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WARNING: STOP-AND-FRISK MAY BE HAZARDOUS TO YOUR HEALTH

Josephine Ross*

The law did not protect us. And now, in your time, the law has become an excuse for stopping and frisking you, which is to say, for furthering the assault on your body.

—Ta-Nehisi Coates¹

[T]his case tells everyone . . . that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

—Justice Sonia Sotomayor, dissenting in *Utah v. Strieff*²

INTRODUCTION

In the past decade, there has been an explosion of data regarding stop-and-frisk. The New York City Police Department started to collect data regarding the number and justifications of police stops.³ Sociologists have interviewed the adults and people targeted by these practices and studied the effects of stop-and-frisk on the neighborhoods and communities.⁴

Almost fifty years have passed since the Supreme Court's seminal decision in *Terry v. Ohio*,⁵ where the Court carved out the Fourth Amendment requirements for stop-and-frisk.⁶ Balancing law enforcement needs against the right to unhindered locomotion and physical autonomy, the *Terry* Court compromised by requiring that

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¹ TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 17 (2015).

² 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

³ See N.Y.C., *Stop, Question and Frisk Report Database*, CITY N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml [https://perma.cc/64M3-UK66].

⁴ See generally Abigail A. Sewell et al., *Living Under Surveillance: Gender, Psychological Distress, and Stop-Question-and-Frisk Policing in New York City*, SOC. SCI. & MED. 1, 1–2 (2016).

⁵ 392 U.S. 1 (1968).

⁶ See *id.* at 16–27.

officers justify their suspicions, and created a standard of proof that fell above a hunch, but below probable cause.⁷ *Terry*'s rationale was based on a cost-benefit analysis based on the information available to the Court at the time. During the last several years, the public has been inundated with videos of unwarranted police aggression and killings, most of them involving black men and boys.⁸ This alone should spark the Court's willingness to re-examine the *Terry* Court's assumption that stop-and-frisk could coexist with a fair criminal justice framework. The *Terry* Court's policy analysis is ripe for review, particularly given the recent data available about the effects of this form of policing on individuals and communities.

The term "Ferguson" describes more than the police shooting in 2014 that brought weeks of protest to Ferguson, Missouri. Ferguson conjures up a new understanding of the way police interact with individuals in poor and minority communities. It is against this background that the Court accepted certiorari in 2015 in *Utah v. Strieff*,⁹ a case that brought stop-and-frisk policing once again to the Court's attention.¹⁰ The Supreme Court squandered an opportunity to examine *Terry*'s legacy in light of new information about widespread police abuse. In *Utah v. Strieff*, the Supreme Court accepted certiorari to determine if the trial judge must suppress the fruits of an unlawful *Terry* stop in a situation where the police officer learned of an outstanding warrant during the illegal stop.¹¹ Sadly, the majority of Justices failed to grab this opportunity to admit that *Terry* sustains a system of policing where thousands of people are stopped, most of them innocent, for little or no reason. Worse still, the decision expands the ability of prosecutors to procure convictions based on evidence seized in violation of people's civil rights.¹² The decision was reached without examining the extant stop-and-frisk data.¹³ Even on its own terms, *Strieff* was poorly reasoned.

⁷ See *id.* at 27.

⁸ See, e.g., Josh Sanburn, *From Trayvon Martin to Walter Scott: Cases in the Spotlight*, TIME (Apr. 10, 2015), <http://time.com/3815606/police-violence-timeline/> [<https://perma.cc/K38K-FD4Y>] (chronicling different occasions where the victim of a police shooting was black); see also Julia Craven, *Here's How Many Black People Have Been Killed By Police This Year*, HUFFINGTONPOST (July 7, 2016), http://www.huffingtonpost.com/entry/black-people-killed-by-police-america_us_577da633e4b0c590f7e7fb17 [<http://perma.cc/Y4B8-4C3A>].

⁹ 136 S. Ct. 2056 (2016).

¹⁰ See *id.* at 2059.

¹¹ See *id.*

¹² *Id.* at 2065–66 (Sotomayor, J., dissenting).

¹³ See *id.* at 2068–69 (citing DEP'T OF JUSTICE, INVESTIGATION OF FERGUSON POLICE DEPARTMENT 47, 55 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<http://perma.cc/A8BR-692N>] [hereinafter DOJ FERGUSON]; DEP'T OF JUSTICE, INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 29 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [<http://perma.cc/CP5B-8H47>] [hereinafter DOJ NEW ORLEANS]; DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 8, 19 n.15 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [<http://perma.cc/3JM5-QQ3H>] [hereinafter DOJ NEWARK]).

On the surface, the *Strieff* majority simply applied the attenuation doctrine of the exclusionary rule to a *Terry* stop. The decision as written left intact the compromise reached in *Terry v. Ohio* that allowed police to stop-and-frisk on less than probable cause, while still demanding a quantum of evidence of wrongdoing.¹⁴ However, this Article will explain why it is impossible to divorce the policy questions surrounding the exclusionary rule from the cost-benefit analysis undertaken by the *Terry* Court. Although the majority imagines it was simply weighing the policy considerations of the exclusionary rule, in essence, *Strieff* relitigated the cost-benefit analysis performed in *Terry*, albeit only in the direction of further limiting the Fourth Amendment's clout.

What is most remarkable about *Utah v. Strieff* is Justice Sonia Sotomayor's literary and searing dissent. Justice Sotomayor writes passionately about the need to recognize the connection between civil rights for some and civil rights for all.¹⁵ She challenges her brethren to start making decisions based on data, rather than abstract and technical theories about how the world works.¹⁶ Her dissenting opinion reveals a nuanced understanding of the harms of stop-and-frisk, and the connection between Supreme Court case law and the risk of "treating members of our communities as second-class citizens."¹⁷ There is now a voice on the Supreme Court for the victims of stop-and-frisk, a Justice who recognizes that "unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name."¹⁸

Justice Sotomayor was right, not only based on the legal issues at play in *Strieff*, but because she provided a larger context for evaluating stop-and-frisk policing. Unlike most Fourth Amendment opinions, Justice Sotomayor openly discusses race.¹⁹ She does this at times eloquently but sometimes succinctly, stating for example, "it is no secret that people of color are disproportionate victims of this type of scrutiny."²⁰

Another recent case highlights the significance of *Terry v. Ohio* for contemporary policing and helps position the issue for a future Supreme Court challenge. *Floyd v. City of New York*²¹ was a civil rights class action in the Southern District of New York decided in 2013.²² When United States District Court Judge Shira Scheindlin was asked to rule on the constitutionality of New York City's stop-and-frisk program, she began her opinion by explicitly refusing to consider whether the program's benefits outweighed its costs.²³ "The enshrinement of constitutional rights

¹⁴ See *id.* at 2059–64 (majority opinion) (failing to mention, or cite, *Terry* throughout the opinion).

¹⁵ See generally *id.* at 2064–71 (Sotomayor, J., dissenting).

¹⁶ See *id.* at 2068–69 (introducing data to show how police officers have used outstanding warrants to stop people without cause).

¹⁷ *Id.* at 2069–71.

¹⁸ *Id.* at 2069.

¹⁹ *Id.* at 2070–71.

²⁰ *Id.* at 2070.

²¹ 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

²² See *id.* at 556.

²³ See *id.*

necessarily takes certain policy choices off the table[.]” wrote Judge Scheindlin in *Floyd*.²⁴ Quite correctly, Judge Scheindlin left it to the people and legislatures to decide whether stop-and-frisk policing is smart policy. But the Supreme Court has the power to determine if *Terry* should be overruled based on a rebalancing of the cost and benefits of intrusions on less than probable cause.

This Article shows, through current research, that there are considerable hidden costs to stop-and-frisk and that these far outweigh any beneficial effects. As a policy matter, crime reduction, if any, must be weighed against the harms facilitated by *Terry* stops and *Terry* frisks. Though the data from New York sparked a healthy debate about whether stop-and-frisk is an effective method of reducing crime, less is known about the costs on the other side of the ledger. While social science has begun this important inquiry, the research is far from complete. The data that has been analyzed thus far has troubling implications for the way pedestrians are policed in certain communities.²⁵ Researchers have found that policing can be unnecessarily violent and that aggressive stops deplete trust in the police force and in the criminal justice system.²⁶ Most recently, studies indicate that stop-and-frisk policing can be bad not only for the health of those targeted but also bad for the health of the whole community.²⁷ Many of these harms are largely hidden from policy debates.

The nation is seeking answers to problems about police violence and race. The elimination of stop-and-frisk as we know it must be part of these conversations. Fortunately, the effectiveness of stop-and-frisk is no longer something that must be decided by gut reactions or unsubstantiated theories. In fact, data is now available on whether attempting to prevent crime by stopping-and-frisking certain populations does more harm than good.²⁸ This data can inform the Court as it sets Fourth Amendment rules based on cost-benefit analysis. It is time to relitigate *Terry v. Ohio*, not in the indirect way that the issues were presented in *Strieff*, but by an honest reconsideration of whether it is constitutional to stop-and-frisk civilians on less than probable cause.

This Article proceeds in three parts. Part I reviews *Utah v. Strieff*, exploring the shortcomings of the majority opinion and the better arguments made by Justices Elena Kagan and Sonia Sotomayor in their dissents. Part II establishes that there is little or no benefit to stop-and-frisk, for current statistics show that the policing practice does not reduce serious crime. Part III turns to the sociological studies of aggressive stop-and-frisk practices that lay out the harm, including recent studies that suggest stop-and-frisk may be bad for the health of those targeted or even for those who live in highly targeted zones. This literature should be essential reading

²⁴ *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

²⁵ *See* Sewell et al., *supra* note 4, at 2–3 (stating that frequent and aggressive police stops in a community can lead to negative health consequences for members of that community).

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.* at 2, 10.

for Supreme Court Justices, legislators, police department officials, and anyone else who is reconsidering whether stop-and-frisk is good policy.

