



Winter 2020

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Recommended Citation

Lucius T. Outlaw III, *Unsecured (Black) Bodies: How Baltimore Foreshadows the Dangers of Racially Targeted Dragnet Policing Let Loose by Utah V. Strieff*, 50 N.M. L. Rev. 25 (2020).
Available at: <https://digitalrepository.unm.edu/nmlr/vol50/iss1/3>

UNSECURED (BLACK) BODIES: HOW BALTIMORE FORESHADOWS THE DANGERS OF RACIALLY TARGETED DRAGNET POLICING LET LOOSE BY *UTAH V. STRIEFF*

Lucius T. Outlaw III*

I. INTRODUCTION

“The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer’s violation of your Fourth Amendment rights.”¹ With this sentence, Justice Sonia Sotomayor unleashes a fierce admonishment of the majority opinion (drafted by Justice Clarence Thomas) in *Utah v. Strieff*² and the majority’s lack of understanding of (and empathy for) those who will suffer the consequences of the Supreme Court’s latest pronouncement that the ends-justifies-the means in policing. As Justice Sotomayor recognizes, and this article argues using Baltimore as backdrop, *Strieff* not only provides further judicial cover for racially targeted dragnet policing³ of our cities’ black residents, but the opinion *encourages* such invidiously discriminatory policing.

This article strives to add to the growing criticism of *Strieff* in three ways. First, it adds to the chorus of work exposing and criticizing the flawed legal reasoning of the majority opinion.⁴ Next, by using Baltimore, Maryland’s recent policing history, this article shows how racially targeted dragnet policing was already a fact

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1. *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

2. *See id.*

3. “Racially targeted dragnet policing” as used in this article means police systematically subjecting large numbers of non-white residents to investigatory stops unsupported by individualized reasonable suspicion, probable cause, or in response to a description of a suspect, but rather for reasons that resemble or constitute racial profiling, as a tactic to detect crime. *See generally* Guy Padula, *Utah v. Strieff: Lemonade Stands and Dragnet Policing*, 120 W. VA. L. REV. 469, 478–83 (2017) (defining dragnet policing and discussing how it interacts with racial profiling).

4. *See, e.g., id.*; Allison Bruff, *Ripe for Rejection: A Methodology for States’ Departure from Utah v. Strieff and its Poisonous Fruit*, 86 MISS. L.J. 833 (2017); Julian A. Cook III, *The Wrong Decision at the Wrong Time: Utah v. Strieff in the Era of Aggressive Policing*, 70 SMU L. REV. 293 (2017); Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689 (2016); Emily J. Sack, *Illegal Stops and the Exclusionary Rule: The Consequences of Utah v. Strieff*, 22 ROGER WILLIAMS U. L. REV. 263 (2017); Jackson D. Wagner, *Stop and Exploit: What Remains of the Constitutional Right Against Unreasonable Searches and Seizures After Strieff*, 56 WASHBURN L.J. 383 (2017).

of life pre-*Strieff* for many black residents of our cities, and how this discriminatory policing tactic is fortified and encouraged by *Strieff*. Finally, this article explains why Justice Thomas's claim that his opinion will not lead to increased invidious dragnet policing because of the threat and availability of civil liability is misguided and divorced from reality.

II. BACKGROUND: *UTAH V. STRIEFF*

In December 2006, South Salt Lake City Narcotics Detective Douglas Fackrell began investigating an anonymous tip about "narcotics activity" at a particular house.⁵ During intermittent surveillance of the house for about a week, Detective Fackrell observed enough visitors to the house leaving a few minutes after arriving to suspect that the occupants of the house were distributing drugs.⁶

On the day at issue, Edward Strieff was one of the visitors the detective observed.⁷ Detective Fackrell observed Mr. Strieff exit the house and walk toward a convenience store nearby.⁸ The detective did not know, however, when Mr. Strieff had entered the suspected drug house, or how long he had been in the house.⁹ Therefore, the detective "lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction."¹⁰ Nonetheless, in the store's parking lot, the detective stopped Mr. Strieff, identified himself as law enforcement, requested that Mr. Strieff produce identification, and asked Mr. Strieff what he had been doing at the suspected drug house.¹¹ In response, Mr. Strieff produced his Utah identification card.¹² Detective Fackrell relayed Mr. Strieff's identity information to a police dispatcher, who responded that Mr. Strieff had an outstanding warrant for a traffic violation.¹³ The detective arrested Mr. Strieff pursuant to the outstanding warrant and searched Mr. Strieff.¹⁴ The search yielded a small bag of methamphetamine and drug paraphernalia (hereinafter the "drug evidence").¹⁵

Mr. Strieff was charged with unlawful possession of drugs and drug paraphernalia. He moved to suppress the drug evidence on the ground that it derived from an unlawful stop.¹⁶ During the motion hearing, the State conceded that Detective Fackrell lacked sufficient reasonable suspicion to conduct the stop, but argued that the motion should nonetheless be denied because the outstanding warrant attenuated the connection between the unlawful stop and the discovery of the drug

5. See *Strieff*, 136 S. Ct. at 2059.

6. *Id.*

7. *Id.* at 2060.

8. *Id.*

9. *Id.* at 2063 ("First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there.").

10. *Id.*

11. *Id.* at 2060.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

evidence.¹⁷ The trial court agreed with the State and denied Mr. Strieff's suppression motion.

Mr. Strieff subsequently pled guilty to attempted possession of a controlled substance and possession of drug paraphernalia, but reserved the right to appeal the denial of his suppression motion, which he did appeal.¹⁸ The Utah Court of Appeals affirmed the trial court.¹⁹ The Utah Supreme Court reversed because Mr. Strieff did not commit a voluntary act to trigger the attenuation doctrine.²⁰ According to Utah's high court, the attenuation doctrine applies only where "a voluntary act of the defendant's free will (as in a confession or consent to search)" breaks the connection between an illegal search and the discovery of the evidence at issue.²¹

The Supreme Court granted certiorari to "resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant."²² Early in the majority opinion, Justice Thomas rejected the Utah Supreme Court's belief that the attenuation doctrine applies only when there is intervening voluntary act by the defendant. According to Justice Thomas, the "attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions."²³ Therefore, the only valid question in play, in Justice Thomas's view, was "whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person."²⁴ To answer that question, the Justice relied on the three-factor attenuation test articulated in *Brown v. Illinois*:²⁵ (1) the "temporal proximity" between the unconstitutional conduct and the discovery of the evidence at issue; (2) "the presence of intervening circumstances;" and (3) "the purpose and flagrancy of the official misconduct."²⁶

In applying the *Brown* test, Justice Thomas concluded that the first factor – temporal proximity – favored Mr. Strieff because the drug evidence was discovered "only minutes after the illegal stop," which "counsels in favor of suppression."²⁷ The next two *Brown* factors were found to favor the State. As discussed in more detail later, Justice Thomas relied on a case concerning the independent source doctrine – *Segura v. United States*²⁸ – to find that the second *Brown* factor "strongly favors the

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 2061. Justice Thomas defines the attenuation doctrine as follows: "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Id.* (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006)).

24. *Id.*

25. 422 U.S. 590, 603–04 (1975).

26. *Strieff*, 136 S. Ct. at 2061–62 (quoting *Brown*, 422 U.S. at 603–04).

27. *Id.* at 2062.

28. 468 U.S. 796 (1984).

State.”²⁹ In finding that the third factor (i.e. purpose and flagrancy of the misconduct) favored the State, Justice Thomas explained that “Officer Fackrell was at most negligent” when he unlawfully detained and seized Mr. Strieff, and there was no evidence that the unlawful conduct was “part of any systematic or recurrent police misconduct.”³⁰ With the *Brown* factors favoring the State two-to-one, Justice Thomas and the majority held that “[the detective’s] discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest,” and reversed the judgment of the Utah Supreme Court.³¹

III. STRIEFF’S FLAWED REASONING & DISTORTION OF *SEGURA*

The *Strieff* majority held that the *Brown* attenuation test’s second (presence of intervening circumstances) and third (purpose and flagrancy of the misconduct) factors favored the government and weighed against excluding the drug evidence obtained from Mr. Strieff. The focus here is Justice Thomas’s findings as to the second factor. To find that the intervening circumstances factor favored the State, Justice Thomas engaged in a twisted and incomplete interpretation of a case decided 32 years prior: *Segura v. United States*.³²

A. Background: *Segura v. United States*

Mr. Segura’s case started with a tip to drug task force agents that Mr. Segura and his co-defendant were trafficking cocaine using their shared apartment in New York.³³ While surveilling Mr. Segura and his co-defendant, the agents observed the co-defendant deliver a bulk package of suspected narcotics.³⁴ Shortly thereafter, a recipient of the package confessed to the agents that the package contained cocaine, and that he had purchased the cocaine from Mr. Segura.³⁵ Based on this confession, the agents obtained permission from a federal prosecutor to arrest Mr. Segura and his co-defendant, but were advised that because a search warrant for the defendants’ apartment could not be obtained until the next day, the agents should secure (but not search) the apartment to prevent the destruction of evidence.³⁶ Despite this advisement, the agents entered the defendants’ apartment without their consent.³⁷ Inside the apartment, the agents observed in plain sight some accessories associated with drug dealing.³⁸ The agents remained in the apartment to await the warrant, but

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

30. *Id.* at 2063.

31. *Id.* at 2064.

32. 468 U.S. 796 (1984); see *Strieff*, 136 S. Ct. at 2062 (Justice Thomas relied on *Segura* because “the Court addressed similar facts to those here and found sufficient intervening circumstances to allow the admission of evidence.”).

33. *Segura*, 468 U.S. at 799.

34. *Id.*

35. *Id.* at 800.

36. *Id.*

37. *Id.* Mr. Segura had been arrested in the lobby of the apartment building right before the agents entered his apartment.

38. *Id.* at 800–01.

did not search the apartment until a warrant was obtained later the next day.³⁹ The search pursuant to the warrant yielded nearly three pounds of cocaine, more than \$50,000 in cash, ammunition, and records of narcotics transactions.⁴⁰

The issue that made its way to the Supreme Court was “whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the [illegal] entry into the residence.”⁴¹ In other words, did the warrantless (illegal) entry into Mr. Segura’s apartment taint the evidence that was later discovered pursuant to a valid warrant? On this question, the Court relied primarily on the independent source doctrine to side with the government and against suppression.⁴² The Court explained that the independent source doctrine removed any taint from the evidence at issue because none of the information used to obtain the search warrant derived from the illegal entry in Mr. Segura’s apartment.⁴³ Indeed, because the warrant information was obtained from an independent and lawful source prior to the illegal entry, the Court brushed aside the illegal entry as “irrelevant.”⁴⁴

B. Justice Thomas & *Segura*: Misunderstanding and Misuse

As Justice Thomas admits, *Segura* turned on the independent source doctrine and not the attenuation doctrine.⁴⁵ Nonetheless, in ruling against Mr. Strieff, Justice Thomas focused on what he perceived as *Segura*’s suggestion “that the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is ‘sufficiently attenuated to dissipate the taint.’”⁴⁶ Even though *Segura* involved a different warrant exception doctrine, according to Justice Thomas, the case still supported applying the attenuation doctrine in *Strieff* because the arrest warrant, specifically the probable cause underlying the warrant, was “wholly unconnected” to the unlawful stop.⁴⁷ There are two critical problems with this interpretation and application of *Segura*.

First, in writing for the majority in *Segura*, then-Chief Justice Burger was clear that the Court was resolving the “narrow and precise question” of whether a court has to suppress evidence not discovered during an initial unlawful entry, but

39. *Id.* at 800. It is important to note that the application for the warrant did not include any of the agents’ observations from their warrantless entry into Mr. Segura’s apartment. *Id.*

40. *Id.* at 801.

41. *Id.* at 797–98.

