the slips themselves used in questioning [the employee]. Substantial periods of time elapsed between the time of the illegal search and the initial

Nine years after *Brown*, the Court announced another major exception to the exclusionary rule. In *United States v. Leon*,¹³⁷ the Supreme Court held that evidence seized pursuant to a search warrant that is executed in good faith reliance by an officer is not subject to the exclusionary rule.¹³⁸ Specifically, *Leon* involved the execution of a “facially valid search warrant” which resulted in the recovery of illegal narcotics and other incriminating evidence.¹³⁹ The validity of the warrant was challenged at a pretrial suppression hearing, and the motion to suppress was granted, in part, by the district court.¹⁴⁰ The Court of Appeals subsequently affirmed.¹⁴¹

The Supreme Court, however, reversed.¹⁴² The Court found that the exclusionary rule is a judicially created remedy and that its primary objective is “to deter police misconduct.”¹⁴³ It deemed the issue of the exclusionary rule’s application an inquiry separate from whether an individual’s Fourth Amendment rights were infringed.¹⁴⁴ Further, whether the exclusionary rule was applied in a given case was dependent upon a cost-benefit review.¹⁴⁵ Noting the rule’s “substantial social costs” upon the criminal justice system’s “truth-finding function[],” the Court found that “when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the crim-

contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which [the employee] testified at trial can be logically traced back to [the officer’s] discovery of the policy slips both the identity of [the employee] and her relationship with the respondent were well known to those investigating the case. There is, in addition, not the slightest evidence to suggest that [the officer] entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer . . . The cost of permanently silencing [the employee] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect. [T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object.

Id. at 279–80.

137. 468 U.S. 897 (1984).

138. *Id.* at 913.

139. *Id.* at 902.

140. *Id.* at 903.

141. *Id.* at 904.

142. *Id.* at 905.

143. *Leon*, 468 U.S. at 916.

144. *Id.* at 906.

145. *Id.* at 906–07 (“[I]t must be resolved by weighing the costs and benefits of preventing the use in the prosecution’s case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective.”).

inal justice system.”¹⁴⁶

In a series of cases decided since *Leon*, the good faith rationale, and its deterrence emphasis, has been applied in a series of different factual constructs. In *Illinois v. Krull*, the Supreme Court upheld the admission of incriminating evidence found by an officer who performed an administrative search of a junk yard pursuant to a statute that was subsequently found to be unconstitutional.¹⁴⁷ The Court found that the officer performed the search with a good faith belief that the statute was valid, and that suppression of the evidence would not further the deterrence rationale underlying the rule.¹⁴⁸ In *Arizona v. Evans*, the Court held that evidence recovered by officers subsequent to an unconstitutional arrest of the defendant after a vehicular stop should not be suppressed when a member of the judicial staff incorrectly informed the arresting officer that the defendant had an outstanding warrant.¹⁴⁹ Since the fault rested with the judicial staff, as opposed to the police, the Court reasoned that suppression would not further the rule’s deterrence objective.¹⁵⁰

In 2009, the Court held in *Herring v. United States* that evidence found on the defendant’s person and his vehicle pursuant to a search incident to arrest should not be suppressed when the arresting officer was erroneously informed by a police department in a different county that the defendant had an outstanding warrant.¹⁵¹ The Court declared that the suppression of evidence is a “last resort,” exclusion is required only when meaningful deterrence can be achieved, and the deterrence benefits must outweigh the substantial costs that append to suppression.¹⁵² Finding that suppression was not warranted, the Court reasoned that the officer’s conduct was the product of “nonrecurring and attenuated negligence,” and did not rise to the level of culpability necessary to further the purpose of the exclusionary rule.¹⁵³ Specifically, the Court stated:

An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule

146. *Id.* at 907–08. The Court concluded:

If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments. . . . [S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.

. . . .
We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.

Id. at 918, 922.

147. 480 U.S. 340, 342–43, 356–59 (1987).

148. *Id.* at 347–57.

149. 514 U.S. 1, 10–16 (1995).

150. *Id.* at 10–15.

151. 555 U.S. 135–37 (2009).

152. *Id.* at 140–41.

153. *Id.* at 144.

in the first place. And in fact since *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.¹⁵⁴

Certainly, one of the most notable features of *Herring* is that the Court applied the good faith exception when the fault rested with the police department (as opposed to the judiciary or legislature). However, *Herring* involved a situation where the fault rested with a police department in a different county. In *Davis v. United States*,¹⁵⁵ decided in 2011, the Court applied the good faith exception to a factual scenario where the fault was attributable to the officer who performed a vehicular search.¹⁵⁶ *Davis* involved an arrest of a driver (which was valid), followed by a search of his vehicle.¹⁵⁷ The officer's search complied with the Supreme Court precedent in existence at that time.¹⁵⁸ However, during the pendency of the defendant's case, the law changed, rendering the vehicular search at issue unconstitutional.¹⁵⁹ Though the Court agreed that the new law governed the constitutionality of the search, it disagreed that the evidence should be suppressed.¹⁶⁰ The officer, according to the Court, engaged in "conscientious police work."¹⁶¹ It concluded that since "suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."¹⁶²

The standing cases aside, *Leon* and its progeny are unquestionably the principal explanation for the exclusionary rule's precipitous decline. For years, the Court's attenuation doctrine jurisprudence had remained largely dormant, but it recently reemerged with a splash in *Hudson v. Michigan*, decided in 2006,¹⁶³ and *Utah v. Strieff*, which was decided ten years later. Both cases announced decisions which expanded the scope of the attenuation doctrine.