I. *UTAH V. STRIEFF*

Strieff was not a case that seemed likely to head to the Supreme Court. *Strieff* was a run-of-the-mill street stop where the officer seized a small quantity of drugs.²⁹

Edward Strieff was stopped in Salt Lake City, Utah, after he exited a house that police officer Douglas Fackrell suspected of being involved in the selling or storing of drugs.³⁰ An anonymous caller had identified the house as a place connected to narcotics and the officer testified that he had watched the house off and on for a week for a total of three hours and saw some “short-term visitors” during that time.³¹ Although Officer Fackrell admitted that he did not know how long Strieff had been at the home, he followed Strieff for a short while as he headed toward a store and stopped him in the store’s parking lot.³² During a hearing on the case, the officer claimed he merely wanted to stop Strieff to ask him a few questions, and claimed he posed a question or two, although the officer could not remember the answers.³³

After stopping Strieff, Officer Fackrell demanded Strieff turn over his identification and Fackrell retained his identification card while dispatch ran a warrants check.³⁴ When Fackrell ran Strieff’s identification through the database, he learned that Strieff had an outstanding warrant for a minor traffic offense.³⁵ The officer arrested Strieff on the traffic warrant and searched him, finding methamphetamine and related paraphernalia.³⁶ Before a trial on his minor drug charges, Strieff moved to suppress the evidence seized based on the theory that the officer lacked reasonable suspicion to stop him and that the drugs were therefore a fruit of the poisonous tree.³⁷

The State of Utah conceded that the police officer violated the Fourth Amendment when he detained Strieff, but argued that the government should be able to admit the seized evidence anyway.³⁸ It was a hunch-based stop. Under pre-existing case law, if the officer violated the Fourth Amendment when they stopped Strieff, then the evidence seized as a result of the illegal stop would be suppressed as a “fruit

²⁹ *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2015).

³⁰ *Id.* at 2059–60.

³¹ *Id.* at 2059, 2063.

³² *Id.* at 2059–60, 2063.

³³ Transcript of Oral Argument at 44–45, *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (No. 14-1373), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-1373_mlho.pdf [<http://perma.cc/K5LT-EEPR>].

³⁴ *Strieff*, 136 S. Ct. at 2060.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*; see also *State v. Strieff*, 357 P.3d 532, 537 (Utah 2015), *rev'd*, 136 S. Ct. 2056 (2016); *State v. Strieff*, 286 P.3d 317, 320 (Utah Ct. App. 2012), *rev'd*, 357 P.3d 532 (2015).

of the poisonous tree.”³⁹ However, the Supreme Court has proved increasingly hostile to the exclusionary rule and has expanded the depth of arguments available to judges to deny suppressing evidence seized in violation of the Fourth Amendment.⁴⁰ Attenuation is one of the exceptions that the Supreme Court has carved out of the exclusionary rule.⁴¹ Under that doctrine, courts should not exclude fruits of an illegal encounter if the evidence can be traced to intervening circumstances far removed from the original misdeed, so attenuated from the original violation that one could conclude that the evidence no longer bore the taint of the original governmental overreach.⁴² The discovery of the warrant, argued the government, “attenuated the connection between the unlawful stop and the discovery of the contraband.”⁴³

Justice Antonin Scalia died less than two weeks before oral arguments in *Strieff*.⁴⁴ In the absence of a ninth justice, the Supreme Court ruled in favor of the government five to three.⁴⁵ It was a gender split, with the three women Justices in the dissent.⁴⁶ Justice Clarence Thomas wrote for the majority.⁴⁷ Even though the events occurred in quick succession, from stop to warrant check to search, the Court ruled that the warrant check was an intervening act that attenuated the taint and that, on balance, the harms resulting from the exclusion of good evidence outweighed the value to be gained by suppressing the fruits of the poisonous tree.⁴⁸

Utah v. Strieff was wrongly decided. First, the dissent had the better argument about how the attenuation doctrine applied to Strieff’s situation. Second, in balancing

³⁹ See *Strieff*, 136 S. Ct. at 2061 (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)).

⁴⁰ *Id.* (writing for the majority, Justice Thomas mentioned several recognized exceptions including the independent source doctrine, inevitable discovery, and attenuation). Several scholars have critiqued the Supreme Court’s gradual evisceration of the exclusionary rule. See Tracey Maclin & Jennifer Rade, *No More Chipping Away: The Roberts Court Uses an Axe To Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1219 (2012) (noting that the decision in *Hudson v. Michigan*, 547 U.S. 586 (2006), was a “novel and expansive” application of the rule); see also Thomas K. Clancy, *The Fourth Amendment’s Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 372 (2012) (noting that the *Hudson* decision ultimately amounted to a “frontal assault” aimed at abolishing the exclusionary rule).

⁴¹ See *United States v. Ceccolini*, 435 U.S. 268, 273–74 (1978); *Brown v. Illinois*, 422 U.S. 590, 591–92 (1975); *Nardone v. United States*, 308 U.S. 338, 341 (1939); see also *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

⁴² *Brown*, 422 U.S. at 603–04. The *Brown* Court rejected the conclusion that the *Miranda* rights and confessions attenuated the taint and identified three factors necessary to answering that question in the future. *Id.* at 603–05. Courts should consider the “temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” *Id.* at 603–04.

⁴³ *Strieff*, 136 S. Ct. at 2060.

⁴⁴ See Adam Liptak, *Grief Gives Way to Division in First Court Arguments Since Scalia’s Death*, N.Y. TIMES, Feb. 23, 2016, at A17.

⁴⁵ See *Strieff*, 136 S. Ct. at 2059.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *id.* at 2063.

the costs of the exclusionary rule against the benefits of suppression, the majority reveals itself to be unmoored from the reality of everyday policing and unmoved by the pain expressed so accurately in Justice Sotomayor's dissent. Third, the Court appeared to think that it could change the exclusionary rule without overturning *Terry v. Ohio*, the seminal decision from 1968 that created the stop-and-frisk exceptions to the Fourth Amendment's probable cause requirement. In fact, *Utah v. Strieff* rejected *Terry v. Ohio*, replacing *Terry*'s cost-benefit analysis with its own.

A. Striking Out on the Three-Prong Attenuation Test

The Supreme Court created a three-prong test to determine whether the attenuation doctrine applies to a given situation.⁴⁹ Writing for the majority, Justice Thomas laid out the test that was originally set forth in *Brown v. Illinois* in this order: "First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, . . . we examine 'the purpose and flagrancy of the official misconduct.'"⁵⁰

The *Strieff* majority admitted that the first prong favored suppressing the evidence because the discovery of evidence occurred in close proximity to the underlying unconstitutional stop.⁵¹ This was not a situation where several hours elapsed between the initial wrongdoing and the eventual seizure of drugs. In fact, the evidence against *Strieff* was found during the unconstitutional stop.⁵² As Justice Kagan stated in her dissent, this was "strike one" against the government in applying the *Brown* test.⁵³

Turning to the second prong, the Court was asked to decide whether the traffic warrant should be treated like an intervening circumstance or whether it flowed naturally from the stop. The majority concluded that the warrant interrupted the causal connection between the illegal stop and the finding of evidence.⁵⁴ This makes little sense because "but-for" the stop, the officer never would have run the check and found the warrant. In order to reach the conclusion that the warrant broke the causal connection, Justice Thomas turned to a case where a search warrant served as an independent source of discovery. In *Segura v. United States*,⁵⁵ police violated

⁴⁹ See *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (citing *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972)).

⁵⁰ *Strieff*, 136 S. Ct. at 2062 (quoting *Brown*, 422 U.S. at 603–04). Although the majority in *Strieff* emphasizes the third factor, in *United States v. Ceccolini*, 435 U.S. 268, 280 (1978), the Court stated that in interpreting the *Brown* factors for attenuation, "no mathematical weight" can be assigned to any one of the factors.

⁵¹ *Strieff*, 136 S. Ct. at 2062.

⁵² *Id.*

⁵³ *Id.* at 2071 (Kagan, J., dissenting).

⁵⁴ *Id.* at 2062–63 (majority opinion).

⁵⁵ 468 U.S. 796 (1984).

the Fourth Amendment by searching premises without a warrant, but the police came back a second time to search with a valid search warrant.⁵⁶ The warrant in *Segura* was independent of the wrongdoing because the officer who sought the warrant and then searched the premises was not even aware of the prior unlawful search.⁵⁷

The situation in *Strieff* was not analogous to *Segura*. Unlike *Segura*, where there was no causal connection between the unlawful behavior and the finding of evidence, Officer Fackrell learned about Strieff's warrant precisely because he violated Strieff's constitutional rights.⁵⁸ By refusing to suppress the evidence found as a result of the search warrant, the *Segura* Court merely put the government in the same position they would have been in had the first officer followed the law. In contrast, had the *Strieff* Court suppressed the evidence, this would place the government in the same position it would have been in had Officer Fackrell obeyed the law. The warrant in *Segura* was an independent event, not an intervening event.⁵⁹ The only similarity between *Segura* and *Strieff* is that they both involved warrants.

In her dissent, Justice Kagan asserted that the intervening circumstance prong of the *Brown* test should have been strike two for the government.⁶⁰ A "circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away[.]" explained Justice Kagan.⁶¹ Outstanding warrants "are nothing like what intervening circumstances are supposed to be."⁶² As Professor Orin Kerr pointed out, checking for warrants is hardly divorced from the initial *Terry* stop: "For an officer, the stop-to-ID-to-warrant-check-to-search-incident-to-arrest path is a coherent sequence. It's a good way to go from mere reasonable suspicion, which only authorizes a stop, to a full search of the suspect for evidence."⁶³

Purpose or flagrancy of the conduct represents the third prong of the attenuation test.⁶⁴ This prong is supposed to gauge whether an officer was motivated by the intention or desire to investigate when he clearly lacked the requisite probable cause or reasonable suspicion, or whether there was some benign explanation.⁶⁵ Ironically,

⁵⁶ *Id.* at 797–98.

⁵⁷ *See id.* at 814.

⁵⁸ *See Strieff*, 136 S. Ct. at 2072 (Kagan, J., dissenting) (stating that Fackrell learned of Strieff's warrant after he made the illegal search).

⁵⁹ *See Segura*, 468 U.S. at 814.

⁶⁰ *Strieff*, 136 S. Ct. at 2072 (Kagan, J., dissenting).

⁶¹ *Id.* at 2073 (citing W. KEETON et al., PROSSER AND KEETON ON LAW OF TORTS 312 (5th ed. 1984)).