42. *See id.* at 805 (“In short, it is clear from our prior holdings that ‘the exclusionary rule has no application [where] the Government learned of the evidence “from an independent source.”’” (quoting *Wong Sun v. United States*, 371 U.S. 471, 487 (1963)).

43. *Id.* at 814 (“None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners’ apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the initial entry.”).

44. *Id.* at 813–14 (“Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which the evidence was seized.”).

45. *Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016) (quoting *Segura*, 468 U.S. at 815).

46. *Id.*

47. *Id.*

later discovered during a second entry pursuant to a valid warrant.⁴⁸ This was the “only issue” before the Court.⁴⁹ The circumstances of *Strieff* do not fit within these “narrow and precise” parameters.⁵⁰ Factually, *Strieff* is too dissimilar for *Segura* to be an authoritative guide for determining the ramifications for the drug evidence seized from Mr. Strieff following the unlawful stop. Indeed, as discussed in more detail later, while the unlawful entry into Mr. Segura’s apartment had no causal relationship to the discovery of the challenged evidence at issue, the same cannot be said about unlawful stop and the drug evidence in *Strieff*.

This leads to the second critical problem with the Justice Thomas’s reliance on *Segura*. Again, Justice Thomas and the majority held that in light of *Segura* the attenuation doctrine cured the unlawful stop of Mr. Strieff because “the warrant was valid, it predated Officer Fackrell’s investigation, and it was entirely unconnected with the [unlawful] stop.”⁵¹ But this rationale appreciates *only half* of the requirements that *Segura* sets for finding sufficient attenuation between unlawful police conduct and evidence secured by a warrant. *Segura* is explicit that there is sufficient attenuation (more accurately, a sufficient independent source) when the probable cause for a warrant is “wholly unconnected with the [unlawful police conduct] *and was known to the agents well before* [the unlawful police conduct].”⁵² Both requirements were met in *Segura* – the warrant was obtained without using any information obtained by the agents’ unlawful entry into Mr. Segura’s apartment, *and* the offending agents were aware of the probable cause used to obtain the warrant *prior* to unlawfully entering the apartment. The same cannot be said for *Strieff*. While Mr. Strieff’s arrest warrant was secured without any information obtained during the unlawful stop of Mr. Strieff, Detective Fackrell was unaware of this information prior to unlawfully stopping Mr. Strieff.⁵³

The majority in *Strieff* conveniently ignored *Segura*’s second requirement. For the majority it was enough that “the warrant was valid, it predated Detective Fackrell’s investigation, and it was entirely unconnected with the stop.”⁵⁴ Justice Thomas does not mention, much less discuss, *Segura*’s second requirement -- that Detective Fackrell have the untainted knowledge underlying the warrant prior to his unlawful stop of Mr. Strieff. This is understandable since the facts do not allow this hurdle to be cleared. Detective Fackrell had no knowledge of the information (probable cause) that supported Mr. Strieff’s arrest warrant prior to unlawfully stopping him. In fact, Detective Fackrell had no knowledge of Mr. Strieff at all before the unlawful stop.⁵⁵

The obvious rebuttal to this argument is that Justice Thomas’s rationale is consistent with *Segura* because the probable cause underlying the warrant for Mr.

48. *Segura*, 468 U.S. at 804 (“The only issue here is whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry, under an admittedly valid search warrant, should have been suppressed.”).

49. *Id.*

50. *Id.* (“At the outset, it is important to focus on the narrow and precise question now before us.”).

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

52. *Segura*, 468 U.S. at 814 (emphasis added).

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

54. *Id.*

55. *Id.* at 2060.

Strieff's arrest was generally known to the South Salt Lake City police before Detective Fackrell's unlawful conduct. In other words, the counter-argument goes, *Segura* is not narrowly limited to where the officers who properly secured a warrant must be the same officers who committed the unconstitutional stop or search -- that *Segura* is focused on the timing and causation relationship between the probable cause lawfully obtained and the Fourth Amendment violation.

But this counter-argument fails because in *Segura* the unlawful entry happened because the agents were attempting to secure evidence that *they knew there was probable cause to seize*. The agents knew that a warrant was forthcoming because they themselves had observed the probable cause justifying a warrant, and their observations occurred prior to their illegal entry into Mr. Segura's apartment. The circumstances in *Strieff* are far different. Detective Fackrell had *no* prior knowledge of the probable cause underlying the arrest warrant for Mr. Strieff, so he did not stop Mr. Strieff to protect evidence that he already knew there was probable cause to seize. In sum, *Segura* involved agents committing a Fourth Amendment violation with untainted knowledge that a crime was in process, while *Strieff* involved a detective committing a Fourth Amendment violation as part of a fishing expedition based on speculation.

C. The Causation Gulf between *Segura* and *Strieff*

The rebuttal argument equally fails when the "but for" causation test that plays a central role in *Segura*, is applied to the circumstances of *Strieff*.⁵⁶ In *Segura*, Chief Justice Berger reaffirmed the long-standing principle that suppression is warranted only if the illegal government activity is "at least the 'but for' cause of the discovery of the evidence."⁵⁷ Mr. Segura, Chief Justice Burger found, could not clear this fundamental causation hurdle because the "illegal entry into [his] apartment did not contribute *in any way* to the discovery of the evidence seized under the warrant."⁵⁸ The agents' unlawful entry into Mr. Segura's apartment had no impact on the issuance of a valid warrant, nor the execution of the warrant, therefore the unlawful entry was not a "but for" cause of the discovery of the incriminating evidence in Segura's apartment.

In contrast, in *Strieff*, there is a direct chain of causation from the unlawful stop to the discovery of the drug evidence. This unbroken chain sufficiently fulfills the "but for" requirement that is so important under *Segura*. There is no plausible

56. See *Segura*, 468 U.S. at 815.

57. *Id.*; see also *Burridge v. United States*, 571 U.S. 204, 210 (2014) ("The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause."). Actual cause is more commonly referred to as the "but for" cause because the complained harm or injury would not have occurred "but for" the conduct at issue. See *Univ. of Tex. S. Med. Ctr. v. Nassar*, 570 U.S. 338, 346–47 (2013) (explaining in Title VII context that the but-for standard "requires the plaintiff to show 'that the harm would not have occurred' in the absence of – that is, but for – the defendant's conduct."); see also *United States v. James*, 534 F. App'x 755, 757 (10th Cir. 2013) ("We define 'directly' as requiring a showing of 'but-for' causation, so that a particular loss would not have occurred but for the conduct underlying the offense of conviction."); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41 (4th ed. 1971) ("[A]n act or an omission is not regarded as a cause of an event if the particular event would have occurred without it.").

58. *Segura*, 468 U.S. at 815 (emphasis added).

debate that “but for” the unlawful stop, Detective Fackrell would not have discovered the drug evidence used to arrest and convict Mr. Strieff. The drug evidence obtained from Mr. Strieff was certainly “in some sense the product of illegal governmental activity.”⁵⁹ Indeed, the warrant check that revealed the arrest warrant for Mr. Strieff would not have occurred but for the illegal stop that forced Mr. Strieff to provide his identity information to Detective Fackrell.

This critical and vital difference between the two cases is best exemplified by the hypothetical alternate scenario posed by Chief Burger in *Segura* to demonstrate the soundness of the “but for” test, and how the Fourth Amendment violation by the agents had no bearing on the discovery of the challenged evidence in that case. As the Chief Justice posited, had the agents not illegally entered Mr. Segura’s apartment, but instead established a perimeter to prevent anyone from entering the apartment to destroy evidence, the challenged evidence would have still been discovered and seized.⁶⁰ In short, subtract the unlawful entry by the agents and the outcome would have been the same – the discovery of the incriminating evidence pursuant to a valid warrant. This alternate scenario proved for the Chief Justice that the agents’ unlawful entry into Mr. Segura’s apartment was “wholly irrelevant” to the discovery of the evidence pursuant to the search warrant.⁶¹

No comparable alternate scenario exists that cleans the taint on the drug evidence seized from Mr. Strieff after being illegally stopped. Because Detective Fackrell had no legal basis to stop Mr. Strieff (as the government conceded), there was no basis to detain Mr. Strieff until a warrant was obtained or discovered to already exist, and no warrant would have been granted based on Detective Fackrell’s mere speculation. Subtract the illegal stop, Detective Fackrell never discovers the drug evidence, and the story ends much differently for Mr. Strieff. As such, the factual circumstances of *Strieff* fulfill the but-for test that is critical for suppression under *Segura*.

In reaching his decision in *Strieff*, Justice Thomas makes one of two mistakes (if not both) concerning the causation *Segura* requires for suppression instead of the application of the attenuation doctrine. The first possibility is that the Justice misinterpreted *Segura*’s “but for” standard narrowly to mean that exclusion of seized evidence is justified only if the warrant would not have been obtained but for the government’s Fourth Amendment violation.⁶² However, nothing in *Segura* supports this narrow interpretation. In fact, *Segura* pushes a very broad view of the “but for” standard. *Segura*’s view of “but for,” evidence is sufficiently attenuated from the government’s illegal conduct only if the conduct “did not contribute in any way to the discovery of the evidence” and the evidence is not “in some sense the product of illegal governmental activity.”⁶³ Chief Burger’s deliberate use of “in any way” and “in some sense” is a clear signal that the “but for” standard is to be construed broadly when measuring attenuation. It must be remembered that the issue before the Court in *Segura* was whether the agents’ unlawful entry tainted evidence

59. *Id.* (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)).

60. *Id.* at 814.

61. *Id.*

62. *See Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016) (“In this case, the warrant was valid, it predated Officer Fackrell’s investigation, and it was entirely unconnected with the [illegal] stop.”).

63. *Segura*, 468 U.S. at 815 (emphasis added).

later discovered pursuant to a valid search warrant. Key to the Court's ruling that the evidence was not tainted as to require suppression was that the unlawful entry had no impact *whatsoever* on the receipt or execution of the warrant. As Chief Justice Burger's opinion stresses, the test is whether the outcome (i.e. the discovery of the incrimination evidence) would have still occurred if the government's illegal conduct is extracted from the fact pattern. The facts of *Segura* pass this test. The facts of *Strieff* do not.

Justice Thomas's overly narrow interpretation of "but for" causation leads and relates to the second possible mistake the Justice may have made. In placing great weight on the warrant for Mr. Strieff's arrest as the intervening (and therefore attenuating) event, the majority opinion suggests that a harm, injury, or event has only one "but for" cause. In other words, the exclusive but-for cause of the discovery of the drugs and paraphernalia on Mr. Strieff was *either* the illegal stop *or* the valid warrant, with the majority determining it was the latter. But "[a]s both tort law and common sense tell us, there may be multiple but-for causes of a single loss and each, as a but-for cause, may be responsible for the entire loss in the sense that had that party not acted as it did, there would have been no loss."⁶⁴ But-for causation does not mean "sole causation, i.e., 'standing alone.'"⁶⁵ Instead, "but-for causation broadly defines causation, requiring only an act or omission without which the event would not have occurred."⁶⁶ That multiple but-for causes can exist is widely accepted

64. *Loughman v. Consol-Penn. Coal Co.*, 6 F.3d 88, 106 (3d. Cir. 1983) (civil fraud action).

65. *Evanston Ins. Co. v. Sandersville R.R. Co.*, No. 5:15-CV-247 (MTT), 2016 WL 5662040, at *9 (M.D. Ga. Sept. 29, 2016).