154. *Id.*

155. 564 U.S. 229 (2011).

156. *Id.* at 232.

157. *Id.* at 235.

158. *Id.*

159. *Id.* at 236.

160. *Id.* at 240.

161. *Davis*, 564 U.S. at 241.

162. *Id.* at 232.

163. 547 U.S. 586 (2006).

Hudson involved a search of a residence that was preceded by a violation of the knock and announce rule.¹⁶⁴ This statutory rule requires that officers announce their presence prior to entering a residence to execute a search warrant.¹⁶⁵ The Court held that the evidence should not be suppressed.¹⁶⁶ In reaching its decision, the Court dismissed *Mapp*'s pronouncements regarding the constitutionality of the exclusionary rule as "[e]xpansive dicta," and stated that exclusion is not a necessary by-product of a constitutional infringement.¹⁶⁷

The Court then reached two conclusions of particular interest to this section. First, it found that the evidence recovered was not a direct consequence of the knock and announce violation.¹⁶⁸ Specifically, the Court stated:

In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.¹⁶⁹

Second, and more significantly, the Court announced a new, expansive interpretation of the attenuation doctrine.¹⁷⁰ Assuming a connection between the constitutional infraction and the seized evidence, the Court stated that attenuation can occur when the connection between the constitutional infraction and the derivative evidence is remote and when the connection is direct.¹⁷¹ It explained that when the purposes that underlie a constitutional safeguard "would not be served by suppression of the evidence obtained," the recovered evidence is attenuated from the original taint and should not be suppressed.¹⁷² It identified three purposes served by the knock and announce rule: "the protection of human life and limb;" "the protection of property;" and protection against "those elements of privacy and dignity that can be destroyed by a sudden entrance."¹⁷³ The Court stated that these interests are distinct from the interests served by the Fourth Amendment—the protection against unreasonable government searches and seizures.¹⁷⁴ Thus, the Court concluded that "[s]ince the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."¹⁷⁵

164. *Id.* at 588.

165. *Id.* at 589.

166. *Id.* at 599.

167. *Id.* at 591–92.

168. *Id.* at 594.

169. *Hudson*, 547 U.S. at 592.

170. *See id.* at 593.

171. *Id.*

172. *Id.*

173. *Id.* at 594.

174. *Hudson*, 547 U.S. at 593–94.

175. *Id.* at 594.

Then, in 2016, the Supreme Court decided *Utah v. Strieff*.¹⁷⁶ At issue was “whether th[e] attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest.”¹⁷⁷ The Court answered this question in the affirmative.¹⁷⁸

In response to an anonymous tip regarding narcotics activity at a local residence, the South Salt Lake City police commenced an investigation.¹⁷⁹ For approximately seven days, Officer Fackrell observed enough individuals entering the residence and staying for only “a few minutes” to generate his suspicions that illegal narcotics transactions were occurring within the residence.¹⁸⁰ When he saw Strieff leave the residence and walk in the direction of a nearby business, the officer stopped Strieff, and after informing Strieff of his identity, Fackrell inquired about Strieff’s purpose for visiting the residence.¹⁸¹ In response to a request by Fackrell, Strieff handed the officer his Utah identification card.¹⁸² After sharing this information with a police dispatcher, the officer was informed “that Strieff had an outstanding arrest warrant for a traffic violation.”¹⁸³ Thereafter, Strieff was arrested.¹⁸⁴ A subsequent search incident to Strieff’s arrest uncovered illegal narcotics and other incriminating items.¹⁸⁵ He was subsequently indicted on drug charges.¹⁸⁶

Strieff unsuccessfully argued that the evidence seized during the search should be suppressed since it was the product of an unlawful detainment.¹⁸⁷ The government conceded that the stop could not be justified on Fourth Amendment grounds.¹⁸⁸ However, the state contended that the “arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.”¹⁸⁹ The trial court accepted this argument and denied the defendant’s motion.¹⁹⁰ The case was affirmed on appeal, but was reversed by the Utah Supreme Court.¹⁹¹

The Supreme Court reversed, finding that the seized evidence should not be suppressed given that the warrant attenuated the seized evidence from the unconstitutional seizure.¹⁹² The Court summarily addressed and

176. 136 S. Ct. 2056 (2016).

177. *Id.* at 2059.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 2060.

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

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

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

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 2063.

rejected a conclusion of the Utah Supreme Court that the attenuation doctrine¹⁹³ applies “only ‘to circumstances involving an independent act of a defendant’s “free will” in confessing to a crime or consenting to a search.’”¹⁹⁴ The Court, noting the defendant’s apparent concession of this issue, stated that the “logic” of its prior precedents involving the attenuation principle does not restrict itself to free will acts of the defendant.¹⁹⁵

The Court then assessed whether the report of the arrest warrant constituted a valid attenuating circumstance. It made this assessment by reviewing three factors identified in *Brown v. Illinois*: “temporal proximity” between the constitutional breach and the recovered evidence, “the presence of intervening circumstances,” and “the purpose and flagrancy of the official misconduct.”¹⁹⁶ As for temporal proximity, the Court, citing *Brown*, concluded that this factor favored suppression given that the defendant’s unconstitutional detainment and the recovery of the evidence were separated by only a few minutes.¹⁹⁷ The majority found that the second factor—intervening circumstances—“strongly favor[ed]” the government.¹⁹⁸ It reasoned that the existence of a valid arrest warrant predated, and was unrelated to, the incident involving Strieff.¹⁹⁹ Upon learning of the warrant, the Court stated that the officer had an obligation to effectuate an arrest and that the search of Strieff’s person was a lawful search incident to arrest.²⁰⁰