⁶² *Id.*

⁶³ Orin Kerr, *Argument Preview: Utah v. Strieff and the Future of the Exclusionary Rule*, SCOTUSBLOG (Feb. 3, 2016, 4:09 PM), <http://www.scotusblog.com/2016/02/argument-preview-utah-v-strieff-and-the-future-of-the-exclusionary-rule/> [<http://perma.cc/6HP7-E3T2>].

⁶⁴ *See Brown v. Illinois*, 422 U.S. 590, 603–04 (1975) (citing *Wong Sun v. United States*, 371 U.S. 471, 491 (1963)).

⁶⁵ Justice Kagan quoted *Brown*, 422 U.S. at 592, 605, but inserted Fackrell and Strieff's names into the opinion, while substituting "stop" for "arrest" and "reasonable suspicion" for "probable cause."

the majority treats the officer's desire to investigate as proof of good faith. "Officer Fackrell's stated purpose was to 'find out what was going on [in] the house,'" wrote Justice Thomas for the majority.⁶⁶ In this way, the majority construes investigation without reasonable suspicion as a non-flagrant violation of the Fourth Amendment's reasonable suspicion requirement.

The majority also separated the initial stop from the warrant check that followed.⁶⁷ "While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful," writes the majority.⁶⁸ This is like stating that police were wrong to enter a home without a search warrant but once they were there, they lawfully searched the home for evidence. In his opinion, Justice Thomas excuses the warrant check because it was done for the officer's safety rather than for purposes of investigation.⁶⁹ However, if the officer had feared for his safety, he would have frisked Strieff. As Justice Sotomayor notes in her dissent, there was no evidence on the record to support the notion that the officer feared Edward Strieff.⁷⁰ Rather, "the decision of Salt Lake City police officers to run warrant checks on pedestrians they detained without reasonable suspicion" is routine, she writes, quoting the Utah Supreme Court.⁷¹ Officers check for warrants in the hope they will be able to arrest and then perform a search incident to arrest. But even if the warrant check had been done for the officer's safety, its purpose would still have been to facilitate the continued illegal detention of Edward Strieff. Whether Officer Fackrell undertook the warrant check for safety reasons as the majority suggests, or whether warrant checks serve as a method to turn an investigative stop into an arrest and a search, as

[I]t is not disputed that [Fackrell stopped Strieff] without [reasonable suspicion]. [He] later testified that [he] made the [stop] for the purpose of questioning [Strieff] as part of [his] investigation. . . . The illegality here . . . had a quality of purposefulness. The impropriety of the [stop] was obvious. [A]wareness of that fact was virtually conceded by [Fackrell] when [he] repeatedly acknowledged, in [his] testimony, that the purpose of [his] action was 'for investigation': [Fackrell] embarked upon this expedition for evidence in the hope that something might turn up.

Strieff, 136 S. Ct. at 2072 (Kagan, J., dissenting) (alterations in original).

⁶⁶ *Id.* at 2063 (majority opinion) (quoting Fackrell's statements in the record).

⁶⁷ *See id.* at 2062.

⁶⁸ *Id.* at 2063.

⁶⁹ *Id.* (citing *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015)).

⁷⁰ The majority stated that the warrant check was undertaken for officer safety, but this has never been given as the reason for warrant checks on the street. As Justice Sotomayor pointed out in dissent: "By his own account, the officer did not fear Strieff. Moreover, the safety rationale we discussed in *Rodriguez* [relied upon by the majority], an opinion about highway patrols, is conspicuously absent here. A warrant check on a highway 'ensur[es] that vehicles on the road are operated safely and responsibly.'" *Id.* at 2067 (Sotomayor, J., dissenting) (quoting *Rodriguez*, 135 S. Ct. at 1615).

⁷¹ *Id.* at 2069 (quoting *State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003)).

the dissent explains, it is indisputable that the only reason Officer Fackrell found the traffic warrant was because he purposely looked for it.

Justice Kagan calls the flagrancy prong another “[s]wing and a miss.”⁷² Regardless of the weight the Justices give to each of the three prongs, an honest reading of *Brown v. Illinois* should have led the *Strieff* Court to conclude that the government struck out.

B. Reality Check Needed

Because *Utah v. Strieff* upended the precedent that it pretended to follow, it should not be viewed as a straightforward application of the three-prong attenuation test. In deciding whether to expand the attenuation doctrine to situations where a police officer discovers an outstanding warrant during a stop or stop-and-frisk, the Court independently weighed the costs and benefits of suppressing evidence. However, as Justice Sotomayor argued in her dissent, the decision ignored the data that exists about how policing affects people’s lives.⁷³

1. Outstanding Warrants

A good deal of the questioning during oral argument centered on whether outstanding warrants are ubiquitous.⁷⁴ The number of outstanding arrest warrants in a community was central to two aspects of the attenuation doctrine. First, the existence of a high percentage of warrants would contradict the government’s claim that *Strieff*’s warrant was an intervening event. As Justice Kagan wrote in her dissent, the attenuation doctrine does not apply because “outstanding warrants do not appear as bolts from the blue. They are the run-of-the-mill results of police stops.”⁷⁵ Second, the number of warrants goes to the question of deterrence. In weighing the benefits of excluding evidence against its costs, the majority had to decide whether the exclusion of evidence seized during a search incident to an outstanding warrant would deter police from making illegal stops.⁷⁶

Referring to the Justice Department report on Ferguson,⁷⁷ Justice Elena Kagan stated: “I was surprised beyond measure by how many people have arrest warrants outstanding, and particularly in the kind of areas in which these stops typically tend to take place.”⁷⁸ Justice Sotomayor summed up the deterrence issue during oral argument:

⁷² *Id.* at 2072 (Kagan, J., dissenting).

⁷³ *See id.* at 2068–69 (Sotomayor, J., dissenting) (citing DOJ FERGUSON, *supra* note 13; DOJ NEW ORLEANS, *supra* note 13; DOJ NEWARK, *supra* note 13).

⁷⁴ Transcript of Oral Argument at 2–17, *supra* note 33.

⁷⁵ *Strieff*, 136 S. Ct. at 2073 (Kagan, J., dissenting).

⁷⁶ *See id.* at 2063 (majority opinion).

⁷⁷ DOJ FERGUSON, *supra* note 13.

⁷⁸ Transcript of Oral Argument at 12, *supra* note 33 (Kagan, J.).

If you have a town like Ferguson, where 80 percent of the residents have minor traffic warrants out, there may be a very good incentive for just standing on the street corner in Ferguson and asking every citizen, give me your ID; let me see your name. And let me hope, because I have an 80 percent chance that you're going to have a warrant.⁷⁹

Suppression would be deterrence if police knew they could make lawless stops but use the existence of an outstanding warrant to forgive their misdeed.

In contrast, Justice Samuel Alito used hypothetical figures during oral argument to undercut the deterrence claim:

[Assuming] there's a 1 in 200 chance that there's going to be an outstanding warrant, so the officer says well, . . . I have no reason to stop this person, but if I stop 200 people today illegally, then I'm going to find one who has an outstanding warrant, you would say that that—that gives the officer the incentive to make those 199 illegal stops.⁸⁰

Pressing counsel for the accused, Justice Alito eventually asked if “one in 10,000, would that upset your argument?”⁸¹ Justice Alito's point was that suppression would only deter police misconduct in certain neighborhoods.

The oral argument in *Strieff* encapsulated how the outcome turned on whether the Justices chose to incorporate recent data on policing or instead chose to base their decision on hypotheticals. When it comes to proof of outstanding warrants, the facts fell squarely on the side of suppressing the evidence. A full 16,000 of the 21,000 people residing in the town of Ferguson, Missouri have outstanding warrants.⁸² Though the Justice Department's Ferguson report first exposed the problem of excessive ticketing in the community, the problem is hardly isolated to Ferguson, Missouri. In fact, the Justice Department wrote in the Ferguson report that St. Louis, next door to Ferguson, also suffered from bad stops that were driven by the officer's desire to run a warrant check.⁸³ In her dissent, Justice Sotomayor cites a study of the New Orleans Police Department which found that officers “made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as unpaid tickets.”⁸⁴

⁷⁹ *Id.* at 6 (Sotomayor, J.).

⁸⁰ *Id.* at 30 (Alito, J.).

⁸¹ *Id.* at 51.

⁸² *Utah v. Strieff*, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (citation omitted).

⁸³ *Id.* (citation omitted).

⁸⁴ *Id.* (quoting DOJ NEW ORLEANS, *supra* note 13, at 29).

The dissent also cites the Newark, New Jersey police department study that found that “officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them.”⁸⁵ Justice Kagan pointed to a study of the Cincinnati, Ohio, population of 300,000, whose residents had over 100,000 outstanding warrants.⁸⁶

Faced with recent disturbing statistics from Ferguson, Missouri and other cities where many residents have warrants for unpaid fines and other minor charges, the *Strieff* majority simply sidestepped this issue. Justice Thomas, writing for the majority, alludes to the plethora of warrants only obliquely, and then, just to explain that these problems were not shown to exist in the particular town where Officer Fackrell stopped Edward Strieff.⁸⁷ “Were evidence of a dragnet search presented here, the application of the *Brown* factors could be different. But there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.”⁸⁸ In fact, some facts were known about outstanding warrants in Utah. In her dissent, Justice Sotomayor writes that “at the time of the arrest, Salt Lake County had a ‘backlog of outstanding warrants’ so large that it faced the ‘potential for civil liabilit[y],’” according to the Department of Justice statistics.⁸⁹

Even if there were no information, it would still have been disingenuous for the majority to claim that the facts established by multiple Justice Department investigations have no bearing on how to balance the costs and benefits of the exclusionary rule. When the Justices weigh the values and competing interests in *Strieff*, their conclusion creates precedent for all cases where an officer finds an outstanding warrant during an improper stop. The *Terry v. Ohio* opinion was not a case-by-case cost-benefit analysis and neither was *Brown v. Illinois*. Here, the majority created new precedent for the country based on what occurred or rather, what was unknown, in a particular section of Utah.⁹⁰

⁸⁵ *Id.* (quoting DOJ NEWARK, *supra* note 13, at 8, 19 n.15). The Department of Justice analyzed these warrant-checked stops and reported that “approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion.” *Id.* at 2069 (quoting DOJ NEWARK, *supra* note 13, at 9 n.7).