66. *Id.*

among courts and has been applied in a variety of case types.⁶⁷ This acceptance extends to criminal cases.⁶⁸

The Fifth Circuit's acceptance of the multiple but-for causes concept in a recent criminal case shows just how misguided is the *Strieff* opinion. In *United States v. Ruiz-Hernandez*, the defendant was convicted at trial of conspiring to bring in, transport, and harbor a foreign person within the United States in a manner that resulted in death, and a substantive count of transporting a foreign person into the United States for financial gain.⁶⁹ The story behind the conviction was that Mr. Ruiz-Hernandez assisted in the smuggling of Ms. Patricia Cervantes, a Mexican citizen, from Mexico into the United States, first by boat across the Rio Grande River, followed by a nighttime swim across a ship channel in Brownsville, Texas.⁷⁰ While

67. See *Univ. of Tex. S. Med. Ctr. v. Nassar*, 570 U.S. 338, 383 (2013) (Ginsburg, J., dissenting) (Title VII retaliation case) ("When an event is 'overdetermined,' i.e., when two forces create an injury each alone would be sufficient to cause, modern tort law permits the plaintiff to prevail upon showing that either sufficient condition created the harm."); *Kwan v. Andalex Grp. LLC*, 737 F.3d 834, at 846 n.5 (2d Cir. 2013) (Title VII discrimination and retaliation case) ("However, a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability."); *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1173 (10th Cir. 2010) (Lucero, J., concurring) (civil action under Price-Anderson Act) ("[T]here can be multiple but-for causes of a plaintiff's injury."); *Evanston Insur. Co.*, 2016 WL 5662040, at *9 (negligence action under the Federal Employees Liability Act) ("Sandersville Railroad mistakenly reads but-for causation to mean sole causation, i.e., 'standing alone.' It does not."); *Geras v. Hempstead Union Free Sch. Dist.*, 149 F. Supp. 3d 300, 330 (E.D.N.Y. 2015) (employment discrimination and retaliation case) ("However, '[r]equiring proof that a prohibited consideration was a 'but-for' cause of an adverse action does not equate to a burden that such consideration was the 'sole' cause.'") (quoting *Kwan*, 737 F.3d at 846 n.5); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015) (Title VII gender discrimination case) ("There may be multiple wrongful, actionable but-for causes of a termination."); *Amusement Indus., Inc. v. Stern*, 786 F. Supp. 2d 758, 777 (S.D.N.Y. 2011) (civil fraud case) ("As case law notes, there can be 'multiple "but-for" causes of varying degrees of directness. . . .") (quoting *Zito v. Leasecomm Corp.*, No. 02 Civ.8074(GEL), 2003 WL 22251352, at *19 (S.D.N.Y. Sept. 30, 2003)); *Zito*, 2003 WL 22251352, at *19 (insurance coverage dispute) ("Thus, the 'but-for' causation requirement is satisfied whether or not the enticement to sign them is considered the more direct cause. Put another way, there can be multiple 'but-for' causes of varying degrees of directness. . . ."); see also *United States v. Snider*, 180 F. Supp. 3d 780, 787 (D.Or. 2016) (In discussing the but-for causation requirement for proving a defendant's drug distribution conduct resulted in the death or serious injury of a victim under 21 U.S.C. § 841, the court noted that "[t]he Supreme Court left open the possibility that this [but-for] requirement might also be satisfied 'when multiple sufficient causes independently, but concurrently produce a result.'") (quoting *Burrage v. United States*, 571 U.S. 204, 214 (2014)).

68. See, e.g., *United States v. Ruiz-Hernandez*, 890 F.3d 202, 212–13 (5th Cir. 2018) ("But-for causation exists if the result would not have occurred without the conduct at issue. A particular result can be caused by multiple necessary factors—multiple but-for causes—yet one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence.") (citation omitted). Moreover, recent cases involving the "resulting in death or serious injury provisions" of 21 U.S.C. § 841 reflect the growing acceptance of multiple but-for causes by the courts in criminal cases. The criminal statute requires mandatory minimum sentences of various lengths, such as twenty years, if "death or serious bodily injury results from" the use of the particular drug distributed by the defendant. What level of causation is required by the statute's "resulting from" language was resolved by *Burrage*. Writing for the majority, Justice Scalia rejected the government's plea for a "substantial" or "contributing" factor causation standard in favor of the but-for standard. *Burrage*, 571 U.S. at 218. Following this pivotal decision, courts have noted that the opinion "left open the possibility that this [but-for] requirement might also be satisfied 'when multiple sufficient causes independently, but concurrently produce a result.'"
Snider, 180 F. Supp. 3d at 787 (quoting *Burrage*, 571 U.S. at 214).

69. 890 F.3d 202, 202 (2018), *cert. denied*, 139 S. Ct. 278 (2018).

70. *Id.* at 206.

swimming across the ship channel, “Ms. Cervantes was struck by a passing Coast Guard vessel and [was] killed.”⁷¹

In convicting Mr. Ruiz-Hernandez, the jury, by way of a special interrogatory, found that the conspiracy and the substantive transportation counts both resulted in the death of Ms. Cervantes.⁷² The jury’s special finding had two sentencing effects. First, it increased the statutory maximum sentence to life imprisonment or death.⁷³ Second, it triggered a 10-level increase in Mr. Ruiz-Hernandez’s sentencing guidelines offense level, pursuant to United States Sentencing Guidelines § 2L1.1(b)(7), for conduct resulting in death.⁷⁴

As part of his appeal, Mr. Ruiz-Hernandez argued that the lower court erred in applying the 10-level resulting in death enhancement. He did not dispute that “resulting in death” under § 2L1.1(b)(7) “requires only that a defendant’s conduct be the but-for, not proximate, cause of the resulting death.”⁷⁵ Rather, Mr. Ruiz-Hernandez’s argued that the “Coast Guard vessel [that struck Ms. Cervantes], and not his conduct, was the but-for cause of Cervantes’s death.”⁷⁶ The Fifth Circuit soundly rejected this argument. Citing *Burrage*, the appellate court affirmed the foundation that “[b]ut-for causation exists if the result would not have occurred without the conduct at issue.”⁷⁷ Then, important for the purposes of this article, the Fifth Circuit explained that “[a] particular result can be caused by multiple necessary factors—multiple but-for causes—yet one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence.”⁷⁸ In applying this broad view of but-for causation, the appellate court affirmed the lower court’s imposition of the 10-level enhancement because “while the Coast Guard ship was *a* but-for cause of Cervantes’s death, she would not have been in its path but for Ruiz-Hernandez’s conduct in smuggling her across the ship channel. Accordingly, his conduct was also a but-for cause of her death”⁷⁹

The majority’s opinion in *Strieff* collapses under the broad but-for causation view endorsed by *Segura* and applied in *Ruiz-Hernandez*. While the arrest warrant was *a* but-for cause of the discovery of the drug evidence on Mr. Strieff’s person, Mr. Strieff would not have been arrested on the warrant and searched *that day* but-for the unlawful stop. In fact, the illegal stop directly led to Detective Fackrell gaining the information that allowed him to run a warrant check, i.e. Mr. Strieff’s name. Absent receiving Mr. Strieff’s name, Detective Fackrell would not have had the means to run a warrant check. There is a continuous (and unbroken) but-for causation chain from the illegal government conduct to the discovery of Mr. Strieff’s name to the discovery of the warrant to the discovery of the drug evidence.

71. *Id.*

72. *Id.* at 208.

73. *Id.* at 210 (citing 8 U.S.C. § 1324(a)(1)(B)(iv)).

74. *Id.* at 208.

75. *Id.* at 212.

76. *Id.*

77. *Id.*

78. *Id.* at 212–13.

79. *Id.* at 213.

In the full-light of *Segura*, the *Strieff* majority's analogizing of the two cases "is difficult to understand."⁸⁰ Detective Fackrell's conduct with Mr. Strieff in no way parallels the conduct of the agents in *Segura*. Justice Sotomayor sagaciously summarized the material dissimilarities:

In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, [Officer Fackrell's] illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant. *Segura* would be similar only if the agents used information they illegally obtained from the apartment to procure a search warrant or discover an arrest warrant. Precisely because that was not the case, the Court admitted the untainted evidence [in *Segura*].⁸¹

As Justice Sotomayor recognized, the factual gap between the two situations is too broad and wide for *Segura* to sanitize Detective Fackrell's violation of Mr. Strieff's rights. Every action and discovery by Detective Fackrell sprung from his unlawful stop of Mr. Strieff. Take away Detective Fackrell's unlawful conduct and Mr. Strieff is a free man today.

In sum, *Segura* supports suppression of the drug evidence in *Strieff*, not admission. The facts of *Strieff* do not fulfill two of *Segura*'s key requirements for triggering the attenuation doctrine: that Detective Fackrell knew of the probable cause supporting the arrest warrant prior to stopping Mr. Strieff, and that the illegal stop of Mr. Strieff was not a but-for cause of the discovery of the drug evidence. These requirements are not acknowledged, and certainly not addressed, by Justice Thomas even though he places great weight on *Segura*'s "suggest[ion] that the existence of a valid warrant favors finding that the connection between unlawful [law enforcement] conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"⁸² This is precedent cherry-picking at its worst. The majority opinion distorts *Segura* from being a case that actually supports suppression under the facts of *Strieff* into the key cog in the legal justification and cover for dragnet policing. As discussed next, invariably those who will disproportionately suffer under this police tactic are people of color, particularly those living in the economically disadvantaged parts of our cities.

IV. BALTIMORE AND HOW *STRIEFF* INCREASES AND ENCOURAGES RACIALLY TARGETED DRAGNET POLICING

The *Strieff* majority found that the *Brown* test's third factor (purpose and flagrancy of the official misconduct) "strongly favors the State" because Detective Fackrell made "good-faith mistakes" that were "at most negligent."⁸³ In doing so, the majority summarily shrugs-off any concern that their opinion will open the door to dragnet stops and searches by police, particularly in jurisdictions where

80. *Utah v. Strieff*, 136 S. Ct. 2056, 2067 (2016) (Sotomayor, J., dissenting).

81. *Id.*

82. *Id.* at 2062 (quoting *Segura v. United States*, 486 U.S. 815 (1984)).

83. *Id.* at 2063.

outstanding arrest warrants are prevalent.⁸⁴ According to Justice Thomas, such conduct by police is “unlikely” and is deterred by the potential of civil liability.⁸⁵ Justice Thomas and the majority’s quick dismissal of Detective Fackrell’s “negligence” and the wide-spread and deep impact of the majority opinion is not only callous and out of touch with the reality of policing in many urban and impoverished communities, but it also fails to recognize how the opinion encourages dragnet policing, including racially targeted dragnet policing, without fear of liability, civil or otherwise.

As Justice Sotomayor reminds (or rather educates) the majority, “[o]utstanding warrants are surprisingly common,” and are issued even for minor infractions, such as traffic violations, failing to pay a traffic ticket, or drinking alcohol while on probation.⁸⁶ Indeed, there were over 7.8 million warrants in state and the federal government databases at the time of the opinion’s announcement, with “the vast majority of which appear to be for minor offenses.”⁸⁷ Justice Sotomayor also points out that even before *Strieff*, warrant checks have been the foundation of dragnet policing in a St. Louis, Missouri and Newark, New Jersey.⁸⁸

St. Louis and Newark, however, are not alone in police using warrant checks to conduct dragnet policing. In fact, the Supreme Court need only look 40 miles to the northeast to understand that dragnet policing is a daily reality for black people in our cities, and that the judiciary’s continued endorsement of such policing fuels public discontent that eventually blows over into civil unrest.

A. Story of Two Baltimores

With its population of about 621,000 residents, Baltimore is Maryland’s the largest city.⁸⁹ Baltimore is a majority black city with blacks constituting approximately 63 percent of the population, followed by a distant 30 percent white, and 4 percent Latino.⁹⁰ Looking from the outside at a high level, Baltimore appears to prosper economically. The city ranks seventh among the thirty-five largest metropolitan areas in terms of per capita income (at about \$54,457), and jobs in the city pay better than the national average (\$58,091 compared to the national average of \$49,808 as of 2013).⁹¹ The city is home to educational beacons such as Johns Hopkins University, Morgan State University (one of country’s oldest historically black universities), Loyola University, and the University of Maryland School of Law. The city’s Johns Hopkins Hospital is one of the world’s foremost teaching

84. *See id.* at 2064.