With respect to the third factor—“the purpose and flagrancy of the official misconduct”—the Court concluded that this factor also “strongly favor[ed] the” government.²⁰¹ The Court reasoned that two errors committed by the officer—not knowing how long Strieff had been in the apartment prior to his detainment, and not asking Strieff whether he would agree to talk as opposed to “demanding” that he talk—were “negligent” mistakes.²⁰² And it added that there was nothing in the record to

193. The Court noted that the attenuation doctrine is one of three exceptions to the exclusionary rule that involve direct linkages between the constitutional violation and the evidence seized. *Id.* at 2061. The other two are the independent source doctrine and the inevitable discovery rule. The former “allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source.” *Id.* (citation omitted). And the latter “allows for the admission of evidence that would have been discovered even without the unconstitutional source.” *Id.* (citation omitted).

194. *Strieff*, 136 S. Ct. at 2061.

195. *Id.*

196. *Id.* at 2061–63 (citing *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975)). Professor Kerr argues that the majority “presents the *Brown* three-factor test as if it were obviously the settled doctrine a court should apply. It’s worth noting that this is hardly so.” Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but It Still Lives*, SCOTUS-BLOG (June 20, 2016), <http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/> [https://perma.cc/SYR7-VKEC].

197. *Strieff*, 136 S. Ct. at 2062. (noting that, in *Brown*, the illegal arrest and evidence recovery were separated by “less than two hours”).

198. *Id.*

199. *Id.*

200. *Id.* at 2062–63.

201. *Id.* at 2063.

202. *Id.*

suggest that this practice was a “systemic or recurrent” issue.²⁰³ The Court rejected Strieff’s argument that the officer’s actions were purposeful because the officer stopped him for the sole reason of attempting to gather evidence.²⁰⁴ It reasoned that the officer’s decision to stop Strieff was based upon his legitimate suspicion about narcotics activity within the house.²⁰⁵ Thus, the Court concluded that the detainment of Strieff was not a “suspicionless fishing expedition.”²⁰⁶

The Court also rejected Strieff’s argument that a decision not to apply the exclusionary doctrine would encourage “dragnet searches” given the voluminous existence of outstanding warrants.²⁰⁷ The Court disagreed, setting forth two responses.²⁰⁸ First, the Court explained that such practices would expose an officer to civil liability.²⁰⁹ Second, it stated that the third *Brown* factor (the flagrancy of the officer’s conduct) accounts for this practice.²¹⁰ Had such evidence been presented, the Court commented, the outcome of the case might have been different.²¹¹

In her dissent, Justice Sotomayor stated that *Strieff* authorizes the police to detain an individual without suspicion, demand identification, arrest and search that person in the event that there is an outstanding warrant, have the constitutional infraction excused, and have the evidence admitted at a subsequent criminal trial.²¹² She strenuously disputed the majority’s arguments regarding the second and third *Brown* factors.²¹³ Given the existence of more than 180,000 misdemeanor warrants in Utah, Sotomayor maintained that the officer’s actions “[were] not some intervening surprise,” but “[were] ‘calculated’ to procure . . . evidence.”²¹⁴ She added that “nothing about this case is isolated.”²¹⁵ Rather, she insisted, that the police often exploit the commonality of warrants (“over 7.8 million outstanding warrants,” mostly for minor offenses) and

203. *Strieff*, 136 S. Ct. at 2063.

204. *Id.* at 2064.

205. *Id.* at 2063.

206. *Id.* at 2064.

207. *Id.*

208. *Id.*

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

210. *Id.*

211. *Id.*

212. *Id.* (Sotomayor, J., dissenting). Justice Kagan also wrote a dissent in which she argued, inter alia, that the majority’s “misapplication” of the *Brown* factors creates incentives for the police to perform unconstitutional stops. *Id.* at 2073 (Kagan, J., dissenting). She stated:

Now the officer knows that the stop may well yield admissible evidence: So long as the target is one of the many millions of people in this country with an outstanding arrest warrant, anything the officer finds in a search is fair game for use in a criminal prosecution. The officer’s incentive to violate the Constitution thus increases: From here on, he sees potential advantage in stopping individuals without reasonable suspicion—exactly the temptation the exclusionary rule is supposed to remove. *Id.* at 2074.

213. *Id.* at 2066–67 (Sotomayor, J., dissenting).

214. *Id.* at 2066.

215. *Strieff*, 136 S. Ct. at 2068.

stop individuals in order to perform a warrant check.²¹⁶

III. EXCLUSIONARY RULE AND STANDING DOCTRINE REFORM

The causes of aggressive policing, and the proffered solutions, are numerous and varied. For example, Professor Rachel Harmon, noting the limited potential of existing federal remedies to inspire police reform, argues that “federal actors may foster reform by lowering the costs of adopting policies that prevent misconduct and by shoring up rewards for police chiefs and departments that pursue reform.”²¹⁷ Second Circuit Judge Jon A. Newman contends that aggressive policing can be curbed by amending 42 U.S.C. 1983,²¹⁸ including the qualified immunity enjoyed by officers.²¹⁹ Professor Samuel Walker has proposed a statute that parallels Section 14141 of the 1994 Violent Crime Control Act which empowers the Justice Department to pursue civil remedies against municipalities that engage in a pattern or practice of civil rights deprivations.²²⁰ His suggested statute would empower state attorney generals to bring civil suits analogous to those brought by the Department of Justice.²²¹ Professor Jeffery Fagan argues that the New York Police Department’s aggressive stop and frisk tactics were characterized less by a broken windows approach to policing, than by factors such as race and poverty.²²² He sug-

216. *Id.* (referencing the Department of Justice’s Ferguson Report, Sotomayor observed that, “In the St. Louis metropolitan area, officers ‘routinely’ stop people—on the street, at bus stops, or even in court—for no reason other than ‘an officer’s desire to check whether the subject had a municipal arrest warrant pending.’”).

217. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 34 (2012).

218. 42 U.S.C. § 1983 (2012) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

219. Jon O. Newman, *Here’s a Better Way to Punish the Police: Sue Them for Money*, WASHINGTON POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html [<https://perma.cc/T8PS-JMA9>].

220. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. C.R. L.J. 479, 481–82 (2009).

221. *Id.*

222. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 463–64 (2000) (“We find little evidence to support claims that policing targeted places and signs of physical disorder, and show instead that stops of citizens were more often concentrated in minority neighborhoods characterized by poverty and social disadvantage.”).

gests that reform must include an infusion of community social norms into police organizational culture.²²³

In addition, the President's Task Force on 21st Century Policing, established by President Obama in May 2015, was charged with the task of examining the problems associated with aggressive policing and prescribing remedial measures.²²⁴ In their Final Report, the Task Force identified an array of underlying causes and made over fifty recommendations.²²⁵ The report called for, among other things, more effectual officer training, greater transparency in regards to police department policies, and greater community involvement in public safety matters.²²⁶ It also recommended that officers approach their service with a "guardian mindset," and that police departments develop policies that clarify what is considered reasonable and unreasonable force and that discourage unnecessary aggression.²²⁷

Parts I and II of this article have detailed how Supreme Court jurisprudence, primarily since the close of the Warren Court, has steadily strengthened the investigative arm of the police and weakened Fourth Amendment protections. This protracted period of favorable law enforcement decisions carries predictable implications. It is safe to say that decades of rulings that diminish Fourth Amendment protections certainly do nothing to promote police organizational respect for such safeguards. Rather, it has had the opposite effect. The steady drumbeat of Court rulings favorable to law enforcement interests have the obvious effect of encouraging officers to take advantage of the freedoms that the Court has previously granted. This encouragement is particularly evident in the Court's exclusionary and standing rule jurisprudence, with *Strieff* representing the latest entry in this digression.

When the Court, over the course of several decades, renders decisions which communicate, inter alia, that the police enjoy wide investigative

223. *Id.* at 502–03 (“How information is shared with community stakeholders, whether the agenda for analysis is shared with these groups, and how the findings of data analyses are translated into concrete measures for organizational change are part of a process of community participation that can ‘civilize’ the police workplace through transparency, leading to democratic interactions focused on data-driven facts. The extent to which opportunities for community interaction with police are routinized and institutionalized can break down the insularity of police social norms at the top and bottom of its hierarchy.” (footnote omitted)). For additional academic recommendations, see also Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RES. L. REV. 931, 946 (2016) (arguing for termination or near-termination of pretextual stops); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 610, 675 (2011) (proposing an approach that differentiates between guilty and innocent defendants at the screening stage); Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE RELIGION GENDER & CLASS 240, 267–68 (2014) (arguing for the adoption of a series of federal and state legislative responses to strengthen individual Fourth Amendment safeguards).

224. Exec. Order No. 13684, 3 C.F.R. § 312 (2014).

225. President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, at 69–99 (2015).

226. *Id.* at 13, 41–42, 53.

227. *Id.* at 11, 20–21.

authority and that their constitutional missteps will frequently be overlooked, the impact on police organizational culture and officer behavior is fairly clear. It is foolhardy to think that police organizations will voluntarily refrain from exercising the investigative authority which they have been granted.²²⁸ And it should surprise no one when the police, during the course of such investigations, exhibit a disregard for individual constitutional protections given that the Court has encouraged them to do so. Furthermore, it is plainly foreseeable that some of these officers who cross constitutional lines will get too aggressive, and that some of these encounters will become unnecessarily deadly.²²⁹ With little to fear in terms of criminal or civil sanctions,²³⁰ internal discipline,²³¹ or suppression of evidence, the aggressive policing that has been so prevalent of late will only continue.

As Justices Kagan and Sotomayor noted, the majority in *Strieff* sent a signal to the police that they can stop individuals without cause and check for the existence of a warrant.²³² If there is a warrant and that warrant is outstanding, then this event will dissipate the taint from the original constitutional infraction.²³³ *Strieff* grants officers yet another investigative freedom and further weakens individual protections under the Fourth Amendment. But the most distressing aspect of *Strieff* is not that it encourages officers to breach constitutional safeguards, but rather, that it encourages them to do so in the context of a *physical* intervention. With the plethora of media reports depicting nationwide aggressive police practices, senseless deaths of African-Americans, and growing community distrust and resentment, *Strieff* was remarkably ill-timed.²³⁴

228. See *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004) (“Emphasizing the impeachment exception to the *Miranda* rule . . . some [police] training programs advise officers to omit *Miranda* warnings altogether or to continue questioning after the suspect invokes his rights.”); *U.S. v. Payner*, 447 U.S. 727, 733, 735 (1980) (holding that evidence recovered as a byproduct of deliberate unconstitutional search of a third-party’s privacy interests was nevertheless admissible against the defendant who lacked standing to object to the search).