⁸⁶ *Id.* at 2073 n.1 (Kagan, J., dissenting) (citing Erik Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 98 (2004)).

⁸⁷ *Id.* at 2064 (majority opinion).

⁸⁸ *Id.*

⁸⁹ *Id.* at 2066 (Sotomayor, J., dissenting). Utah lists over 180,000 misdemeanor warrants in its database. See DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2014 (2015), <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf> [<http://perma.cc/3WS2-EW7V>]; INST. FOR LAW & POLICY PLANNING, SALT LAKE COUNTY CRIMINAL JUSTICE SYSTEM ASSESSMENT, at 6.7 (2004), https://www.supremecourt.gov/opinions/URLs_Cited/OT2015/14-1373/14-1373-2.pdf [<https://perma.cc/9VU8-C9Z5>].

⁹⁰ Moreover, prosecutors have the burden of proving attenuation, but the *Strieff* prosecutors produced no evidence regarding the number of outstanding warrants in Salt Lake City. The lack of specific evidence of warrant abuses in the evidentiary record was taken as proof

2. Re-evaluating the Costs and Benefits of Suppressing Evidence

The *Strieff* opinion's reasoning is flawed in more ways than ignoring data surrounding the number of outstanding warrants for unpaid fines. It is also wrong in its central premise that police will only violate stop-and-frisk requirements if it nets them an arrest or evidence. The majority presumes that police will not play "catch and release" if there are only a small number outstanding traffic warrants, so the deterrence value is minimal where there are few warrants. The data gathered by the New York City Police Department over the past decade proves these assumptions false. In New York City, from 2004 to 2012, the rate of return on police stop-and-frisks was extremely low.⁹¹ Specifically, in 88% of all stops, the police found no evidence of a crime or misdemeanor or even violations of city ordinances such as littering.⁹² Nor did the lower hit rates reduce the incidents of stop-and-frisk. From 2002 to 2011 stops and frisks increased by 600%.⁹³ During the eight years from 2004 to 2012 that formed the basis of a civil rights lawsuit, the New York City Police Department made 4.4 million stops, and they patted down their targets in 2.3 million of these stops.⁹⁴ To put that number in perspective, the total of New York's population is just over 8 million.⁹⁵ If police only stopped individuals once, that would mean half of New York City was subjected to these detentions. The New York Police Department data established that neither low hit rates nor safety threats curtail stop-and-frisk. The notion posited by amici that police are deterred anyway from making large quantities of stops because of "the inherent safety threat that accompanies any attempt to detain an unknown individual"⁹⁶ is patently false.

The Justices should test their assumptions on data when it exists. A class action filed in federal district court in New York resulted in a seminal ruling that police lacked reasonable suspicion in many of these stops and intentionally targeted blacks

that the serious issues plaguing cities across the country have no footprint within Salt Lake City. *See Strieff*, 136 S. Ct. at 2064. It appears that from now on, indigent defendants now bear the burden of proving that there are systemic problems within the town in order to argue that *Strieff* does not apply. To make this pretense a reality, attorneys who represent misdemeanor clients must be given funding for this research or else legislatures must mandate that warrants be tracked and widely reported in all jurisdictions.

⁹¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013) (internal citations omitted).

⁹² *Id.* at 573 (citations omitted).

⁹³ *2011 NYPD Stop and Frisk Statistics*, CTR. FOR CONST. RTS. (2011), <http://ccrjustice.org/sites/default/files/assets/CCR-Stop-and-Frisk-Fact-Sheet-2011.pdf> [<http://perma.cc/K5V9-ZDSJ>].

⁹⁴ *Floyd*, 959 F. Supp. 2d at 556, 558.

⁹⁵ *New York City, N.Y.*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/SEX205210/3651000> [<http://perma.cc/LAY7-CW4G>].

⁹⁶ Brief for United States as Amicus Curiae Supporting Petitioner at 6, *Utah v. Strieff*, 136 S. Ct. 2056 (No. 14-1373), 2015 WL 9450142, *6.

and Latinos for stop-and-frisks.⁹⁷ Thus, New York City data proves unequivocally that police are not deterred from violating people's rights simply because hit rates are low. This means that the benefits of suppressing evidence should not be pinned to a specific number of outstanding warrants.

The *Strieff* decision reveals an antipathy to the Fourth Amendment suppression doctrine shared by many members of the Court. "Suppression of evidence," writes the majority "has always been our last resort, not our first impulse[.]" citing *Hudson v. Michigan*,⁹⁸ authored by Justice Alito.⁹⁹ In *Hudson*, Justice Alito called the exclusion of evidence a "bitter pill" that "society must swallow . . . only as a 'last resort.'"¹⁰⁰ As the government noted in their brief, to apply the exclusionary rule "in many cases [will] . . . set the criminal loose in the community without punishment."¹⁰¹ Those opposed to the exclusionary rule view deterrence as the only benefit to be gained from suppressing evidence.

There is a value to suppressing evidence seized illegally beyond the deterrence factor. In her dissent, Justice Sotomayor alludes to one of these. "When 'lawless police conduct' uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence[.]" she wrote.¹⁰² "In his search for lawbreaking, the officer in this case himself broke the law."¹⁰³ A "basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right."¹⁰⁴ There is a cost to society when the government benefits from its own law-breaking. One cost is referred to as the integrity rational, for when courts entertain illegal evidence, they become participants in the wrongdoing.

The majority provides no proof for its supposition that exclusion of evidence will not deter police. Even in oral argument, Justice Sotomayor refuses to engage with the notion that officers' behavior will not change based on what courts exclude.¹⁰⁵ During oral argument, Justice Sotomayor pressed the Assistant to the Solicitor General on the Department of Justice position that violating *Terry v. Ohio* should not result in suppression when the stop was not a flagrant violation of the constitution but only a reasonable mistake.¹⁰⁶ "JUSTICE SOTOMAYOR: So what's our rule now? Now you don't need reasonable suspicion to stop someone. You only need questionable reasonable suspicion to stop someone. (Laughter.) . . . so we've now lessened the

⁹⁷ *Floyd*, 959 F. Supp. 2d at 627, 635, 644, 646.

⁹⁸ 547 U.S. 586 (2006).

⁹⁹ *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson*, 547 U.S. at 591).

¹⁰⁰ *Davis v. United States*, 564 U.S. 229, 237 (2011) (quoting *Hudson*, 547 U.S. at 596, 591).

¹⁰¹ Brief for Petitioner at 12, *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (No. 14-1373) (quoting *Davis*, 564 U.S. at 237).

¹⁰² *Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 12 (1968); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

¹⁰³ *Id.* (internal citation omitted).

¹⁰⁴ *Id.*

¹⁰⁵ Transcript of Oral Argument, *supra* note 33, at 8–9 (Sotomayor, J.).

¹⁰⁶ *Id.* at 19–20.

standard—the Terry stop standard, which is fairly intrusive to stop someone.”¹⁰⁷ As Justice Sotomayor demonstrated here, *Strieff* diluted the already low bar of “reasonable suspicion” to something that the government could not even explain. Implicit in her remarks is a recognition that it is not possible to separate out the violation from the exclusionary rule for *Terry* stops.

Another feature of the Supreme Court’s “bitter pill” approach is its premise that excluding evidence is bad for society. This is at odds with current social science reports that indicate that prosecution and punishment are often worse for society than non-punitive approaches to behavior. When the Supreme Court measures the cost of the exclusionary rule, to be accurate, the Court should discount the cost of mass incarceration. The 500% increase in U.S. prison population over the past thirty years has undoubtedly harmed families and communities.¹⁰⁸ Professor Dorothy Roberts synthesized the available research and showed how “[m]ass imprisonment inflicts harm at the community level ‘not only because incarceration, experienced at high levels, has the inevitable result of removing valuable assets from the community, but also because the concentration of incarceration affects the community capacity of those who are left behind.’”¹⁰⁹ Some of the unintended harms to black neighborhoods from mass incarceration include reduced economic opportunity, damage to social networks, and a reduction in political power.¹¹⁰ This is in addition to bearing the brunt of unjustified stops and frisks.

One type of damage to social networks can be gleaned from data on children who lose a parent to the prisons or jails. Data shows that separation from an incarcerated parent, in depriving children of needed economic support, “has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.”¹¹¹ The number of children whose

¹⁰⁷ *Id.*

¹⁰⁸ *Trends in U.S. Corrections*, SENT’G PROJECT (Dec. 2015), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<http://perma.cc/5CDG-TZYJ>].

¹⁰⁹ Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (citing Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 181, 184 (Marc Mauer & Meda Chesney-Lind eds., 2002) (stating that “[t]here is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers”)).

¹¹⁰ *Id.* at 1283 (stating “[m]ass incarceration not only overwhelms the small, isolated kin networks prevalent in poor communities, but also makes it harder for residents to form expansive networks that are most adept at producing social capital”).

¹¹¹ *Id.* at 1284 (citing Sandra Lee Browning et al., *Criminal Incarceration Dividing the Ties That Bind: Black Men and Their Families*, in *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY* 87, 91 (Othello Harris & R. Robin Miller eds., 2003); Denise Johnston, *Effects of Parental Incarceration*, in *CHILDREN OF INCARCERATED PARENTS* 59 (Katherine Gabel & Denise Johnston eds., 1995); R. Robin Miller, *Various Implications of*

parents are incarcerated nearly doubled from 1991 to 2007, rising to 1,706,600 parents behind bars.¹¹² The number of incarcerated fathers increased by 77% during this time period.¹¹³ Although fewer mothers are incarcerated, the number of incarcerated mothers grew by an astonishing 131%.¹¹⁴ Simply put, social scientists have established that “mass imprisonment inflicts devastating collateral damage on black communities.”¹¹⁵

Intelligently, Utah did not argue that society would be harmed were the courts to allow Strieff to walk free. After all, Strieff was only guilty of misdemeanor drug possession. Instead, the government warned of a drastic remedy that could result if the exclusionary rule were applied in future cases. Although the exclusionary rule will occasionally exact high costs, if one is arguing about the general harm in letting people walk, then the Justices again should examine the data. The number one basis for arrest in New York City during its massive stop-and-frisk policy was possession of marijuana.¹¹⁶

Whatever the attitudes towards prosecuting drug users might have been at the height of the War on Drugs, data has shown that incarcerating people for drugs causes harm to the individuals, their families and even to communities. More than 60% of the people in prison are now racial and ethnic minorities even though whites make up over 75% of the population.¹¹⁷ For black males in their thirties, one in every ten is in prison or jail on any given day.¹¹⁸ Whites use drugs at the same rate as black people and whites are actually 30% more likely to sell drugs than blacks.¹¹⁹ But

the “Race to Incarcerate” on Incarcerated African American Men and Their Families, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY, supra, at 3, 9; William H. Sack, Children of Imprisoned Fathers, 40 PSYCHIATRY 163, 165–69 (1977); see also Rod K. Brunson, “Police Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 CRIMINOLOGY & PUB. POL’Y. 71, 87, 91 (2007), <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00423.x/epdf> [<http://perma.cc/DE8L-HALK>].