85. *Id.*

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

87. *Id.*

88. *See id.* at 2068–69.

89. *See* U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 12 (2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter BPD DOJ REPORT].

90. *Id.*

91. Alan Berube & Brad McDearman, *Good Fortune, Dire Poverty, and Inequality in Baltimore: An American Story*, BROOKINGS: THE AVENUE (May 11, 2015), <https://www.brookings.edu/blog/the-avenue/2015/05/11/good-fortune-dire-poverty-and-inequality-in-baltimore-an-american-story/> [https://perma.cc/XHG6-3V6H].

hospitals and medical research facilities. The city's Inner Harbor is a tourism hub that features the Maryland Science Center and the famous National Aquarium alongside a bustling complex of restaurants, retailers, and music venues.

A closer look, however, reveals that what exists today are really two Baltimores – one that is affluent and mostly white (with a growing black middle class), and another that is overwhelmingly black and poor. The predominately-black neighborhoods that sit directly west and east of downtown Baltimore exhibit high rates of poverty and suffer the expected collateral consequences of poverty. Take for instance Sandtown-Winchester/Harlem Park, an overwhelmingly black neighborhood in West Baltimore. The neighborhood has one of the lowest median incomes in the city at \$24,006.⁹² One in four of the neighborhood's residents receive public assistance benefits compared to one in nine residents for the whole city.⁹³ One in three (thirty-three percent) of the neighborhood's houses are vacant or abandoned, which is well over the rate of one in twelve (eight percent) for the city as a whole.⁹⁴ More than one-fifth of Sandtown-Winchester/Harlem Park's working-age residents are unemployed, and with three percent of the neighborhood's population incarcerated, Sandtown-Winchester/Harlem Park has more people in prison than any other Baltimore neighborhood.⁹⁵ The life expectancy of a resident of Sandtown-Winchester/Harlem Park is 69.7 years, compared to 84.4 years for a resident of Roland Park, a majority white Baltimore neighborhood.⁹⁶ The respective infant mortality rates (per 1,000 births) for two neighborhoods is 9.7 for Sandtown-Winchester/Harlem Park versus 3.4 for Roland Park.⁹⁷

Sandtown-Winchester/Harlem Park is not unique in how poverty and the resulting consequences break largely along racial lines in Baltimore. Indeed, to be born black and poor in Baltimore City is to be born into a life of poverty so crippling that it impedes and severely limits nearly every aspect of life – education, job opportunities, and lifespan, to name a few. This is the reality even though Maryland is one of the wealthiest states in the country.⁹⁸ Indeed, nearly 25% of Maryland's poor live in Baltimore City, even though the city comprises 11% of the state's total population,⁹⁹ and black Baltimoreans account for more than 75% of city's residents living in poverty.¹⁰⁰ The median income for black households in Baltimore is

92. JUSTICE POLICY INST. & PRISON POLICY INITIATIVE, *THE RIGHT INVESTMENT? CORRECTIONS SPENDING IN BALTIMORE CITY* 19 (2015), http://www.justicepolicy.org/uploads/justicepolicy/documents/rightinvestment_design_2.23.15_final.pdf.

93. *Id.*

94. *Id.*

95. Jeremy Ashkenas et al., *A Portrait of the Sandtown Neighborhood in Baltimore*, N.Y. TIMES (May 3, 2015), <https://www.nytimes.com/interactive/2015/05/03/us/a-portrait-of-the-sandtown-neighborhood-in-baltimore.html> [https://perma.cc/BGF4-CB2N].

96. MARYLAND DEP'T OF LEGISLATIVE SERV., OFFICE OF POLICY ANALYSIS, HISTORY, PUBLIC POLICY, AND THE GEOGRAPHY OF POVERTY: UNDERSTANDING CHALLENGES FACING BALTIMORE CITY AND MARYLAND 37 (2016), http://dlslibrary.state.md.us/publications/opa/i/hppgp_2016.pdf.

97. *Id.*

98. Jordan Malter, *Baltimore's Economy in Black and White*, CNN BUSINESS (Apr. 29, 2015), <http://money.cnn.com/2015/04/29/news/economy/baltimore-economy/> [https://perma.cc/C2RB-MZ9Z].

99. MARYLAND DEP'T OF LEGIS. SERV., OFF. OF POL'Y ANALYSIS, *supra* note 96, at 3.

100. BPD DOJ REPORT, *supra* note 89, at 14.

\$33,610, which is slightly higher than half the median income for white households in the city (\$60,550), and less than half the median income of all Maryland households (\$73,538).¹⁰¹ This is just a sample of the facts and statistics that show that the birthright of the black poor Baltimorean is extreme poverty, imprisonment, and early death.¹⁰²

In short, “[b]y a wide range of metrics – income, employment, education – the racial divide in Baltimore is wider than in the U.S. as a whole.”¹⁰³ There are numerous causes for this racial divergence. The failings of the education system in the city’s poor black neighborhoods dove-tailed with the decline in the number of jobs located in the city, particularly jobs requiring less skill and education.¹⁰⁴ But a changing economy is only part of the story. More impactful has been Baltimore’s long history of private and government-supported discrimination. Take housing for example, where discriminatory practices, such as red-lining, have established, maintained, and regulated segregation in Baltimore and confined black city residents largely to the poorest (in wealth, education, jobs, and health) parts of the city for decades.¹⁰⁵

101. Malter, *supra* note 98.

102. For example, between 2000 and 2010, the median income of white households in Baltimore increased by 30%, whereas the median income of black households decreased by 10%. MARYLAND DEP’T OF LEGISLATIVE SERV., OFFICE OF POLICY ANALYSIS, *supra* note 96, at 3. Baltimore’s three neighborhoods with the highest average poverty rate within the past twenty-five years (average of about 60%) are primarily populated by black residents. *Id.* at 34 (identifying the neighborhoods of Oldtown/Middle East, Cherry Hill, and Upton/Druid Hill). Unemployment rate for black men in Baltimore between ages twenty and twenty-four was 37% in 2013, compared to 10% for white men. Ben Casselman, *How Baltimore’s Young Black Men Are Boxed In*, FIVETHIRTYEIGHT (Apr. 28, 2015), <https://fivethirtyeight.com/features/how-baltimores-young-black-men-are-boxed-in/> [https://perma.cc/93SV-VP7X]. An estimated 41% of the city’s black children live in poverty, compared to just 13.7% of the city’s white children. Berube & McDearman, *supra* note 91.

103. Casselman, *supra* note 102.

104. See MARYLAND DEP’T OF LEGISLATIVE SERV., OFFICE OF POLICY ANALYSIS, *supra* note 96, at 22.

105. For a poignant and arresting account of how such practices subjected black Americans to decades (if not a lifetime) of de facto segregation and all the negative effects that flow from it, see Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/F46E-L2WD]. For how redlining and other racist practices and government policies have resulted in persistent racial segregation and poverty in Baltimore in particular, see Emily Badger, *The Long, Painful and Repetitive History of How Baltimore Became Baltimore*, WASH. POST (Apr. 29, 2015), [washingtonpost.com/news/wonk/wp/2015/04/29/the-long-painful-and-repetitive-history-of-how-baltimore-became-baltimore/](http://www.washingtonpost.com/news/wonk/wp/2015/04/29/the-long-painful-and-repetitive-history-of-how-baltimore-became-baltimore/); Laura Bliss, *After Nearly a Century, Redlining Still Divides Baltimore*, CITYLAB (Apr. 30, 2015), <http://www.citylab.com/politics/2015/04/after-nearly-a-century-redlining-still-divides-baltimore/391982/> [https://perma.cc/ML5J-ZLK8]; Jamelle Bouie, *The Deep, Troubling Roots of Baltimore’s Decline*, SLATE (Apr. 29, 2015), <https://slate.com/news-and-politics/2015/04/baltimores-failure-is-rooted-in-its-segregationist-past-the-citys-black-community-has-never-recovered.html> [https://perma.cc/3UGG-RXBM]; Justin George & Mark Puente, *Baltimore Leaders Agree: City Has a Race Problem*, BALT. SUN (Mar. 14, 2015), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-baltimore-racism-20150314-story.html> [https://perma.cc/325W-X94F]; see also NAT’L CMTY. REINVESTMENT COAL. (NCRC), HOME MORTGAGE AND SMALL BUSINESS LENDING IN BALTIMORE AND SURROUNDING AREAS 9 (2015), <https://ncrc.org/home-mortgage-and-small-business-lending-in-baltimore-and-surrounding-areas/> [https://perma.cc/U7JH-GDUC] (finding that race plays a significant factor in mortgage lending in Baltimore City and the surrounding counties).

As the city's former police commissioner publicly admitted, Baltimore is still "dealing with 1950's-level black-and-white racism."¹⁰⁶ Indeed, the statistics cited earlier, "make perfect sense in the context of the century-long assault that Baltimore's blacks have endured at the hands of local, state and federal policy makers, all of whom worked to quarantine black residents in ghettos, making it difficult even for people of means to move into integrated areas that offered better jobs, schools and lives for the children."¹⁰⁷ Although Baltimore is not the only city to suffer from a long history of racist government policies and tendencies, as the *New York Times* editorial board recently acknowledged, "the segregationist impulse in Maryland generally was particularly virulent and well-documented in Baltimore."¹⁰⁸ Which leads us to today, where the "two Baltimores have mostly gone unreconciled."¹⁰⁹

B. Baltimore's Recent History of Racially Targeted Dragnet Policing

Certainly, the law-abiding residents of Baltimore want and welcome policing. They want safe streets for their families, to feel secure in their homes, and to go about their lives without being robbed, assaulted, or killed. However, the *manner* in which policing occurs is just as important as the level of policing. It is under the former metric that the Baltimore Police Department ("BPD") has historically failed and continues to do so when it comes to the city's poorer and majority-black neighborhoods. This is made abundantly clear by the 2016 Findings Report on the Investigation of the Baltimore City Police Department by the Civil Rights Division of the United States Department of Justice (hereinafter the "BPD DOJ Report").¹¹⁰

The Civil Rights Division opened a formal investigation into the BPD on May 8, 2015, less than a month after city-wide protests and riots erupted after Freddie Gray, a 26-year old black man, died from injuries he sustained during his arrest by BPD officers.¹¹¹ The investigation lasted 14 months and culminated in a report that was published to the public on August 10, 2016. Overall the investigation found that:

BPD's practices perpetuate and fuel a multitude of issues rooted in poverty and race, focusing law enforcement actions on low-income, minority communities in a manner that is often unnecessary and unproductive. In other words, BPD's law

106. Justin Fenton, *Batts Elaborates on Comments that Baltimore Suffers from '1950s Racism'*, BALT. SUN (Feb. 28, 2015), <https://www.baltimoresun.com/news/crime/bal-batts-elaborates-on-comments-that-baltimore-suffers-from-1950s-racism-20150228-story.html> [https://perma.cc/YWP9-68L5].

107. Editorial Board, *How Racism Doomed Baltimore*, N.Y. TIMES (May 9, 2015), <https://www.nytimes.com/2015/05/10/opinion/sunday/how-racism-doomed-baltimore.html> [https://perma.cc/TVSG-TWYJ].

108. *Id.*

109. Michael A. Fletcher, *What You Really Need to Know About Baltimore, from a Reporter Who's Lived There for Over 30 Years*, WASH. POST (Apr. 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/28/what-you-really-need-to-know-about-baltimore-from-a-reporter-who-lived-there-for-30-years/> [https://perma.cc/D9D2-A37D].