229. Julian A. Cook III, *Police Reform and the Judicial Mandate*, 50 GA. L. REV. ONLINE 1, 5 (2016) (noting that police departments will naturally take advantage of the freedoms allowed by the Supreme Court and that it is predictable that officers will cross constitutional boundaries).

230. Harmon, *supra* note 217 at 37, 52–53; see also Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466–67 (2004) (noting the infrequency of criminal prosecutions under § 242 as well as the various hurdles associated with instituting cases pursuant to this section); Larry Glasser, *The American Exclusionary Rule Debate: Looking to England and Canada for Guidance*, 35 GEO. WASH. INT’L L. REV. 159, 191 (2003) (noting the infrequency of § 1983 and *Bivens* actions that produce successful outcomes); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CAL. L. REV. 205, 239 n.191 (2015) (noting that “civil-damages suits are often ineffective due to qualified immunity, indemnification, and organizational culture” and that criminal actions are “rare and difficult to sustain”).

231. See Armacost, *supra* note 230 at 493–514 (stating that police department culture often encourages unconstitutional and aggressive police practices).

232. *Utah v. Strieff*, 136 S. Ct. 2056, 2064, 2073 (2016).

233. *Id.*

234. Professor Sherry Colb expressed reservations regarding the following dicta that appeared in the majority opinion in *Strieff*: “because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant’s existence

It has been argued by many that the exclusionary rule has not effectively curbed police behavior.²³⁵ But, as this article makes clear, the exclusionary rule has hardly been given a chance to succeed. Though the principle decline in the exclusionary rule commenced after the close of the Warren Court in 1969, the actual curtailment of the rule commenced only two years after *Mapp* in *Wong Sun* in 1963. *Wong Sun* introduced the attenuated circumstances exception, and *Hudson* and *Strieff* have further expanded the reach of that doctrine. Similarly, the attendant standing principle was largely stripped of its scope during the post-Warren Court years. But the process actually began with *Simmons* in 1968. And shortly thereafter, in 1978 and 1980, with the Court's decisions in *Rakas* and *Salvucci*, the expanded bases for standing enunciated in *Jones* had been officially eradicated, leaving the narrow personal privacy test as the principal avenue to challenge unlawful police conduct. With a primary standing test that restricts court access to those who can demonstrate a personal privacy interest in the area of the search, the Court effectively limited the reach of the exclusionary rule within twenty years of *Mapp*. It is difficult to meaningfully assess the impact of the exclusionary rule on police behavior when the exclusionary rule has rarely been operational at anything close to full capacity.

I've argued elsewhere, and reiterate here, that a reinvigoration of the exclusionary rule and a robust standing doctrine are a sound and logical aspect of any long-term police organization reform.²³⁶ Certainly the answer to aggressive policing requires a multi-pronged strategy, and I do

alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence." Sherry F. Colb, *A Potential Landmine in Waiting* in *Utah v. Strieff*, JUSTIA: VERDICT (June 28, 2016), <https://verdict.justia.com/2016/06/28/potential-landmine-waiting-utah-v-strieff> [<https://perma.cc/C95F-M3SD>]. She commented that, should the Court eventually conclude that an outstanding warrant cures the absence of reasonable suspicion on the part of an officer, it would amount to "open season" on individuals given the abundance of outstanding warrants in existence. *Id.* She concluded that "[i]t is far safer, for the public in need of protection from police overreach, for police to act prospectively on the basis of what they have reason to think and what they know regarding a suspect." *Id.* (first emphasis added).

235. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 610, 675 (2011) (arguing that the exclusionary rule does not deter police misconduct against minority communities); Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1821 (2002) (reviewing the arguments of Waite and others who opposed the exclusionary penalty); William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 685 (2011) (arguing "that the Court needs to rethink what it did in *Mapp* because, well intentioned as the exclusionary rule was and appropriate as it may have seemed nearly fifty years ago, the rule is based on an assumption which has proven dangerous over the years, namely, the belief that harsh mandatory punishments will deter undesirable social behaviors"); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365 (1999) (arguing that "[t]he exclusionary rule is significantly flawed as a deterrent device"); Comment, *Rethinking the Good Faith Exception to the Exclusionary Rule*, 130 U. PA. L. REV. 1610, 1630 (1982) (noting that "there is very little empirical 'proof' that the exclusionary rule in fact deters police conduct through [various] institutional mechanisms . . . or through any other method").

236. Julian A. Cook III, *Police Culture in the Twenty-First Century: A Critique of the President's Task Force's Final Report*, 91 NOTRE DAME L. REV. ONLINE 106, 112-14 (2016); Julian A. Cook III, *Policing in the Era of Permissiveness: Mitigating Aggressive*

not suggest that this article's proffered remedial approach is a panacea. Yet, if sustained reform is to take hold, a sustained judicial mandate must be part of the equation. When police organizations are cognizant that negative consequences will accompany their misdeeds, their culture will necessarily adjust. Thus, if law enforcement entities are aware that any evidence obtained by virtue of a constitutional breach will be excluded, these organizations will be motivated to adjust their cultures accordingly. Certainly, this will require an abandonment of those exceptions to the exclusionary rule where there is a direct linkage between the constitutional infraction and the derivative evidence. The attenuated circumstances, good faith, and inevitable discovery exceptions are the three exemptions that fit this paradigm.