¹¹² SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 3 (2009).

¹¹³ *Id.*

¹¹⁴ LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008).

¹¹⁵ Roberts, *supra* note 109, at 1279.

¹¹⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 576 n.131 (2013) (citing CHRISTOPHER DUNN, NYCLU, STOP-AND-FRISK 2012, at 17 (Jennifer Carnig ed., 2013), http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf [<https://perma.cc/W2SR-LCUC>] (“16% of total arrests following stops are for marijuana possession, making marijuana the most common arrest offense arising out of stops.”)).

¹¹⁷ Rutgers University, *Children and Families of the Incarcerated Fact Sheet*, NAT’L RESOURCE CTR. ON CHILD. & FAM. INCARCERATED (2014), <http://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf> [<http://perma.cc/D8BT-UKN5>].

¹¹⁸ *Racial Disparity*, SENT’G PROJECT (2016), <http://www.sentencingproject.org/issues/racial-disparity/> [<http://perma.cc/4E2Z-BQME>].

¹¹⁹ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS

“almost two-thirds of drug prisoners [nationwide] are black or Latino.”¹²⁰ Starting in the mid-1980s, the War on Drugs, according to Marc Mauer, the Director of the Sentencing Project, “has been the most significant factor contributing to the disproportionate incarceration of African Americans in prisons and jails, with increasing effects on Latinos as well.”¹²¹

There is a direct connection between stop-and-frisk and the drug war and again between stop-and-frisk and racial profiling. Stop-and-frisk feeds the racial inequality found in incarceration figures. For example, in a Chicago study published in 2006, a professor of political science at Northwestern University, Wesley Skogan, found that 70% of young African-American men had been stopped by police compared to just 20% of all residents.¹²² Similarly, the data from New York City showed that from 2004 to 2012, over 80% of police stops and frisks involved blacks and Hispanics, although blacks and Hispanics make up just half of the city’s population.¹²³

Instead of assuming there is a “high cost to society” by letting individuals walk free, the Court should at least admit that the costs run both ways. Allowing these adults and youths to walk free should be weighed against the social costs of prosecution, rather than repeating that excluding the evidence would be a “drastic and socially costly” sanction.¹²⁴

C. Justice Sotomayor, Speaking Only for Herself

Anyone interested in criminal justice and the Court should read Justice Sotomayor’s dissent in *Utah v. Strieff*. It is not simply that the dissent has the better argument. Justice Sotomayor breaks new ground in how she writes about stop-and-frisk, how she writes about policing, and how she writes about race.

(Sept. 30, 2014), <http://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/> [<https://perma.cc/48WN-VRS3>].

¹²⁰ MINN. PUB. RADIO, *Does Race Change the Way People Discuss Drug Crimes?*, SENT’G PROJECT (Nov. 16, 2015), <http://www.sentencingproject.org/news/does-race-change-the-way-people-discuss-drug-crimes/> [<https://perma.cc/SZM9-EKUW>]; see also Roberts, *supra* note 109, at 1281 (stating mass imprisonment inflicts harm at the community level “not only because incarceration, experienced at high levels, has the inevitable result of removing valuable assets from the community, but also because the concentration of incarceration affects the community capacity of those who are left behind,” and also stating there is a social dynamic that aggravates and augments the negative consequences to individual inmates when they come from and return to particular neighborhoods in concentrated numbers).

¹²¹ Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 25 (2007).

¹²² Wesley G. Skogan, *Asymmetry in the Impact of Encounters with Police*, 16 POLICING & SOC’Y 99, 101 (2006).

¹²³ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 579 (S.D.N.Y. 2013).

¹²⁴ *Nix v. Williams*, 467 U.S. 431, 442 (1984).

From the opening lines, Justice Sotomayor was scathing in her dissent. Her first lines are:

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. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong.¹²⁵

Even in these two sentences, Justice Sotomayor recasts the majority's holding and hints at what is to come. Instead of “technical language” about intervening circumstances or attenuation of the taint, the Justice is going to tell her readers about what really happens on the sidewalks and streets of our cities. And she does.

In a section that no other Justice joins, Justice Sotomayor lays out the harms of stop-and-frisk. “Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more[,]” she writes.¹²⁶ “The indignity of the stop is not limited to an officer telling you that you look like a criminal.”¹²⁷ One can trawl through every word in the majority opinion and never come across words like “degrading” or “indignity.” In fact, the majority does not examine the case from the point of view of the person violated. Instead, the majority looks at the situation from the officer's point of view, characterizing the violations of Fourth Amendment as “two good-faith mistakes.”¹²⁸

Justice Sotomayor is not the first Justice to use the word “indignity” in the context of stop-and-frisk.¹²⁹ Fittingly, it was Justice Earl Warren in *Terry v. Ohio*, the case that permitted stop-and-frisks based on mere reasonable suspicion, who first referred to the indignity of stop-and-frisk.¹³⁰ “[I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity,’” states the *Terry* decision.¹³¹

Interestingly, Justice Antonin Scalia echoed these sentiments in a later case. Applying originalist principles that he cherished to *Terry* frisks, Justice Scalia wrote: “I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth

¹²⁵ *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (Sotomayor, J., dissenting).

¹²⁶ *Id.* at 2069.

¹²⁷ *Id.* at 2070.

¹²⁸ *Id.* at 2063 (majority opinion).

¹²⁹ *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (stating that a frisk “[i]s a serious intrusion upon the sanctity of the person, which may inflict great *indignity* and arouse strong resentment, and is not to be undertaken lightly”) (emphasis added).

¹³⁰ *Id.*

¹³¹ *Id.* (footnote omitted).

Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity.”¹³² Despite his earlier critique of *Terry v. Ohio*, however, Justice Scalia was a reliable vote against the exclusionary rule.¹³³

Terry v. Ohio cited police manuals from that period to explain the frisk that Justice Sotomayor repeats in *Strieff*:

This involves more than just a pat down. As onlookers pass by, the officer may “feel with sensitive fingers every portion of [your]

¹³² *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

My problem with the present case is that I am not entirely sure that the physical search—the “frisk”—that produced the evidence at issue here complied with that constitutional standard. The decision of ours that gave approval to such searches, *Terry v. Ohio*, made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was ‘reasonable’ by current estimations.

Id. at 380 (1993) (internal citation omitted). Scalia went on to quote a police manual from the time of *Terry v. Ohio*:

“Check the subject’s neck and collar. A check should be made under the subject’s arm. Next a check should be made of the upper back. The lower back should also be checked.

A check should be made of the upper part of the man’s chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.”

Id. at 381–82 (quoting J. MOYNAHAN, POLICE SEARCHING PROCEDURES 7 (1963) (citations omitted)).

¹³³ *See, e.g., Hudson v. Michigan*, 547 U.S. 586 (2006). Justice Scalia authored the majority opinion in *Hudson*, a case that demonstrated hostility to the exclusionary rule. *Id.* at 588. There, for the first time, the Court rejected the exclusion of evidence found when police violated the Fourth Amendment by failing to knock-and-announce when serving a search warrant. *See id.* at 599. Justice Scalia, on behalf of the majority, wrote:

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it, *Colorado v. Connelly*, 479 U.S. 157, 166 (1986), and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application,” *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 364–65 (1998).

. . . .

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial.

Id. at 591, 599.

body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”¹³⁴

This is far from technical language. Reading about groins and testicles, a reader may viscerally understand Sotomayor’s premise that stops are more degrading than most people realize.

It often appears that the majority and dissent are discussing two different cases. And in a sense they are. Edward Strieff was never frisked.¹³⁵ Edward Strieff was a white man.¹³⁶ Justice Sotomayor set out to persuade her readers why the Strieff facts are anything but isolated from what happens to black people in the streets of Ferguson, Baltimore, and Salt Lake City.

Interconnection is a theme that runs throughout the dissent. Justice Sotomayor calls out the majority’s summary rejection of the documented problems in criminal justice because “there is no evidence that the concerns that Strieff raises with the criminal justice system are present in South Salt Lake City, Utah.”¹³⁷ Using her bully pulpit, Sotomayor argues that this distinction is false. “Most striking about the Court’s opinion is its insistence that the event here was ‘isolated,’ with ‘no indication that this unlawful stop was part of any systemic or recurrent police misconduct.’ Respectfully, nothing about this case is isolated.”¹³⁸ With these words, the disagreement between the Justices becomes more than an application of facts to law. Justice Sotomayor here demands that the Court recognize the interconnection of multiple rulings that roll back Fourth Amendment protections and recognize how a Court ruling will spur or restrain biased and aggressive policing across the country.

Supreme Court Justices generally follow a “color blind” approach in evaluating motions to suppress under the Fourth Amendment. As a general matter, Supreme Court opinions do not state whether the accused or convicted individuals are white, black or Latino unless there is a question of mistaken identification. While it is likely that the Justices believe that hiding race will avoid racial bias, several scholars criticize the practice because it prevents the Court from admitting to the biases and fixing them.¹³⁹

Breaking with the color-blind tradition, Justice Sotomayor informs her readers that Edward Strieff was white.¹⁴⁰ Instead of this undercutting her call to address civil

¹³⁴ *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting) (citing *Terry*, 392 U.S. at 17 n.13 (1968)).

¹³⁵ *Id.* at 2059–60 (majority opinion).

¹³⁶ *Id.* at 2070 (Sotomayor, J., dissenting).