110. See generally BPD DOJ REPORT, *supra* note 89.

111. *Id.* at 19–20.

enforcement practices at times exacerbate the longstanding structural inequalities in the City by encouraging officers to have unnecessary, adversarial interactions with community members that increase exposure to the criminal justice system and fail to improve public safety.¹¹²

Specifically, the federal civil rights investigators concluded that BPD engages in the following unconstitutional and unlawful practices: “(1) making unconstitutional stops, searches, and arrests; (2) using enforcement strategies that produce severe and unjustified disparities in the rates of stops, searches and arrests of African Americans; (3) using excessive force; and (4) retaliating against people engaging in constitutionally-protected expression.”¹¹³ This is a longer and eloquent way to say that BPD engages in dragnet policing targeting blacks in the city, and such policing puts black lives and limbs in peril with little to no consequences for offending officers.¹¹⁴

There is much in the BPD DOJ report that could (and should) be discussed concerning the existence, form, and prevalence of racially targeted dragnet policing by the BPD and the community harm it causes. But for the purposes here – exposing the disconnect between the words and rationale of Justice Thomas’s *Strieff* opinion and the reality of today’s policing in urban, minority-majority neighborhoods – this article focuses on two of the federal investigator’s conclusions about the BPD.

The first is the DOJ’s conclusion that the data revealed a “widespread pattern of BPD officers stopping and detaining people on Baltimore streets without reasonable suspicion that they are involved in criminal activity.”¹¹⁵ More specifically, the federal investigators found that BPD officers “routinely violate” the standards set by *Terry v. Ohio*¹¹⁶ for police to briefly detain a person for an investigation by “detaining and questioning individuals who are sitting, standing, or walking in public areas, even where officers have no basis to suspect them of wrongdoing.”¹¹⁷ This conclusion was derived, in part, from data showing the “extremely low rate” at which BPD’s pedestrian stops uncovered criminal activity.¹¹⁸ Among a reviewed sample of 7,200 pedestrian stops, only 271 stops (3.7%), resulted in BPD officers issuing a criminal citation or arrest.¹¹⁹ This translates to BPD officers

112. *Id.* at 20.

113. *Id.* at 3.

114. The investigation behind these conclusions was extensive and thorough. It involved interviewing the then-current BPD commissioner, former commissioners, current and former BPD officers, leaders of the local police union, hundreds of Baltimore residents, and numerous local community, advocacy, and neighborhood groups. *Id.* at 4. In addition to the interviews, the investigators reviewed “hundreds of thousands of pages of documents,” including BPD policy and training manuals, internal affairs files, and data on stops, arrests, and uses of deadly and non-deadly force by officers. *Id.*

115. *Id.* at 27.

116. 392 U.S. 1, 30 (1968) (holding that police officers may briefly detain an individual for an investigation where the officers possess reasonable suspicion that the person is involved in criminal activity).

117. BPD DOJ REPORT, *supra* note 89, at 28.

118. *See id.*

119. *Id.*

finding and charging criminal activity in only one out of every 27 pedestrian stops.¹²⁰ “Such low ‘hit rates’ are a strong indication that [BPD] officers make stops based on a threshold of suspicion that falls below constitutional requirements.”¹²¹

Frequent pedestrian stops, the federal investigators learned, was a policing tactic that is encouraged, even ordered, by BPD supervisors and management, despite the ineffectiveness of the tactic in uncovering evidence of crimes.¹²² Not only did BPD supervising officers not hide their use of pedestrian stops based on questionable and non-existing reasonable suspicion from DOJ investigators, they openly demonstrated their embrace of the tactic. In one account, contained in the BPD DOJ Report, during a ride-along with DOJ investigators, a BPD sergeant instructed a patrol officer to “make something up” as a basis to stop and question a group of young black males standing on a street corner doing nothing suspicious.¹²³ Over the course of their investigation, the federal investigators found that “[t]his incident [was] far from anomalous.”¹²⁴

Important for the purposes of this article, the DOJ investigators found that “[m]any of the unlawful stops . . . 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 firearm or narcotics.”¹²⁵ Such a finding further shows the emptiness of Justice Thomas’s assurance that it is “unlikely” that his opinion will encourage dragnet stops and searches.¹²⁶ It also fortifies Justice Sotomayor’s warning that Mr. Strieff’s case will not be an isolated incident because the majority opinion provides law enforcement another tool “to target pedestrians in an arbitrary manner” and to treat certain “members of our communities as second-class citizens.”¹²⁷

The related and second conclusion of the DOJ investigators of focus here is that the BPD uses “enforcement strategies that produce severe and unjustified disparities in the rates of stops . . . of African Americans.”¹²⁸ Or stated another way, “BPD disproportionately stops African Americans standing, walking, or driving on Baltimore streets.”¹²⁹ The statistical data was too “overwhelming” to conclude otherwise:

The Department’s data on all pedestrian stops from January 2010 to June 2015 shows that African Americans account for 84 percent of stops despite comprising only 63 percent of the City’s population. Expressed differently, BPD officers made 520 stops

120. *Id.*

121. *Id.*

122. *See id.* at 28–29.

123. *Id.* at 29.

124. *Id.*

125. *Id.* at 28.

126. *See Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016).

127. *Id.* at 2068–69.

128. BPD DOJ REPORT, *supra* note 89, at 3.

129. *Id.* at 48.

for every 1,000 black residents in Baltimore, but only 180 stops for every 1,000 Caucasian residents.¹³⁰

The data also showed that the BPD uses pedestrian stops as a policing tactic disproportionately in the city's black neighborhoods. Of the recorded pedestrian stops from January 2010 through June 2015, 44 percent occurred in two of the city's majority black districts that contain just 11 percent of the city's population.¹³¹ But blacks living, working, or just being present in other districts, including black minority districts, are not immune to the being targeted by BPD officers for pedestrian stops. "Indeed, the proportion of African-American stops exceeds the share of African-American population in each of the BPD's nine police districts, despite significant variations in the districts' racial, socioeconomic, and geographic composition."¹³² For example, in the Central District, which includes the city's downtown business area, blacks accounted for 83 percent of the pedestrian stops during the reviewed time period, while constituting a distant fifty-seven percent of the district's population.¹³³ In the mostly suburban and affluent Northern District, blacks accounted for eighty-three percent of the stops, which was more than double their constitution of the district's population (forty-one percent).¹³⁴ And in the Southeast District, where blacks constitute only twenty-three percent of the population, two out of three BPD pedestrian stops involved black subjects.¹³⁵

When the federal investigators looked closer at the pedestrian stop data, they found that not only are black Baltimoreans disproportionately subjected to BPD pedestrian stops, but that they "are far more likely to be subjected to *multiple stops* within relatively short periods of time."¹³⁶ As explained in the report:

African Americans accounted for 95 percent of the 410 individuals stopped at least ten times by BPD officers from 2010–2015. During this period, BPD stopped 34 African Americans at least 20 times and seven other African Americans at least 30 times. No person of any other race was stopped more than 12 times. One African-American man in his mid-fifties was stopped 30 times in less than four years. The only reasons provided for these stops were officers' suspicion that the man was "loitering" or "trespassing," or as part of a "CDS investigation." On at least 15 occasions, officers detained the man while they checked to see if he had outstanding warrants. Despite these repeated intrusions, none of the 30 stops resulted in a citation or criminal charge.¹³⁷

130. *Id.* (footnote omitted).

131. *Id.* at 5–6.

132. *Id.* at 49.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 50 (emphasis added).

137. *Id.* (footnote omitted).

The data showing the BPD's use of pedestrian stops led federal investigators to the unavoidable conclusion that "BPD's disproportionate enforcement may constitute intentional discrimination."¹³⁸ According to the investigators, the "consistent racial disparities" could not be explained by more benign factors such as "population patterns, crime rates, or other race-neutral factors."¹³⁹ The explanation tilted more towards intentional and invidious discrimination "because the racial disparities are greatest for enforcement activities that involve higher degrees of officer discretion."¹⁴⁰ Simply put, the data-proven disparities provide substantial evidence that pedestrian stops (along with searches and arrests of blacks in the city) "are not part of a calibrated, proportionate strategy for responding to criminal activity," but rather intentional, purposeful, and sanctioned discrimination by the BPD.¹⁴¹

The existence of racial disparities in pedestrian stops has important implications for the thesis here: that *Strieff* encourages and judicially insulates racially targeted dragnet policing of our cities. Racial disparities in pedestrian stops (particularly those involving warrant checks) cannot be divorced from the racial disparities and discrimination in the policing that leads to warrants. It is a mutually dependent situation. If there is racial discrimination in the policing that leads to arrests and the lodging of warrants, then the discriminatory and unconstitutional stops will be sanitized (because of *Strieff*) by the warrants that come from the same well of discrimination.

Baltimore is a perfect example. As the DOJ investigators found when reviewing BPD data from November 2010 through July 2015, black Baltimoreans accounted for 86 percent of all criminal offenses charged by BPD officers even though they constitute 63 percent of Baltimore's population.¹⁴² When compared to the arrest rates of residents of other races, black Baltimoreans were charged at a rate of one criminal offense per 1.4 resident, while other races were charged at rate of one criminal offense per 5.1 residents.¹⁴³ The disparities, according to the federal investigators, were not explained by race-neutral factors (such as population patterns or crime rates) or by legitimate law enforcement objectives. Rather, the data led the DOJ to conclude that the disparities were the result of racially-discriminatory police tactics, such as arresting blacks for misdemeanor offenses based on low evidentiary thresholds, and over-policing of blacks for drug-related offenses.¹⁴⁴

It is a simple path: racially discriminatory policing leads to a disproportionate number of arrests and misdemeanor citations involving people of color, which leads to a disproportionate number of warrants being lodged against people of color, which leads to a disproportionate number of baseless and unconstitutional stops of people of color being sanitized by *Strieff*. Baltimore evidences this path, but it is not alone in doing so. For example, in Ferguson,

138. *Id.* at 63. This conclusion was also based on the investigators' review of data concerning BPD's searches and arrests practices.

139. *Id.*

140. *Id.* at 64.

141. *Id.* at 61–62.

142. *Id.* at 7.

143. *Id.* at 55.

144. *Id.* at 64.

Missouri, as DOJ investigators discovered when reviewing the Ferguson Police Department's ("FPD") practices from 2012 through 2014, blacks constituted 67 % of the city's population, but accounted for "85 % of vehicle stops, 90 % of citations, and 93 % of arrests by FPD officers."¹⁴⁵ After reviewing and investigating the data, the federal investigators concluded that "Ferguson's approach to law enforcement both reflects and reinforces racial bias," and that the racial disparities present within the FPD's data on arrests, citations, stops, and searches provided ample evidence that the disparities are "due in part to intentional discrimination on the basis of race."¹⁴⁶

In sum, in an environment such as Baltimore, where racially-discriminatory policing has not only been allowed but encouraged, it is easy to see how *Strieff* will make it worse for those at the receiving end of the discrimination. Indeed, as federal investigators found in Baltimore, BPD officers conducted warrant checks in 73 percent of all pedestrian stops¹⁴⁷ and routinely stopped people, mostly black people, on fishing expeditions for warrants *before* the *Strieff* decision.¹⁴⁸ Now that the Supreme Court has blessed the practice, BPD officers have more license and incentive to engage in baseless fishing expedition stops. As of January 2017, there were an estimated 35,000 active warrants in Baltimore, which included about 6,800 outstanding warrants for people who missed court dates for non-violent misdemeanors.¹⁴⁹ As a result of *Strieff*, BPD officers are now armed with thousands of justifications for engaging in dragnet pedestrian stops for reasons falling far short of reasonable suspicion or probable cause. With the city's recent history as a guide, it is clear that black Baltimoreans will continue to overwhelmingly and disproportionately bear the brunt of this practice that is sure to expand post-*Strieff*.

V. JUST A FANTASY: JUSTICE THOMAS'S CLAIM THAT CIVIL LIABILITY IS A SUFFICIENT DETERRENT AGAINST RACIALLY TARGETED DRAGNET POLICING

As just shown, Justice Thomas's claim that it is "unlikely" that his opinion will open the flood gates to police engaging in dragnet stops in search of warrants ignores what was happening to black people in cities before *Strieff* made the practice more attractive and judicially protected. The other half of his claim — that civil

145. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. The investigation was initiated in large part to the shooting death of Michael Brown, an 18 year-old black resident of the city, by a white police officer (Darren Wilson) on August 9, 2014, and the days of protests and unrest that followed. *Id.* at 5. A separate civil rights investigation of the shooting found that there were insufficient grounds for federal civil rights charges against Officer Wilson.