However, an exclusionary rule, no matter how well reinforced, is a largely empty remedy if the class of individuals eligible to enforce it is insubstantial. Indeed, this winnowed standing landscape has been in effect since *Jones* was reversed in 1980, which was four years prior to the Court's announcement of the most significant exception to the exclusionary rule—the good faith exception—in *Leon*. Today, a demonstration of a privacy interest in the area of the search is the primary standing threshold and there is no recognition of third-party standing. Cognizant of this fact, there is little, if anything, that deters an officer from performing an illegal detention or search of a third-party. In fact, the incentives are precisely the opposite.

Recent evidence of this fact is contained in the Department of Justice's scathing report in August 2016 of its investigation of the Baltimore Police Department.²³⁷ The report concluded that there was reasonable cause to believe that the Baltimore Police Department engaged in a pattern or practice of unconstitutional practices.²³⁸ Specifically, it found, inter alia, that the police routinely made “unconstitutional stops, searches, and arrests,” that this practice disproportionately and “unjustifi[ably]” impacted the African-American community, and that it “us[ed] excessive force.”²³⁹ With respect to searches and seizures, the report found that the practice of stopping individuals in the absence of reasonable suspicion was “widespread” and that such practices were often the result of directives from supervisors within the police department.²⁴⁰ Citing *Strieff's* conclusion that the investigative stop in that case was the product of negligence and was not part of a systemic problem, the Justice Department stated that its findings contradicted that conclusion. The Justice Department found that many officers in the Baltimore Police Department who unconstitutionally

Police Conduct Through Third-Party Standing, 81 BROOKLYN L. REV. 1121, 1153–65 (2016).

237. U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., *Investigation of the Baltimore Police Department*, (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/W3V9-ERV7>].

238. *Id.* at 3.

239. *Id.*

240. *Id.* at 27–28.

stopped individuals were motivated by a desire to ascertain whether the detained individual had an outstanding warrant.²⁴¹

To reverse this incentive, this article argues that in addition to the aforementioned exclusionary rule doctrinal reforms, the landscape of eligible challengers to police conduct must be greatly expanded. This article calls for a due process based third-party standing doctrine that reaches beyond the contours enunciated in *Jones*.²⁴² Standing should extend to criminal defendants, irrespective of their privacy interest in the area of the search, their status as a target, their legitimate presence in the area of the search, or their possessory interest in the items seized. More specifically, the proposal recommends that third-parties be allowed to challenge government conduct to the same extent as the individual who was personally aggrieved by the state's actions. Though he was not directly commenting upon the propriety of third-party standing, the comments of Professor Scott Sundby regarding the exclusionary rule are nevertheless instructive. He states, "the constitutional rights that constrain government actors and that protect its citizens from constitutional transgressions mean little if the everyday person has no way of raising them in forums to which they have *ready and full access*. And in this regard, the exclusionary rule plays a particularly critical role."²⁴³ His poignant comments reflect certain realities. First, the exclusionary rule serves as a vital check upon the actions of government actors. Second, this check is of miniscule value absent meaningful access to the courts by "everyday" individuals. The dual proposals called for in this article—a revitalized exclusionary rule doctrine and broad third-party access to the courts—recognize and further these core concerns.

In the criminal litigation context, third-party standing is already recognized in the jury selection context. In a line of cases starting with *Batson v. Kentucky*, which held that an African-American defendant could challenge the exclusion from jury service of another black potential juror,²⁴⁴ and *Powers v. Ohio*, which allowed a white juror, on equal protection grounds, to challenge the government's exclusion of potential black jurors,²⁴⁵ the Court has recognized the necessity for third-party standing.²⁴⁶ In reaching these conclusions, the Court relied heavily upon a judicial integrity rationale—the very rationale abandoned by the Court in the exclusionary rule context in the post-Warren Court era. In *Powers*, the

241. *Id.* at 28 ("Many of the unlawful stops we identified appear motivated at least in part by officers' desire to check whether the stopped individuals have outstanding warrants that would allow officers to make an arrest or search individuals in hopes of finding illegal firearms or narcotics.").

242. See Nadia B. Soree, *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 *IND. L. REV.* 753 (2013).

243. Scott Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 394 *OHIO ST. J. CRIM. L.* 393, 405 (2013) (emphasis added).

244. 476 U.S. 79, 83–85 (1986).

245. 499 U.S. 400, 402 (1991).

246. *Id.* at 423 (Scalia, J., dissenting).

Court made several observations to this effect. It noted that “racial discrimination in the selection of jurors ‘casts doubt on the integrity of the judicial process,’ and places the fairness of a criminal proceeding in doubt.”²⁴⁷ Noting the role of the jury as a “check” against abusive government power, the Court stated that a jury selection process that is tainted by a discriminatory “process damages both the fact and the perception of this guarantee,” and that a judiciary that stands idly by while a prosecutor “[a]ctive[ly] discriminat[es] . . . condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury’s neutrality and its obligation to adhere to the law.”²⁴⁸ It added that the rationale that underlies “the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair.”²⁴⁹

These same concerns apply in the standing and exclusionary rule contexts. The integrity of the criminal process is tainted when illegally obtained evidence is admitted. As in *Powers*, the Court in *Mapp* expressed similar sentiments regarding the critical need to ensure an adjudicative process untainted by compromising behaviors.²⁵⁰ While it noted Justice Cardozo’s concern that the exclusionary rule allows a “criminal . . . to go free because the constable has blundered,” the Court responded that there is another, more significant factor to consider—the imperative of judicial integrity.²⁵¹ The Court stated, “[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”²⁵²

A trial court’s receipt of evidence obtained by unconstitutional processes implicates the same concerns identified by the Court in the context of racial discrimination in jury selection. However, police reform that is largely dependent upon individual and organizational goodwill is highly unlikely to culminate in sustained improvements, particularly on a national level. Lasting and positive police reform will be difficult to achieve absent a vast landscape of eligible challengers, a reinvigorated exclusionary rule, and the persistent threat of judicial sanction. When officers, as well as the organizations for which they work, understand that negative consequences will append to their misdeeds, then meaningful and lasting changes in the culture of policing are more likely to occur. The following consent decree experiences are informative.