¹³⁷ *Id.* at 2064 (majority opinion).

¹³⁸ *Id.* at 2068 (Sotomayor, J., dissenting) (quoting the majority opinion).

¹³⁹ See, e.g., Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013).

¹⁴⁰ *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

rights issues, the Justice doubles down, arguing: “The white defendant in this case shows that anyone’s dignity can be violated in this manner.”¹⁴¹ Even though *Strieff* was not a civil rights or equal protection lawsuit, the Justice breaks with tradition to write about how black people are targeted by police. “But it is no secret that people of color are disproportionate victims of this type of scrutiny[,]”¹⁴² she wrote. Sotomayor needed to break with the color-blind tradition in order to prove that policing problems are interconnected.

Although the majority opinion focused on the stop of one factually guilty man, Justice Sotomayor described the harm to black adults and children that is caused by stop-and-frisk and other aggressive policing methods:

For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.¹⁴³

No Supreme Court Justice before has written about what black Americans call “the talk.” Even her citations are strikingly non-technical. In the paragraph above, Sotomayor cites three great chroniclers of the African American experience, W.E.B. Du Bois, James Baldwin, and Ta-Nehisi Coates.¹⁴⁴

The majority and dissent even speak different languages as Justice Sotomayor channels W.E.B. Du Bois when she writes: “By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time.”¹⁴⁵ By “double consciousness,” Du Bois meant that black Americans, owing to prejudice, must always remain aware of how they were perceived by white people.¹⁴⁶ To be safe at the turn of the century, black Americans had to disguise themselves in order to fit into the constricted roles and characters permitted to black men, women and children.

Similarly, Justice Sotomayor channels Ta-Nehisi Coates when she writes “[T]his Court has given officers an array of instruments to probe and examine you.”¹⁴⁷ The

¹⁴¹ *Id.*

¹⁴² *Id.* (citing MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 95–136 (2010)).

¹⁴³ *Id.* (internal citations omitted).

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

¹⁴⁶ W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 38 (1903). “It is a peculiar sensation, this double consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unrec- onciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.” *Id.*

¹⁴⁷ *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

Court, by legitimizing the officer's action in *Strieff* "says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."¹⁴⁸ This phrasing echoes sentences from Coates's lyrical book-length essay about how a black man might talk to his son about the fact that police can stop, abuse and even kill unarmed black men and boys with impunity.¹⁴⁹

Justice Sotomayor ends with an unabashed plea to her fellow Justices to start caring about how policing harms non-whites. In a nod to the groundbreaking work of law professors Lani Guinier and Gerald Torres, she writes of the victims of stop-and-frisk policing:

We must not pretend that the countless people who are routinely targeted by police are "isolated." They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. *See* L. GUINIER & G. TORRES, *THE MINER'S CANARY* 274–283 (2002). They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.¹⁵⁰

This is powerful rhetoric. Sotomayor wants her fellow Justices to understand the real-life consequences of relaxing Fourth Amendment protections. During her dissent, she sought to situate stop-and-frisk as part of a larger pattern of case law that together, "risk[s] treating members of our communities as second-class citizens."¹⁵¹ Here, the Justice pleads with her brethren, in literary fashion, to recognize that harm to one is harm to all, that a constant violation of civil liberties to a subset of Americans taints our democracy. When she writes that those affected by stop-and-frisk are the "canaries in the coal mine,"¹⁵² she warns the men on the Court (for in fact, every man on the Court joined the majority) that they ignore the plight of others at their own peril.

Because she wrote for herself, Justice Sotomayor is able to explain that she was "drawing on [her] professional experiences."¹⁵³ The experience alluded to here includes more than four years when Sotomayor worked as a prosecutor in New York City.¹⁵⁴ Although she speaks only of "professional experiences," it is difficult to read

¹⁴⁸ *Id.* at 2070.

¹⁴⁹ *See* Ta-Nehisi Coates, *Letter to My Son*, ATLANTIC (July 4, 2015), <http://www.theatlantic.com/politics/archive/2015/07/tanehisi-coates-between-the-world-and-me/397619/> [<https://perma.cc/3H7B-LMNS>].

¹⁵⁰ *Strieff*, 136 S. Ct. at 2071 (Sotomayor, J., dissenting).

¹⁵¹ *Id.* at 2069.

¹⁵² *Id.* at 2071.

¹⁵³ *Id.* at 2069.

¹⁵⁴ Joe Stephens & Del Quentin Wilber, *Gritty First Job Shaped Nominee*, WASH. POST (June 4, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/03/AR2009>

her dissent without recalling that she is also one of only two minorities on the Supreme Court, the first Latina Justice. Although many of the references in Sotomayor's dissent have a literary flair, the books she cites are filled with data that back up their arguments. This is part of her mission to convince other Court members to base their Fourth Amendment decisions on reality.

Justice Sotomayor is correct that fair decisions must be grounded on reality and that the majority seems willfully blind to the lessons learned from Ferguson, Long Island, and Baltimore. And she is also right about the harms of stop-and-frisk; “‘stops’ have severe consequences much greater than the inconvenience suggested by the name[,]” greater than most people know.¹⁵⁵

D. How Utah v. Strieff Altered the Uneasy Compromise Set Forth in Terry v. Ohio

On the surface, *Utah v. Strieff* appears to change the attenuation rule while leaving intact the seminal case of *Terry v. Ohio*. But a close reading of *Terry* reveals that one cannot divorce the exclusionary rule from the *Terry* decision itself.

Terry v. Ohio was decided in 1968, a mere seven years after the Court extended the exclusionary rule to state actors and local police.¹⁵⁶ Up to this time, there was an assumption that the Fourth Amendment required probable cause for all searches and seizures. But many people in the country thought that police should be able to detain people without having to give a reason.¹⁵⁷

When Chief Justice Earl Warren crafted the majority opinion in *Terry v. Ohio*, he acknowledged that stops and frisks place a genuine burden on the individuals targeted:

And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a “search.” Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.¹⁵⁸

Despite recognition that these police investigative techniques have serious costs to the targeted individuals, *Terry v. Ohio* permitted stop-and-frisks on less than

060304054.html [<http://perma.cc/RXX4-DCYP>]. See generally SONIA SOTOMAYOR, MY BELOVED WORLD (2013).

¹⁵⁵ *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

¹⁵⁶ 392 U.S. 1 (1968); see also *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

¹⁵⁷ See Frank Rudy Cooper, *Cultural Context Matters: Terry's “Seesaw Effect”*, 56 OKLA. L. REV. 833, 840 (2003).

¹⁵⁸ *Terry*, 392 U.S. at 16–17.

probable cause based on a cost-benefit analysis. The resulting compromise allowed police to stop and frisk on less than probable cause but required a quantum of suspicion that the Court labeled “reasonable suspicion.”¹⁵⁹

The exclusionary rule was central to *Terry*’s outcome. As the *Terry* Court explained, “the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure.”¹⁶⁰

In other words, the *Terry v. Ohio* compromise was based in large part on a consideration of whether the exclusionary rule would deter police abuse.

Similar to the current situation, the largest recipients of police abuse in 1968 were African Americans.¹⁶¹ With refreshing candor, the *Terry* majority admitted that police racially harass African Americans.¹⁶² Nevertheless, the Court decided that this fact did not alter the cost-benefit analysis because the exclusionary rule would not bar such behavior: “Doubtless some police ‘field interrogation’ conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule.”¹⁶³

“The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”¹⁶⁴ Regardless of whether the Court was correct that excluding evidence from trials would not discourage harassment, the *Terry* Court actively weighed the costs and benefits of the exclusionary rule. The *Terry* decision did not separate out the exclusionary rule from the violation itself, but saw the issues as interconnected.¹⁶⁵

Thus, *Utah v. Strieff* must be recognized as more than an attenuation case. The Court revisited the *Terry* compromise and replaced *Terry*’s cost-benefit analysis with its own policy analysis. Instead of weighing the costs and benefits of the

¹⁵⁹ *Id.* at 31 (Harlan, J., concurring).

¹⁶⁰ *Id.* at 12 (majority opinion).

¹⁶¹ *Id.* at 14.

¹⁶² *Id.*

¹⁶³ *Id.* at 13 n.9. In a footnote, the *Terry* Court explains some examples of other types of police invasions. Police officers “may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.” *Id.* at 14 n.9.

¹⁶⁴ *Id.* at 14–15 & n.11 (“The President’s Commission on Law Enforcement and Administration of Justice found that ‘(i)n many communities, field interrogations are a major source of friction between the police and minority groups.’ PRESIDENT’S COMM’N ON LAW ENF’T ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967). It was reported that the friction caused by ‘(m)isuse of field interrogations’ increases ‘as more police departments adopt ‘aggressive patrol’ in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.’ *Id.* at 84.”).

¹⁶⁵ *Id.* at 14–15.

exclusionary rule in a vacuum, the Court should have weighed the benefits of continuing to permit prosecutors to introduce fruits of stop-and-frisks on less than probable cause against the costs engendered by stop-and-frisk policing.

Ironically, while the *Terry* Court refused to exclude evidence because it would not stop bad faith harassment, the *Strieff* Court went in the other direction, refusing to exclude evidence because there was no bad faith harassment.¹⁶⁶

The *Terry* Court's separation of racial harassment from law-and-order goals does not hold up against the information that is currently available. For example, in 2016, the Justice Department released a report that concluded:

BPD [the Baltimore Police Department] makes stops, searches and arrests without the required justification; uses enforcement strategies that unlawfully subject African Americans to disproportionate rates of stops, searches and arrests; uses excessive force; and retaliates against individuals for their constitutionally-protected expression. The pattern or practice results from systemic deficiencies that have persisted within BPD for many years and has exacerbated community distrust of the police, particularly in the African-American community.¹⁶⁷

Similarly, New York City data indicates that starting in about 2004, superiors pressured patrol officers to conduct multiple stop-and-frisks based on the flimsiest of reasons.¹⁶⁸ The department had a law-and-order rationale, believing that if police generated enough "activity" by stopping and frisking hundreds of people, they would discourage people from carrying guns and make some arrests, for even random searches will sometimes turn up contraband.¹⁶⁹

Though the majority in *Terry v. Ohio* thought that individual police who harassed black people were motivated by naked racism rather than a desire to ferret out crime, the New York Police Department story proves that stop-and-frisk may constitute

¹⁶⁶ *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

¹⁶⁷ *Justice Department Announces Findings of Investigation into Baltimore Police Department*, DEP'T JUST. OFF. PUB. AFF. (Aug. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> [http://perma.cc/LE8T-DWZL]; see also Richard A. Oppel Jr. et al., *Justice Department to Release Blistering Report of Racial Bias by Baltimore Police*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/10/us/justice-department-to-release-blistering-report-of-racial-bias-by-baltimore-police.html?_r=0 ("The Justice Department has found that the Baltimore Police Department for years has hounded black residents who make up most of the city's population, systematically stopping, searching and arresting them, often with little provocation or rationale.").