146. *Id.*

147. BPD DOJ REPORT, *supra* note 89, at 28 n.43.

148. *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.").

149. Justin Fenton, *Court Offers Help Clearing Warrants for Failing to Appear in Court*, BALTIMORE SUN (Jan. 9, 2017), <https://www.baltimoresun.com/news/crime/bs-md-ci-warrant-second-chance-20170109-story.html> [<https://perma.cc/DMB4-N8U4>].

lawsuits are a deterrent and protection against “[s]uch wanton conduct” — is equally ignorant.¹⁵⁰

A. Section 1983 Lawsuits Are Not An Affordable Or Viable Option

The regular vehicle for victims seeking compensation for police misconduct is a lawsuit pursuant to 42 U.S.C. Section 1983. Section 1983 allows a person to sue state governments, police officers, state government employees, and others acting “under the color of” state law for committing civil rights violations.¹⁵¹ Since its enactment, Section 1983 has been instrumental in providing people harmed by unlawful police conduct the means to have their claims heard, taken seriously, and compensated. The law certainly does deter some unconstitutional police conduct at the individual and institutional levels. For many reasons, this argument does not extend to racially targeted dragnet and baseless stops now given further legal cover by *Strieff*.

For starters, to claim that the specter of civil liability is a sufficient deterrent to prevent police from abusing the dragnet policing license granted by *Strieff* is to erroneously presume that those negatively (and disproportionately) affected by the practice have the ability and means to pursue such a remedy. Pursuing a civil suit against a police department or officer takes time and money — two commodities that many in the inner city who are affected by dragnet warrant fishing expeditions do not have in abundance. The financial costs of pursuing a lawsuit for an unconstitutional pedestrian stop — retaining an attorney, court fees, and lost wages for days spent in court, depositions, and other proceedings — offer far more deterrence to pursuing a Section 1983 lawsuit than the deterrence offered to law enforcement by the possibility of a Section 1983 lawsuit. Regardless of economic status, the litigation costs are barriers to seeking relief. For many of the urban poor affected by dragnet policing deterrence is unaffordable.

This leads to the second reason that Section 1983 lawsuits will not deter police officers from conducting racially targeted fishing expedition stops without legal justification: dubious damages. The harm caused by a suspicionless, fishing-expedition stop that did not lead to an arrest is “difficult to quantify in financial terms.”¹⁵² Without an arrest or detention, any physical or mental harm caused by a baseless stop that lasts only minutes may appear fleeting to many juries, and therefore result in only nominal damages.¹⁵³ For most potential plaintiffs, the likelihood of nominal damages is too much a Pyrrhic victory when balanced against the expense, time, and emotional commitment to pursue a Section 1983 lawsuit for a baseless stop. Nominal damages are a disincentive to plaintiff attorneys as well.¹⁵⁴ The likelihood that only nominal damages await at the end of a Section 1983 lawsuit

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

151. 42 U.S.C. § 1983 (2012).

152. Katherine A. Macfarlane, *Predicting Utah v. Strieff's Civil Rights Impact*, 126 YALE L. J. F. 139, 144 (2016) (quoting Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 432 (2012)).

153. *See id.* at 144–45.

154. *See id.* at 146 (“The availability of attorneys’ fees does not necessarily make *Strieff*-like cases attractive [to attorneys]. To obtain attorneys’ fees, a civil rights plaintiff must prevail.”).

based on a suspicionless and racially motivated stop provides even more deterrence against filing of a lawsuit.

The law also provides a significant obstacle to pursuing a Section 1983 claim — qualified immunity for officers. In Section 1983 cases, the “doctrine of qualified immunity prevents government agents from being held personally liable for constitutional violations unless the violation was of ‘clearly established law.’”¹⁵⁵ According to the Supreme Court, the immunity protects “all but the plainly incompetent or those who knowingly violate the law.”¹⁵⁶ The Supreme Court is not shy in stating that the goal of qualified immunity is “to avoid ‘subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ in cases where the legal norms the officials are alleged to have violated were not clearly established at the time.”¹⁵⁷ In keeping with this goal, qualified immunity is judicially designed to frustrate the ability of Section 1983 plaintiffs to pursue their claims. It can be, and often is, raised early in a Section 1983 case, so that a plaintiff’s case is dismissed before any discovery is exchanged or taken, and judges have the discretion to apply the immunity to dismiss a lawsuit even before it is invoked by a Section 1983 defendant. And if by chance a claim of qualified immunity is defeated at the trial level, Section 1983 police officer defendants have comfort in knowing that the Supreme Court will likely rescue them. The Supreme Court “dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts.”¹⁵⁸ Since 1982, the Supreme Court has decided thirty-two qualified immunity cases and has found that the defendant violated “clearly established law” in just two of the cases.¹⁵⁹ “In these decisions, the Court regularly chides [lower] courts for denying qualified immunity motions given the importance of the doctrine ‘to society as a whole.’”¹⁶⁰ With the Supreme Court’s backing and support, qualified immunity has become an effective and efficient obstacle to Section 1983 lawsuits based on police misconduct. Today, it is “nearly impossible to find clearly established law that would defeat the defense.”¹⁶¹

For people seeking to show that a police department as an institution uses unconstitutional dragnet stops as a policing tactic, the burdens (and therefore the obstacles) are even greater and provide even more disincentives to pursue a lawsuit.¹⁶² As shown by the DOJ’s investigation of Baltimore (as well as Ferguson and other cities), proving that a police department engages in widespread and

155. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 46 (2018).

156. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

157. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982)).

158. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018); see also Samuel L. Bray, *The Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 1793, 1793 (2018) (“The Court issues many summary reversals in qualified immunity cases, and the effect of these reversals is all in one direction: they protect, entrench, and extend the defense of qualified immunity.”).

159. Schwartz, *supra* note 158, at 1798 n.2.

160. *Id.* at 1798 (quoting *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017)).

161. *Id.* For more on qualified immunity, its history, and how it frustrates Section 1983 claims, see, e.g., Baude, *supra* note 155.

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

institutional misconduct is an onerous effort requiring significant resources and time. To reach their findings that the BPD engages in unconstitutional policing, DOJ investigators “reviewed hundreds of thousands of pages of [BPD] documents” including years of training materials, internal affairs files, pedestrian and vehicle stop data, arrest data, incident reports, deadly force reports, and investigation files.¹⁶³ The investigators also interviewed city leaders, current and former BPD commissioners, current and former BPD officers, the police union’s leadership, and “hundreds of people in the broader Baltimore community.”¹⁶⁴ The federal investigators were “assisted by a dozen current and former law enforcement leaders and experts with experience on the issues” as well as “statistical experts to analyze BPD’s data on its enforcement activities.”¹⁶⁵ It is unreasonable to expect the average citizen who seeks to challenge, bring to light, and seek redress from dragnet policing misconduct to be able to marshal comparable resources, receive the same level of cooperation from a police department and city leaders, and have the same access to police data and documents. Yet, that is what it takes to demonstrate the “systemic or recurrent police misconduct” *Strieff* expects and demands, and Justice Thomas fails to provide a less burdensome and resource intensive alternative.¹⁶⁶

B. How Baltimore Exposes Justice Thomas’s Deterrence Claim as Fantasy

Justice Thomas’s claim that civil liability provides a sufficient deterrence against dragnet policing abuse wrongly presumes that the systems in place to police the police will provide the necessary means, i.e., process and evidence, to allow such civil lawsuits to proceed and be successful. For Justice Thomas’s deterrence effect to be realized, there must be a process that facilitates a civilian pursuing a claim of improper policing. This process starts with the police department itself. A department must have accessible means for a civilian to bring attention to improper policing and for such claims to be taken seriously, investigated, and acted on by the department if the claims are substantiated. The process yields a necessity for the successful pursuit of a civil lawsuit: evidence of police misconduct. Without evidence of unconstitutional conduct by police — either by individual officers or police departments as a whole — civil litigation is doomed to fail and offer no deterrence value.

Baltimore, yet again, shows Justice Thomas’s disconnect from reality. This time it is his presumption that police departments act counter to their self-interest and provide a meaningful process for civilians to pursue and obtain data that can be used in litigation to demonstrate individual or institutional malfeasance. The DOJ BPD Report amply reveals how the reality is far different from Justice Thomas’s view of the world. The DOJ’s review included an assessment of how the BPD responds to civilian complaints and how the department investigates and punishes officers for unprofessional and unconstitutional conduct. The assessment involved,

163. BPD DOJ REPORT, *supra* note 89, at 4.

164. *Id.*

165. *Id.*

166. 136 S. Ct. at 2068. Justice Sotomayor notes that Justice Thomas’s opinion fails to “offer guidance for how a defendant can prove that his arrest was the result of ‘widespread’ misconduct.” *Id.* at 2069.

in part, the DOJ reviewing the procedures and efficacy of the department's central accountability system: BPD's Internal Investigation Division (IID).¹⁶⁷

The DOJ's final assessment of BPD's IID and the department's related systems for investigating civilian complaints and police misconduct is stark and plain: "BPD relies on deficient accountability systems that fail to curb unconstitutional policing."¹⁶⁸ According to the federal investigators, the deficiencies run "throughout" BPD's accountability systems, and "undermine adherence to BPD's policies and procedures and contribute to the violations of federal law that [were] found."¹⁶⁹

A number of the discovered deficiencies contribute directly to the inability of Baltimore residents to pursue civil claims against BPD officers and/or the department, and as result put the deterrence heralded by Justice Thomas far out of reach. For instance, the federal investigators discovered that "BPD discourages members of the public from filing complaints against officers through the procedural requirements BPD has imposed on filing complaints, and BPD officers and supervisors have actively discouraged community members from filing complaints."¹⁷⁰ In other words, the BPD *actively and purposefully* creates barriers to prevent the community from bringing attention to, challenging, and seeking relief for improper police conduct.

If a complaining civilian resists the department's efforts to discourage the filing of a complaint, federal investigators discovered that the BPD engages in tactics and erects other obstacles to derail a complaining civilian's efforts to expose police misconduct. For instance, once a complaint is filed, "BPD investigators frequently misclassify those complaints or administratively close them with little attempt to contact the complainant."¹⁷¹ Misclassifying complaints allows the BPD to avoid forwarding the complaints to IID for investigation and resolution.¹⁷² Once a civilian complaint is accepted by the BPD (and not forwarded to IID due to intentional misclassification), it is likely to be administratively closed by a BPD supervisor. "Indeed, BPD supervisors administratively closed 33 percent of all allegations received from 2010 through 2015—ensuring that the allegations would result in no further investigation or officer discipline."¹⁷³ These administrative closures frequently occurred following minimal, if any, investigation.¹⁷⁴

In the rare occasions that civilian complaints progress to the investigation stage "they are hampered from the start by poor investigative techniques and

167. See BPD DOJ REPORT, *supra* note 89, at 139 ("IID investigates and resolves complaints of officer misconduct, both complaints received internally from other officers or BPD employees, and those received from members of the community.").

168. *Id.*

169. *Id.* at 140.

170. *Id.* Some of the procedures that created barriers to filing a complaint noted by the investigators included requiring complaints for common types of police conduct to be notarized and filed in person in a few select locations.

171. *Id.* at 141.

172. See *id.*

173. *Id.* at 142.