In 1996, the Department of Justice commenced an investigation of the Pittsburgh Police Department to investigate allegations of police miscon-

247. *Id.* at 411 (majority opinion) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

248. *Id.* at 411–12.

249. *Id.* at 413.

250. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

251. *Id.* at 659.

252. *Id.*

duct. It was the first case²⁵³ under a federal law that authorizes the Justice Department to bring a civil action against a government entity that “engage[s] in a pattern or practice” of violating individual protections guaranteed by the constitution.²⁵⁴ The following year, the Justice Department and the City of Pittsburgh entered into a consent decree, which is a settlement that outlines the parameters that the City must satisfy, is enforceable by a court, and will persist until such time as the settlement terms are complied with.²⁵⁵ Typically, there is a federal monitor, paid for by the municipality, who oversees the city’s progress and prepares periodic reports. The decree required that the Pittsburgh police “make comprehensive changes in oversight, training, and supervision of officers,” and “develop a computerized early-warning system to track individual officers’ behavior; document uses of force, traffic stops, and searches; and provide annual training in cultural diversity, integrity and ethics.”²⁵⁶

The decree ended five years after it was implemented.²⁵⁷ According to the Vera Institute of Justice, who prepared an extensive report reviewing the impact of the decree,²⁵⁸ there were many positive developments, as well as some developments that were left wanting.²⁵⁹ Nevertheless, after the decree ended, high-profile incidents of police aggression²⁶⁰ and “cronyism” within the police department led to public speculation on the part of the city’s mayor, Bill Peduto, that a second consent decree might

253. Robert C. Davis, Christopher W. Ortiz, Nicole J. Henderson, Joel Miller & Michelle K. Massie, *Turning Necessity into Virtue: Pittsburgh’s Experience with a Federal Consent Decree*, VERA INSTITUTE OF JUSTICE (Sept. 2002), http://archive.vera.org/sites/default/files/resources/downloads/Pittsburgh_consent_decree.pdf [https://perma.cc/X5BK-F3RU].

254. 42 U.S.C. § 14141 (2012) provides:

(a) Unlawful conduct. It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. (b) Civil action by Attorney General. Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) . . . has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

255. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347 n.13 (2015).

256. Davis, Ortiz, Henderson, Miller & Massie, *supra* note 253, at 8.

257. *Id.* at 47.

258. The report was supported by the Office of Community Oriented Policing Services, U.S. Department of Justice. *See id.* at ii.

259. *Id.* at 62–66 (noting various positive lessons, such as the critical roles of the police chief, the city and the monitor in achieving success, as well as areas in need of improvement, such as skepticism among community members regarding the extent of change within police organizations).

260. *A “Pattern or Practice” of Violence in America*, BLOOMBERG (MAY 27, 2015), <http://www.bloomberg.com/graphics/2015-doj-and-police-violence/?cmpid=yhoo&ref=yfp> [https://perma.cc/3AZQ-UDFC] (noting that a violent beating of a high school student who was unarmed garnered headlines, and that former police chief, Nate Harper, was serving time in prison for fraudulent conduct).

be forthcoming.²⁶¹

In 2004, the City of Cleveland entered into a one-year agreement with the Department of Justice requiring that the Cleveland Police Department implement certain reforms pertaining to the department's use of force.²⁶² However, there was neither judicial oversight of the reform process nor a federal monitor.²⁶³ Rather, the police served as its own overseer.²⁶⁴ At least partially due to this lack of judicial oversight, problems persisted which brought about a second Justice Department investigation.²⁶⁵ That investigation culminated in an investigative report issued by the Justice Department in December 2015, and a second consent decree in May 2015 between Cleveland and the Department of Justice. The Justice Department concluded in its investigative report that it had

reasonable cause to believe that [the Cleveland Police Department] engages in a pattern or practice of the use of excessive force in violation of the Fourth Amendment . . . and have determined that structural and systemic deficiencies and practices—including insufficient accountability, inadequate training, ineffective policies, and inadequate engagement with the community—contribute to the use of unreasonable force.²⁶⁶

Pursuant to the consent decree, the parties agreed that the police division would “provide clear guidance to officers; increase accountability; provide for civilian participation in and oversight of the police; provide officers with needed support, training, and equipment; and increase transparency.”²⁶⁷

261. Jeffrey Benzing, *Pittsburgh Police Could Face Second Federal Consent Decree, Peduto Says*, NEW PITTSBURGH COURIER ONLINE (July 10, 2014), <http://newpittsburghcourieronline.com/2014/07/10/pittsburgh-police-could-face-second-federal-consent-decree-peduto-says/> [<https://perma.cc/6YJD-Z2AK>] (noting the Mayor's claim that many officers “don't realize how close we are to going into another consent decree”).

262. Ken Hare, *How the Justice Department Has Handled Other Police Consent Decrees*, CHICAGO DEFENDER.COM (Apr. 6, 2016), <http://chicagodefender.com/2016/04/06/how-the-justice-department-has-handled-other-police-consent-decrees/> [<https://perma.cc/F4VB-6TKK>]; See also U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., AGREEMENT TO CONCLUDE DOJ'S INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE'S USE OF DEADLY FORCE, (Feb. 9, 2004) (noting that the “use of deadly force” precipitated the agreement with the Cleveland Police Department).