¹⁶⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560–61 (S.D.N.Y. 2013). See generally GRAHAM A. RAYMAN, *THE NYPD TAPES: A SHOCKING STORY OF COPS, COVER-UPS AND COURAGE* (2013) (exploring corruption and abuses present in today's NYPD).

¹⁶⁹ *Floyd*, 959 F. Supp. 2d at 660 n.757.

harassment in service of law-and-order goals. This data also reveals the fallacy of *Strieff*'s decision to excuse police who violate rights as part of crime control. It is often too difficult to separate institutional behavior from individual behavior when it comes to unconstitutional stops.

Scholars criticize *Terry* for providing police with too much power to interfere with the liberty of individuals who are doing nothing illegal and too much opportunity to racially profile individuals.¹⁷⁰ Unfortunately, the *Strieff* appeal did not provide the Court an opportunity to re-evaluate *Terry v. Ohio* based on the data now available from fifty years of stop-and-frisk. Instead, the case arrived at the Court in a defensive posture; lawyers for *Strieff* had no reason to revisit the Supreme Court compromise because their client would prevail under *Terry*. While counsel for *Strieff* sought to retain the status quo, however, the government sought to further reduce Fourth Amendment protections for people stopped by police. Because of its posture, *Strieff* did not provide the Court with an opportunity to increase the amount of suspicion necessary for stop-and-frisks. Now, in order to survive motions to suppress, police only need "questionable reasonable suspicion" to stop people who happen to have outstanding warrants.¹⁷¹

Though the holding in *Strieff* is deeply flawed, it provided an opportunity for Justice Sotomayor to launch a discussion about policing, a discussion based on social science and people's experiences. Her dissent demands that the Court stop assuming that criminal prosecution is a net positive even when the methods used create serious harm to individuals and community.¹⁷² Sotomayor has challenged the Court to rethink the policy behind *Terry*'s stop-and-frisk based on actual data. There is a growing body of data collected by police and social scientists that could form the basis for a future challenge to *Terry v. Ohio*.¹⁷³

II. STOP-AND-FRISK DOES NOT REDUCE CRIME

Cost-benefit analysis always has two sides. If *Terry v. Ohio* were to be revisited from the standpoint of potentially expanding civil liberties, the intent to make communities safer must be measured against the harms occasioned by *Terry* stop-and-frisks. Similarly, legislators and executives would follow the same cost-benefit analysis in determining if stop-and-frisk policing is good policy.

¹⁷⁰ Cooper, *supra* note 157, at 855; Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1276 (1998); see also Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1551–52 (2011).

¹⁷¹ Transcript of Oral Argument at 24–26, *supra* note 33 (Sotomayor, J.); see also *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting); *id.* at 2068–69 (arguing police's required threshold for reasonable suspicion is now dangerously low).

¹⁷² *Id.* at 2068–70 (Sotomayor, J., dissenting) (arguing effects of this kind of policing are great, but benefits are negligible).

¹⁷³ See, e.g., sources cited *supra* note 13.

Purportedly, crime reduction is the purpose that supports police stop-and-frisks based on suspicion of criminality without requiring probable cause to believe that the person has engaged in a crime.¹⁷⁴ This goal has been questioned by Loic Waquant, a professor of Sociology at the Institute for Legal Research at the University of California at Berkeley and by Ohio State Law Professor Michelle Alexander; these experts point to aggressive policing as the modern means of preventing blacks from obtaining economic and social equality while other scholars assume that crime reduction truly is the purpose of intensive policing in inner-city neighborhoods, but still question whether there is a tangible benefit.¹⁷⁵ Jeffrey Bellin, a professor at William & Mary Law School, recently calculated that the New York City policy only served to keep guns off the street to the extent that police violated the constitution by stopping people without the “reasonable suspicion” required by *Terry v. Ohio*.¹⁷⁶ He wrote that “a program of aggressive policing designed to deter unlawful gun carrying like that employed in New York City can be either effective or constitutional, but not both.”¹⁷⁷

Data collected by the New York City Police Department for more than a decade has proved invaluable for measuring the success of stop-and-frisk. From 2004 to 2012, the New York City Police Department made 4.4 million stops, and they patted down their targets in 2.3 million of these stops.¹⁷⁸ To put that number in perspective, the total of New York’s population is just over 8 million.¹⁷⁹ New York City Mayor Michael Bloomberg championed stop-and-frisk, arguing that the practice kept guns off the streets.¹⁸⁰ But police seized guns in only 0.1% of stops.¹⁸¹ That means for every thousand people stopped, only one was concealing a gun. In fact, only 6% of the people stopped were charged with any offense at all.¹⁸² The number one crime that led to an arrest that arose from these 4.4 million stops: possession of marijuana.¹⁸³ As Judge Shira Scheindlin noted in her decision in *Floyd v. City of New York*, “the stopped population is overwhelmingly innocent.”¹⁸⁴

Turning the statistics on their head, Mayor Bloomberg then argued that the paucity of gun seizures proved that stop-and-frisk was working.¹⁸⁵ Except for the fact that

¹⁷⁴ *Floyd*, 959 F. Supp. 2d at 556.

¹⁷⁵ ALEXANDER, *supra* note 142, at 116; Loic Waquant, *Deadly Symbiosis*, PUNISHMENT & SOC. 95, 95–133 (2001).

¹⁷⁶ Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1500 (2014).

¹⁷⁷ *Id.*

¹⁷⁸ *Floyd*, 959 F. Supp. 2d. at 558.

¹⁷⁹ *New York City, N.Y.*, *supra* note 95.

¹⁸⁰ Bellin, *supra* note 176, at 1515.

¹⁸¹ *Id.* at 1531 n.166.

¹⁸² *Id.* at 1531.

¹⁸³ *Floyd*, 959 F. Supp. 2d at 567 n.131 (2013) (citing DUNN, *supra* note 116, at 17 (noting that 16% of total arrests following stops are for marijuana possession, making marijuana the most common arrest offense arising out of stops)).

¹⁸⁴ *Id.* at 560.

¹⁸⁵ Bellin, *supra* note 176, at 1516 & n.93.

there were so many stop-and-frisks, hypothesized the mayor and his police commissioner, people would walk around with firearms. Mayor Bloomberg's argument can be boiled down to a deterrence argument, namely that stop-and-frisk is about preventing crimes rather than solving them. Deterrence is not necessarily bad. There are many ways to deter crime that do not intrude on civil liberties. For example, better street lighting deters crime without requiring people to put their hands against a wall while an officer runs his hands down the contours of their bodies. The mayor's call to deter gun possession was really a call for heavy-handed aggressive policing designed to make residents fear the police.

Mayor Bloomberg turned out to be wrong about deterrence, factually as well as morally. The statistics simply do not support a finding that stop-and-frisk policing prevented crime. In 2015, after stop-and-frisk increased and then decreased dramatically in New York, John Jay College of Criminal Justice tracked the quantity of *Terry* stops and measured them against crime data.¹⁸⁶ Tracking these figures from 2003 to 2014, the study supports the argument that New York City's stop-and-frisk policies could not take credit or blame for preventing serious crimes.¹⁸⁷ "You can see two trends—crime coming way down, even though felony arrests are staying relatively constant. At the same time, other more discretionary enforcement activities have gone up and then down,"¹⁸⁸ explained John Jay College of Criminal Justice President, Jeremy Travis, discussing the report. In sum, stop-and-frisk policing did not reduce crime.

Even unconstitutional stop-and-frisk practices do not benefit society. *Floyd v. City of New York* held that the New York Police Department policy violated the Fourth Amendment by performing stops that lacked the requisite degree of reasonable suspicion, and violated the Fourteenth Amendment Equal Protection Clause because police were encouraged to target civilians based on race, gender, and age.¹⁸⁹ The John Jay study included data from the period where New York's stop-and-frisk practices were unconstitutional.¹⁹⁰

After determining that the benefits of stop-and-frisk are aspirational rather than proven, the Court and legislatures should weigh these benefits against stop-and-frisk's demonstrable costs.

¹⁸⁶ *John Jay College Report Tracks Police Enforcement Rates in New York City*, JOHN JAY C. CRIM. JUST., <http://www.jjay.cuny.edu/news/john-jay-college-report-tracks-police-enforcement-rates-new-york-city> [<https://perma.cc/XE3X-98XB>] (describing the report written by John Jay College of Criminal Justice President, Jeremy Travis, and Professor Preeti Chauhan) [hereinafter *John Jay Report*, *Tracking Enforcement Rates in New York City: 2003–2014*].

¹⁸⁷ *Id.*

¹⁸⁸ See Khristina Narizhnaya & Bob Fredericks, *Police 'Enforcement Actions' Drop During de Blasio's First Year*, N.Y. POST (Dec. 12, 2015), <http://nypost.com/2015/12/12/police-enforcement-actions-drop-during-de-blasios-first-year/> [<https://perma.cc/P48J-WD3K>].

¹⁸⁹ *Floyd*, 959 F. Supp. 2d at 658–64.

¹⁹⁰ *John Jay Report*, *Tracking Enforcement Rates in New York City: 2003–2014*, *supra* note 186.