174. See *id.*

unreasonable delays.”¹⁷⁵ The federal investigators discovered that basic and routine investigation tasks—e.g., interviewing the complainants, interviewing the accused officers, interviewing witnesses identified by the complainants, canvassing the area where the alleged misconduct occurred for witnesses and evidence (such as surveillance camera video)—“are frequently plagued by delays.”¹⁷⁶ The delays can last up to ten months.¹⁷⁷ Delays undermine the investigations and weaken the viability of a civilian’s complaint because evidence can be lost or destroyed, witnesses are lost never to be found again, and witness memory fades.¹⁷⁸ In short, the unnecessary delays “preclude[s] BPD investigators from gathering important evidence about allegations of serious misconduct.”¹⁷⁹

“In addition to frequent delays that limit the information available about misconduct allegations, poor investigative techniques further compromise BPD’s investigations.”¹⁸⁰ The federal civil rights investigators identified “several key failures” when reviewing the BPD’s techniques and procedures for investigating police misconduct claims. “First, investigators fail to adequately consider evidence and statements from witnesses or other officers that contradict explanations provided by officers accused of misconduct.”¹⁸¹ The DOJ found that BPD investigators had a pro-officer bias that manifested in allowing accused officers to submit clarifying addendums to original statements that were contradicted by witness statements or other evidence, and discounting entirely evidence that contradicted the accused officer’s account.¹⁸² The bias is most pronounced in deadly force investigations. The interviews of BPD officers involved in deadly force incidents are commonly “conclusory and superficial,” last no longer than 10 or 15 minutes, and regularly fail to include “critical questions about the threat they faced or their decision-making process leading up to their [use of] deadly force.”¹⁸³ In comparison, the “BPD’s interviews of civilian witnesses . . . often last hours, and the investigators ask specific, probing questions, demonstrating their ability to be thorough and exacting.”¹⁸⁴

The second key failure discovered by the DOJ investigators is that “BPD investigators compromise officer interviews by failing to probe beyond reports the accused officer already provided, and performing unrecorded ‘pre-interviews’ with accused officers.”¹⁸⁵ The federal investigators found “numerous instances” in which

175. *Id.*

176. *Id.*

177. *See id.* at 142–43.

178. *See id.* at 107. An investigation into an officer’s use of deadly force is not immune from such compromising delays. The delays appear to be by design. It is standard practice that BPD investigators do not interview an officer who discharges his/her weapons until *after* the State Attorney’s Office issues a letter declining to prosecute the officer for a criminal act. It regularly takes the State Attorney’s Office many months to issue such a declination letter. In some cases uncovered by the DOJ investigators, the letter did not come until up to two years after the shootings. *Id.* at 107–08.

179. *Id.* at 143.

180. *Id.* at 144.

181. *Id.*

182. *See id.*

183. *Id.* at 108.

184. *Id.*

185. *Id.* at 144.

the official investigation interviews consisted of the accused officers orally reciting their statements or administrative reports that they had reviewed just prior to the interview, and the IID investigators not asking any questions.¹⁸⁶

This leads to the third failure discovered by the DOJ investigators: “BPD risks compromising investigations by providing accused officers with a detailed notice describing the alleged misconduct, often right after a complaint has been filed and before any investigation occurs.”¹⁸⁷ The notice is not required policy, but is frequently provided almost immediately after a complaint is filed and before any investigative steps have been taken, and provides critical details about the allegation and the civilian accuser.¹⁸⁸

These three failures just scratch the surface of the problems the federal investigators found with the BPD’s practices for investigating police misconduct. Indeed, the DOJ Report notes troubling issues at every level of the BPD’s process for handling and investigating police misconduct complaints from the initial intake of complaints to the supervision of complaint investigations.¹⁸⁹ Not surprisingly, these deficiencies “contribute to BPD’s extremely low rate of sustaining allegations of officer misconduct, which in turn leads to a lack of discipline and accountability in the Department.”¹⁹⁰ Data reviewed by the DOJ investigators revealed that the disciplining of a BPD officer for misconduct is a rarity:

Of the 1,382 allegations of excessive force that BPD tracked from 2010 through 2015, only 31 allegations, or 2.2 percent were sustained. These allegations arose out of fourteen separate incidents. In light of the significant evidence of excessive force we found in our investigation, the low rate of sustaining excessive force complaints is troubling. Similarly, BPD completed investigations into 1,359 allegations of discourtesy from 2010 through 2015, and sustained just 2.6 percent of those allegations, arising out of just fifteen incidents. This low number of sustained outcomes is also concerning, considering the number of community members we spoke to who described BPD officers behaving in a rude or abusive manner during encounters with community members.¹⁹¹

In sum, the BPD is unable to police itself. Not only does the BPD fail to provide Baltimoreans a means of seeking redress for officer misconduct, the department actively discourages and stymies civilian efforts to hold offending officers responsible for their unprofessional and unconstitutional conduct.

186. *Id.*

187. *Id.*

188. *See id.* at 144–45. Maryland’s Law Enforcement Officer’s Bill of Rights requires that that an accused officer obtain a basic notice of the allegations and five days to obtain counsel prior to questioning.

189. *See, e.g., id.* at 145 (“The deficiencies in BPD’s investigative techniques persist in part because of ineffective supervision and training. Indeed, we found that most investigators receive no formal investigative training.”).

190. *Id.* at 146.

191. *Id.*

Unfortunately, the BPD is not an anomaly. Federal pattern and practice investigations of police departments from around the country, particularly those in cities with large black populations, have found similar accountability failures and deficiencies. Federal investigators determined that the police department of Ferguson, Missouri lacked “any meaningful system for holding officers accountable when they violate law or policy,” and the department did “little to investigate the external allegations that officers have not followed FPD policy or the law.”¹⁹² An investigation of the Chicago Police Department (“CPD”) “confirmed that CPD’s accountability systems are ineffective at deterring and detecting misconduct, and at holding officers accountable when they violate the law or CPD policy.”¹⁹³ Federal investigators found that it was New Orleans Police Department practice and policy to “exclude from investigation many categories of serious officer misconduct and fail to adequately investigate and track allegations of discriminatory policing.”¹⁹⁴ A 2014 federal review of the Cleveland Police Department concluded that the department’s accountability systems fell “woefully short” in large part because investigations of officer misconduct “are neither timely nor thorough, that civilians face a variety of barriers to completing the compliant process, and that the system as a whole lacks transparency.”¹⁹⁵

As Baltimore (as well as Ferguson, New Orleans, Chicago, and Cleveland) demonstrates, the self-protection instinct of police department is a powerful force. This instinct translates into processes and procedures that frustrate a civilian’s ability to seek acknowledgement and redress through the department for unconstitutional policing. This in turn impedes the collection of data that could be used in civil litigation to prove that a police officer and/or a police department is engaging in unconstitutional policing. The lack of available data further weakens the deterrent effect offered by civil liability against dragnet policing abuse.

192. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., *supra* note 145, at 82. In a near identical echo of the BPD findings, federal investigators found that the Ferguson police department “makes it difficult to make complaints about officer conduct” and “discourages individuals from making complaints” about officer conduct. *Id.* And even when a citizen pushes through the discouragement and obstruction to report officer misconduct “there is a significant likelihood it will not be treated as a complaint and investigated.” *Id.* at 83.

193. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE, N. DIV. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 47 (2017), <https://www.justice.gov/opa/file/925846/download>. Federal investigators found “consistent patterns of egregious investigative deficiencies that impede the search for the truth,” and that police misconduct investigations by CPD “foundered because of the pervasive cover-up culture among CPD officers, which the accountability entities accept as an immutable fact rather than something to root out.”

194. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 79 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

195. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 38 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf.

C. DOJ Investigations & Consent Decrees: Only As Powerful As Those Charged With Enforcing Them.

A natural response to the criticisms raised in this article is that the DOJ investigations and reports concerning the police departments of Baltimore and the other cities show that “the system” effectively confronts and redresses discriminatory policing, and therefore any harm caused by *Strieff* will be detected and mitigated. But while the BPD DOJ Report (and the similar reports concerning other police departments) is a welcomed and important change agent, its reach and power are limited. First of all, the report does very little to mitigate the humiliation, frustration, life disruption, and diminished self-worth experienced by black Baltimoreans who lived for years (and continue to live) under the BPD’s unchecked regime of race-driven unconstitutional stops, searches, and arrest. The report comes way late for the hundreds to thousands of black Baltimoreans who lived under, and were affected by, the years of unchecked racially targeted dragnet policing, such as the 34 black city residents who were stopped at least 20 times, and the seven black residents who were stopped at least 34 times in 2010 through 2015.¹⁹⁶

Moreover, DOJ reports are change agents only if the respective departments actually implement meaningful change in response. To avoid litigation, a regular course after the DOJ finds that a police department engages in unconstitutional practices, is for the DOJ and the police department (and/or the jurisdiction the police department is located in) to enter into a consent decree addressing the department’s deficiencies and problems. Consent decrees are binding agreements that must be approved by a federal judge and overseen by a federal monitor. The agreements detail the reforms and other practice and policy changes a police department must institute to achieve fair and constitutional policing and establish trust with its respective community. There are currently fourteen consent decrees in place between the DOJ and police departments around the country, including Baltimore and its police department.¹⁹⁷

Not surprisingly, some police departments are better at implementing the reforms required under a consent decree than others. For Baltimore, the progress for the first year under the consent decree was mixed. Of course, as acknowledged by the federal monitor overseeing the city’s consent decree, “Achieving transformational change in a large police department does not happen overnight.”¹⁹⁸ According to the first semi-annual report of the decree’s monitor, the BPD made considerable progress towards the goals and obligations of the consent decree, including revising policies regarding use of force, stop and searches, body camera

196. BPD DOJ REPORT, *supra* note 89, at 50.

197. See Jacey Fortin, *Jeff Sessions Limited Consent Decrees. What about the Police Departments Already Under Reform?*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/sessions-consent-decrees-police.html> [https://perma.cc/CE3N-MHQT]; Kevin Rector, *Federal Judge Approves Baltimore Policing Consent Decree, Denying Justice Department Request for Delay*, BALT. SUN (Apr. 7, 2017), <https://www.baltimoresun.com/maryland/baltimore-city/bs-md-ci-consent-decree-approved-20170407-story.html> [https://perma.cc/WS4L-MWK5].

198. BPD MONITORING TEAM, BALTIMORE POLICE DEPARTMENT MONITORING TEAM, FIRST SEMI-ANNUAL REPORT 2 (2018), <https://static1.squarespace.com/static/59db8644e45a7c08738ca2f1/t/5b4f83b070a6ad75b5b8adb9/1531937719069/BPD+-+First+Semiannual+Report+7-18-18.pdf>.

use, transportation of persons in custody, and sexual assault investigations, and has “demonstrated a genuine commitment to reform.”¹⁹⁹ But the news was not all positive. The monitor noted that while the political leadership of the Baltimore and the BPD’s leadership are “fully committed to reform” it is still an open question whether “BPD has the *capacity* to implement the linchpin requirements of the Consent Decree.”²⁰⁰ In other words, at this early stage of the consent decree the federal monitor remains unconvinced that the BPD has the ability to obtain and utilize the technology and staffing (including patrol officers) to “fulfill the Consent Decree’s community-oriented policing goals.”²⁰¹

However, it is another of the decree monitor’s early findings that is of critical importance to this article. The finding concerns the BPD’s response to the shooting death of an on-duty detective after the federal monitor had been in place.²⁰² The BPD’s response included:

(1) stopping civilians and restricting access to a large, six square-block area around the crime scene for several days after the threat of an armed and dangerous suspect had dissipated; (2) ***conducting warrant checks (i.e., investigations) of the stopped individuals without reasonable suspicion or probable cause to believe that the individuals had committed a crime***; (3) searching certain individuals at or inside the perimeter of the six square-block area without probable cause and patting down at least one other person without reasonable suspicion to believe he had a gun; (4) failing to properly document whether there was probable cause for certain arrests and whether individuals interviewed about the shooting voluntarily consented to be interviewed²⁰³

This response, in the eyes of the federal monitor, “calls into question the [BPD’s] underlying capacity to ensure that its officers make stops, searches and arrests consistent with the Consent Decree.”²⁰⁴ For the BPD to engage in dragnet policing while a *federal monitor is scrutinizing the department* raises significant concern and doubt that the BPD, institutionally and at the individual officer level, has the capability and will to end its history of racially discriminatory policing.