263. Hare, *supra* note 262. See also Sarah Childress, *Cleveland's Second Chance at Police Reform*, PBS (May 25, 2015), <http://www.pbs.org/wgbh/frontline/article/clevelands-second-chance-at-police-reform/> [<https://perma.cc/7YGG-HRLB>] (“The deal wasn't meant to bring structural change. It imposed no federal monitor to hold the department accountable, and there was little community involvement.”).

264. Hare, *supra* note 262.

265. *Id.* See also Childress, *supra* note 263 (noting that within “the last two decades, Cleveland's police department is one of only five law enforcement agencies that has been subject to two separate federal investigations”).

266. U.S. ATTY'S OFFICE, N.D. OF OHIO, U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND POLICE DEP'T at 1 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [<https://perma.cc/97GP-WPKX>].

267. Settlement Agreement at 1, *United States v. City of Cleveland*, No. 1:15-cv-01046-SO (N.D. Ohio May 26, 2015) (“The Constitution requires the City to prevent excessive force, to ensure that searches and seizures are reasonable, and to ensure that police ser-

The Justice Department cited the absence of judicial oversight in the 2004 agreement as a critical reason why that agreement failed. It noted that Cleveland initially abided by the agreement, which resulted in its termination in 2005. However, over time the city failed to enact other agreed upon measures or failed to maintain those measures that had been implemented. The Justice Department stated:

In 2002, we provided initial observations regarding CDP's use of force and accountability systems and, in 2004, we recommended that the Division make changes to address some of the deficiencies we identified. CDP entered into an agreement with us, but that agreement was not enforced by a court and did not involve an independent monitor to assess its implementation. . . . In 2005, we found that Cleveland had abided by that agreement and it was terminated. It is clear, however, that despite these measures, many of the policy and practice reforms that were initiated in response to our 2004 memorandum agreement were either not fully implemented or, if implemented, were not maintained over time. It is critical that the City and the Division now take more rigorous measures to identify, address, and prevent excessive force to protect the public and to build the community's trust. We believe that a consent decree and an independent monitor are necessary to ensure that reforms are successfully implemented and sustainable.²⁶⁸

The Pittsburgh and Cleveland examples highlight why judicial oversight, among other influences and reform measures, is essential to the successful implementation and sustenance of police reform measures. Admittedly, some police departments will, and have to date, maintained successful reforms.²⁶⁹ However, the critical inquiry is whether such measures, when implemented, will be preserved over the long term and whether such reforms can take hold on a national scale. As Professor Samuel Walker commented, “[s]erious questions remain about whether reforms effected through litigation will be sustained once the consent decree or [memoranda of agreement] is terminated.”²⁷⁰ This article submits that persistent judicial oversight, accompanied by a reinvigorated exclusionary rule and an expanded standing landscape, are central to sustained and widespread police reform.

vices are delivered free from bias. These precepts also are fundamental to a strong community-police relationship. To further these goals, the City has agreed to provide clear guidance to officers; increase accountability; provide for civilian participation in and oversight of the police; provide officers with needed support, training, and equipment; and increase transparency.”); Hare, *supra* note 262.

268. Settlement Agreement, *supra* note 267 at 5.

269. *The DOJ and the Consent Decree—Will It Change Bad Policing?*, SCPR.COM: TAKE TWO (Aug. 11, 2016), <http://www.scpr.org/programs/take-two/2016/08/11/51208/the-doj-and-the-consent-decree-will-it-change-bad/> [<https://perma.cc/5KA7-3MNK>] (noting Professor Samuel Walker's comment that some cities, such as Los Angeles, have emerged from their consent decrees with reforms that, to date, have been sustained).

270. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 481 (2009).

IV. CONCLUSION

Justice Sotomayor's dissent in *Strieff* generated substantial media commentary. It was referred to as "blistering,"²⁷¹ was noted for its "extraordinary . . . breadth and intensity,"²⁷² and was recognized for its "brutal and necessary indictment" of the conservative majority.²⁷³ Her dissent expressed the sentiments of many, particularly those in minority communities, who feel that the criminal justice system is characterized by inequities. In her final paragraph she commented that the "countless people who are routinely targeted by [the] police . . . are the canaries in the coal mine whose deaths . . . warn us that no one can breathe in this atmosphere."²⁷⁴ And she concludes with these words: "Until their voices matter too, our justice system will continue to be anything but."²⁷⁵

Within the umbrella of her comments, though not directly referenced, is *Strieff's* place in the ongoing dialogue about aggressive policing. *Strieff's* encouragement of unconstitutional policing in the context of physical encounters is poorly reasoned and ill-timed. But when viewed in the greater context of the Court's exclusionary rule history, it is the latest entry in a persistent digression of individual liberties that has lasted several decades. As claimant access to the courts has lessened, and the exclusionary mandate has been weakened, the investigative authority of the police has necessarily been enhanced. And until there is a meaningful reversal of this trend, significant and lasting police reforms will have substantial hurdles to overcome.

271. Robert Barnes, *Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence from Illegal Stops*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html [https://perma.cc/G6DA-HV6P].

272. 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/JL7H-NZ9K].

273. Mark Joseph Stern, *Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE.COM: THE SLATEST (June 20, 2016), http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_streiff_takes_on_police_misconduct.html [https://perma.cc/WDJ6-XWH2].

274. *Utah v. Strieff*, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting).

275. *Id.*