Finally, the force and utility of consent decrees, as well as the ability of the DOJ to investigate police departments and uncover patterns and practices that

199. *Id.* at 6–7.

200. *Id.* at 6.

201. *Id.* at 6–7.

202. See Justin Fenton & Ian Duncan, *Panel Finds Baltimore Police Det. Sean Suiter’s Death Was Likely Suicide, Not Murder, Attorney for Widows Says*, BALT. SUN (Aug. 27, 2018), <https://www.baltimoresun.com/news/crime/bs-md-ci-suiter-irb-suicide-20180827-story.html> [https://perma.cc/3JMZ-YYKT]. On November 15, 2017, Detective Sean Suiter was shot and killed while conducting an investigation. He was shot in the head with his own service weapon. Suiter was shot one day before he was supposed to testify before a federal grand jury about misconduct involving the BPD’s specialized gun task force unit. Suiter’s death was later determined to be a suicide. *Id.*

203. BPD MONITORING TEAM, *supra* note 198, at 17 (emphasis added).

204. *Id.*

promote, hide, and fail to punish unconstitutional conduct, are at the whim of the Attorney General and the presidential administration she/he serves. The Obama administration actively investigated police departments, particularly when officer caused fatalities and other events lead to community protests and unrest. The DOJ, under President Obama, opened twenty-five civil rights investigations into police departments and sheriff offices around the country.²⁰⁵ This activist approach resulted in consent decrees with Baltimore, Ferguson, Cleveland, and other cities.

The Trump administration's approach is 180 degrees unapologetically different. Soon after his appointment, then-Attorney General Sessions directed the DOJ leadership to review all consent decrees and assess whether the decrees aligned with the new administration's law enforcement objectives, principles, and policies.²⁰⁶ Many criminal justice reform activists feared that the review was the first step toward rolling-back and neutering existing consent decrees. This fear proved warranted when Session's DOJ took aim at the Baltimore consent decree by asking the federal judge charged with approving the decree, to delay his approval because the Attorney General had "grave concerns" about the consent decree's ability to simultaneously promote public safety, strengthen law enforcement, and protect civil rights.²⁰⁷

The former Attorney General's animus toward consent decrees is so consuming and complete that one of his last official acts was to undercut and reduce their use and efficacy. On his way out the door, having been fired by the president, Sessions issued a departmental policy memorandum that criticizes consent decrees as encroachments on state sovereignty, raises the bar for when the DOJ can enter into consent decrees, and imposes new requirements for the implementation and execution of consent decrees.²⁰⁸ Under this new policy, a consent decree is appropriate only if one or more of the following factors are present:

1. The [government entity] has an established history of recalcitrance or is known to be unlikely to perform because, for example, the [government entity] has violated other related administrative orders, judicial orders, settlement agreements, or consent decrees.

205. See Pete Williams, *AG Sessions Says DOJ to 'Pull Back' on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2017, 11:47 AM), <https://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-n726826> [<https://perma.cc/53ES-VPL4>].

206. See Motion for Continuance of Public Fairness Hearing at ¶ 6, *United States v. Police Dep't of Balt.*, No. 1:17-cv-00099-JKB (D. Md. 2017), ECF No. 23.

207. Laura Jarrett & David Shortell, *DOJ Has 'Grave Concerns' over Baltimore Police Reform Plan*, CNN (Apr. 6, 2017), <https://www.cnn.com/2017/04/06/us/baltimore-consent-decree-public-hearing/index.html> [<https://perma.cc/458V-Q9YS>]. In denying the DOJ's delay request and approving the consent decree, United States District Court Judge James K. Bredar wrote: "The time for negotiating the agreement is over." Rector, *supra* note 197.

208. See Katie Benner, *Sessions, in Last-Minute Act, Sharply Limits Use of Consent Decrees to Curb Police Abuses*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/sessions-limits-consent-decrees.html> [<https://perma.cc/C54Y-QMDZ>]; see also Memorandum from Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, to Heads of Civ. Litigating Components U.S. Attorneys (Nov. 7, 2018), <https://www.justice.gov/opa/press-release/file/1109621/download>.

2. The [government entity] has unlawfully attempted to obstruct the investigation by, for example, engaging in spoliation.

3. The [government entity] has engaged in a pattern or practice of deprivations of rights or other violations of federal law, and other remedies have proven ineffective, such that ensuring compliance without the ongoing supervision of a court is unrealistic.

4. A consent decree is necessary to secure statutory protection or relief for the [government entity], such as statutory protection against challenges and claims by third parties or statutory relief that preempts state law.²⁰⁹

In sum, under this new policy, it is not enough for a police department to have been found to practice unconstitutional and discriminatory policing that erodes the community-police relationship. A consent decree is now appropriate only when there is discrimination-plus – i.e., discrimination plus a history of resisting reforms, obstruction of the DOJ’s investigation of the police department, and/or the failure of alternative remedies.²¹⁰ And if approval is given, the new policy imposes requirements that limit the force and power of a consent decree to bring about institutional change. For instance, the new policy sets a three-year time limit on consent decrees, requires consent decrees to include a “sunset” provision that terminates the agreements upon a showing that the government entity “has come into durable compliance with the federal law that gave rise to the decree,” and forbids using consent decrees “to achieve general policy goals or to extract greater or different relief from the [government entity] than could be obtained through agency enforcement authority or by litigating the matter to judgment.”²¹¹

VI. CONCLUSION

In characterizing the unlawful stop of Mr. Strieff as an “isolated instance of negligence,” Justice Thomas downplayed (or ignored) the Pandora’s box of harm set free by his opinion.²¹² It is a characterization that drew ire from Justice Sotomayor for good reason.²¹³ DOJ investigations and reports concerning police departments in Baltimore, Ferguson, and other cities, show in stark and plain terms that black (and increasingly brown) people in our cities are disproportionately targeted by police for dragnet stops and searches without legal cause or justification. Today, we can no

209. Memorandum from Jeff Sessions, *supra* note 208, at 4.

210. To be clear, however, the presence of one or more discrimination-plus factors does not “guarantee approval of a consent decree.” *Id.*

211. *Id.* at 5.

212. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

213. *See id.* at 2068 (Sotomayor, J., dissenting) (“Respectfully, nothing about this case is isolated.”); *id.* at 2069 (Sotomayor, J., dissenting) (“That does not mean these stops are ‘isolated instance[s] of negligence,’ however. Many are the product of institutionalized training procedures.”) (citation omitted).

longer “pretend that the countless people who are routinely targeted by police are ‘isolated.’”²¹⁴

Strieff, combined with the widespread prevalence of warrants, not only justifies, but encourages, such unconstitutional targeting. The majority opinion tells police officers that unconstitutional conduct—stopping and seizing citizens without legal justification and for unlawful bases such as race, will be completely sanitized after the fact by something as simple and unrelated as a warrant for an outstanding traffic ticket. In practice, the majority opinion is an endorsement of racially targeted dragnet policing, and the specter of civil lawsuits or federal civil rights investigations will not curb the use of the tactic nor provide sufficient remedies to those who will suffer because of it.

The *Strieff* decision and how it will be used comes with a cost, and not just the cost to the people (mostly of color) who will suffer because of it. There is a societal cost that eventually has to be paid. As James Baldwin cautioned, “[T]he most dangerous creation of any society is that man who has nothing to lose.”²¹⁵ Eventually, the community frustration and indignity that comes with being treated as second-class citizens and subjects of a carceral state by the police reaches a boiling point and boils over.²¹⁶ It happened in Baltimore on April 27, 2015, after Freddie Gray, a 26-year old black man who had lived and grown up in the Sandtown-Winchester neighborhood discussed earlier, died as a result of injuries he sustained while in police custody.²¹⁷ In the immediate days after Mr. Gray’s death, Baltimore was besieged with protests (mostly peaceful) calling for police reform and the arrest of the officers connected to Mr. Gray’s death.²¹⁸ Hours after Mr. Gray’s funeral a

214. *Id.* at 2071 (Sotomayor, J., dissenting).

215. JAMES BALDWIN, *THE FIRE NEXT TIME*, 90 (Delta Publ’g Co., Inc. 1963).

216. *See Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting) (“It implies that you are not a citizen of democracy but the subject of a carceral state, just waiting to be cataloged.”).

217. On April 12, 2015, at about 8:45 am, Mr. Gray while standing on a street in his neighborhood, made eye contact with patrolling police officers, and according to the charging documents filed by the police, Mr. Gray then “fled unprovoked.” *See* Eyder Peralta, *Timeline: What We Know About the Freddie Gray Arrest*, NPR (May 1, 2015), <https://www.npr.org/sections/thetwo-way/2015/05/01/403629104/baltimore-protests-what-we-know-about-the-freddie-gray-arrest> [<https://perma.cc/7QTV-A7PX>]. After a brief foot chase, police apprehended and searched Mr. Gray, finding a knife clipped to the inside one of Mr. Gray’s pants pocket. Mr. Gray was then arrested. According to the official police report about the incident, Mr. Gray was arrested without force or incident. But a witness to the arrest alleged that the arresting officers forcefully folded Mr. Gray like “a piece of origami,” with one officer putting his knee in Mr. Gray’s back while another bent Mr. Gray’s legs backward. All the while, according to the witness, Mr. Gray was “screaming for his life.” Mr. Gray was placed in the police transport van with his hands handcuffed and his legs shackled. He was placed head first on the floor, on his stomach, and not secured or buckled-in. At some point between his arrest and a long-ride in the police van through West Baltimore, Mr. Gray suffered a serious spinal injury. He was transported to the hospital where he had surgery. Seven days later, April 19, Mr. Gray died. His death was ruled a homicide. *Id.*

218. Six Baltimore police officers were charged by Baltimore’s state attorney’s office for various offenses related to Mr. Gray’s arrest and death. *See* Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions Against Officers*, BALT. SUN (July 27, 2016), <https://www.baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://perma.cc/8P3N-7WFD>]. The high-profile prosecution ended with zero convictions. The state attorney’s office dropped their cases against three of the officers after the other three officers were acquitted in bench trials. *Id.*

few days later, however, Baltimore exploded as the protests were replaced with riots during which buildings and cars were set on fire, businesses were looted, and police and first responders were attacked.²¹⁹ Interviews of the protesters, rioters, and other Baltimoreans revealed in plain terms that a principal cause for the unrest was not racial in the sense of black versus white, but rather black versus blue, i.e. the police officers the black community viewed as occupiers imposing oppressive control and abuse under the guise of policing. As a Baltimore church's reverend explained to reporters during the riots, "Police have a tradition to dehumanize, to beat down and to show people who's in charge. . . . It's the blue uniform."²²⁰

Through *Strieff*, the Supreme Court has added to law enforcement's arsenal of stripping people of their citizenship and humanity. The decision now allows police officers cover to engage in baseless racially targeted dragnet stops with little fear of reprisal or discipline. The message of the majority opinion to black Americans is clear: "your body is subject to invasion while courts excuse the violation of your rights."²²¹

219. See Holly Yan & Dana Ford, *Baltimore Riots: Looting, Fires Engulf City After Freddie Gray's Funeral*, CNN (Apr. 28, 2015), <https://www.cnn.com/2015/04/27/us/baltimore-unrest/index.html> [<https://perma.cc/NB4S-P7FZ>].

220. Peter Hermann, John Woodrow Cox & Ashley Halsey III, *After Peaceful Start, Protest of Freddie Gray's Death in Baltimore Turns Violent*, WASH. POST (Apr. 25, 2015), https://www.washingtonpost.com/local/baltimore-readies-for-saturday-protest-of-freddie-grays-death/2015/04/25/8cf990f2-e9f8-11e4-aae1-d642717d8afa_story.html [<https://perma.cc/BBG9-5K85>].

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