III. THE SOCIAL SCIENCE

Social scientists began studying stop-and-frisk and other forms of aggressive policing at the beginning of the twenty-first century to determine how it affected the individuals and communities targeted. Not surprisingly, evidence mounted that police departments concentrate aggressive forms of policing such as stop-and-frisks in disadvantaged neighborhoods.¹⁹¹ These communities have “low ‘collective efficacy,’” meaning that they are relatively powerless to hold officers accountable for abuse.¹⁹²

A. Qualitative Studies

Researchers conducted qualitative research to learn about community members’ interactions with police and how such members felt about the interactions. Here is a representative example of a stop-and-frisk in a black neighborhood in St. Louis, Missouri from a sociology study published in 2009, in the *Urban Affairs Review*:

“Me and my friends was walkin’ and I guess [the police] thought we was hangin’ on the corner. [The police] rode up and pulled us over. First thing they said was, ‘Get on the hood [of the patrol car].’ . . . They told us to spread our arms and legs and then searched us.”¹⁹³

Another example from a qualitative study in St. Louis published in 2007 in the *Journal of Criminology and Public Policy* demonstrates what happens when young people suggest that this type of policing is harassment:

“I was sittin’ on the front [steps] and two police they pulled over or whatever and got to askin’ me all the [usual] questions like, ‘Where the dope at?’ and all this kinda stuff and I said, ‘Aw, man, I don’t know what y’all talking about.’ [The police said,] ‘Come on man, you know what we talkin’ about.’ [One officer] tried to get [out of the car] and he wanted to search me and I asked him why and he said he just *wanted* to. So I said, ‘I feel [like] you harassing me ‘cuz *every* time you see us you out

¹⁹¹ Rod K. Brunson & Ronald Weitzer, *Police Relations with Black and White Youths in Different Urban Neighborhoods*, 44 *URB. AFF. REV.* 858, 859 (2009).

¹⁹² *Id.* at 859–60 (citing Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *SCI.* 918 (1997)). “Social disorganization theory holds that certain neighborhood conditions (poverty, unemployment, single-parent households, etc.) weaken social ties between residents and decrease their willingness to engage in social control over offenders, hence increasing neighborhood crime rates.” *Id.* at 859.

¹⁹³ *Id.* at 865–66 (quoting a survey respondent).

here you stop[ping] somebody and checkin” “em.” He said he was gon’ show me what harassment was and locked me up.”¹⁹⁴

These researchers noticed a pattern of those who challenged police.

Just as young men’s law-abiding status failed adequately to protect them from general police harassment, it also did not insulate them from police violence. In fact, being innocent could increase young men’s chances of being assaulted, as they were more likely to challenge the inappropriateness of officers’ actions when they were not engaged in unlawful acts.¹⁹⁵

Researchers in the 2007 publication summed up the negative policing experiences reported by young male participants between the ages of 13 and 19 during interviews in 1999 and 2000 in this way:

Police stops of our respondents were often associated with some type of bodily contacts (i.e., rifling through pockets, restraining action, and forcibly undressing suspects). While most of the involuntary police contact did not result in any serious physical harm . . . [t]he most common forms of force that young males reported included shoving, punching, kicking, and the use of mace.¹⁹⁶

Although “rifling through pockets” is disturbing from the standpoint of constitutional law, it is not necessarily violent. However, researchers are correct to characterize the common forms of force described above as physical abuse.

Forcibly undressing suspects is harder to characterize. Researchers do not classify it as sexual abuse, but certainly it may seem that way to the recipient of such unwanted attention even if the officer’s intent was to discover drugs rather than prurient curiosity. Sexualized frisking is not limited to teenagers in St. Louis. In a study published in the *Journal of Social Science and Medicine*, the authors quoted a 35-year-old Latino man who explained how New York City officers “pulled my pants down past my knees” during a sidewalk search.¹⁹⁷ “The only thing that they needed to do was stick their finger up my ass. . . . That was very low. . . . You got women and children walking by[.]”¹⁹⁸

¹⁹⁴ Brunson, *supra* note 111, at 85.

¹⁹⁵ *Id.* at 95–96.

¹⁹⁶ Brunson & Weitzer, *supra* note 191, at 871.

¹⁹⁷ Hannah Cooper et al., *Characterizing Perceived Police Violence: Implications for Public Health*, 94 AM. J. PUB. HEALTH, 1109, 1113 (2004).

¹⁹⁸ *Id.*

Although only one out of four people in the 2007 study were victims of police violence, others witnessed this behavior or learned about it from others.¹⁹⁹ Thus, when these teenagers were asked whether police harass or mistreat people in the neighborhood, 82.5% said it happened “often” or “sometimes” while only 17.5% chose the “almost never” option.²⁰⁰ Numerous research studies depict police-youth relationships as quite volatile in urban areas with large minority populations and highly strained and antagonistic.²⁰¹

Sociology Professors Rod K. Brunson and Ronald Weitzer focused on racial differences in policing in their qualitative study on youths from three disadvantaged neighborhoods in St. Louis, Missouri. Unlike most studies, the three neighborhoods were racially distinct.²⁰² One was primarily white, another primarily black, and the third neighborhood was racially diverse.²⁰³ Researchers conducted in depth interviews with forty-five male adolescents from these neighborhoods about their experiences with police, both firsthand and observed.²⁰⁴ Both black and white participants believed that they were subject to unjustified police stops.²⁰⁵ These stops “were often associated with some type of bodily contact” such as frisking, “rifling through pockets,” handcuffing or otherwise restraining the person.²⁰⁶

As one black participant phrased it, police “harass us constantly” and stop them for “no reason.”²⁰⁷ Youths told stories of police searching book bags that they carried from school or having to stand in handcuffs “like a common criminal” during a random stop while they ran his name through the police computer system.²⁰⁸ A black youth described how police sometimes used derogatory language, such as “Get ya’ll asses off this corner. What the fuck are ya’ll big, stupid motherfuckers doing?” Participants recounted racial slurs including the “n” word, and sexual words or jokes.²⁰⁹ Many recounted use of force, describing how officers shoved and punched

¹⁹⁹ Brunson, *supra* note 111, at 87–88.

²⁰⁰ *Id.* at 82.

²⁰¹ See, e.g., Sandra L. Browning et al., *Race and Getting Hassled By the Police: A Research Note*, 17 POLICE STUD. 1 (1994); Warren Friedman et al., *Encounters Between Police Officers and Youth: The Social Costs of Disrespect*, 27 J. CRIME & JUST. 1 (2004); Galan M. Janeksela, *Juvenile Attitudes Toward the Police: Theory and Application*, 23 INT’L J. COMP. & APPLIED CRIM. JUST. 313 (1999).

²⁰² See Brunson & Weitzer, *supra* note 191, at 861.

²⁰³ *Id.*

²⁰⁴ *Id.* at 863.

²⁰⁵ *Id.* at 879.

²⁰⁶ *Id.* at 871.

²⁰⁷ *Id.* at 866.

²⁰⁸ *Id.* at 865.

²⁰⁹ *Id.* at 869. One white youth’s experience with a police officer when he was in a majority black neighborhood was starkly different than that experienced by the black youth in majority white neighborhoods:

[We] was on a corner during school hours and a cop talked to us about what we were doing, and then took us back to school. We got in

and kicked them or sprayed them with mace.²¹⁰ Some participants recounted being forcibly undressed. The youth understood these behaviors as power plays: “he [the officer] was showing us that he had more power, authority over us at the time, so there was nothing we could do or say.”²¹¹

Occasionally police would punish a young black man by taking him out of the neighborhood and dropping him off to let him find his own way back.²¹² Though this behavior might strike the reader as an anomaly, Amnesty International reported that Saskatoon police in Saskatchewan, Canada used similar but more dangerous methods with First Nation Canadians in what came to be known as the “starlight tours” or “starlight cruises.”²¹³ “Police had for a number of years had an unofficial policy of abandoning intoxicated or ‘troublesome’ members of the indigenous community away from the population center of Saskatoon, thereby placing them at great risk of dying of hypothermia during the winter months.”²¹⁴ Two Saskatoon officers were convicted of forcible confinement for dropping a Cree man, who lived to testify, outside of town on a frigid night in January 2000.²¹⁵ The authors of the St. Louis study considered the forced removal of young black men to be dangerous “physical abuse.”²¹⁶ As police knew, gangs controlled many poor neighborhoods and often did not welcome outsiders. Whether or not the black teenagers dropped off to walk home were actually in danger, the young men described feeling afraid.²¹⁷

trouble for it at school, it sucked. . . . The cop that stopped us was being a dick at first. He kept asking us if we were going on a booty call together. You know, like we were gay. Then kept making jokes about booty calls and then ask[ed] if we left school because of the “brothers.” Then he asked if we were scared of the “brothers” and if that is why we left school or if the “brothers” booty call[ed] us and that is why we left. The cop finally quit giving us shit, took us back to school, and we got three days of in-school suspension.

Id. at 867.

²¹⁰ *Id.* at 871.

²¹¹ *Id.* at 866.

²¹² *Id.* at 872.

²¹³ Justin Peters, *Maybe Homeless Drunks Don’t Have It Better in Canada, After All*, SLATE (May 13, 2013, 3:23PM), http://www.slate.com/blogs/crime/2013/05/13/starlight_tours_saskatoon_maybe_aboriginals_like_alvin_cote_don_t_have_it.html [<https://perma.cc/SWE3-5FF4>].

²¹⁴ *Id.*

²¹⁵ Windspeaker, *Saskatoon Police Chief Admits Starlight Cruises Are Not New*, 21 WINDSPEAKER 9 (2003), <http://www.ammsa.com/publications/windspeaker/saskatoon-police-chief-admits-starlight-cruises-are-not-new#sthash.IMnMb9nu.dpuf> [<https://perma.cc/FX8Z-HD7U>]. So far no one has been charged with the suspicious deaths of two other men from the First Nation at around the same time. *Id.*

²¹⁶ Brunson & Weitzer, *supra* note 191, at 872 (“Physical abuse can also take the form of forced removal from one’s neighborhood.”).

²¹⁷ *Id.* at 872–73 (“[t]hey’ll just cuss you out or take you somewhere,” said one respondent. “Take you down to the Riverfront, to the Arch, [where] they beat you and let you walk back home.”).

White participants told of guilt by association, with officers treating them differently when they were with black friends than when they were in a group of white youth.²¹⁸ Police also targeted white youth who dressed in a style made popular by blacks, “like baggy pants or a long T-shirt and Nike brand shoes.”²¹⁹ In a law review article about policing, Professor I. Bennet Capers wrote that officers still police the color line decades after the Supreme Court banned housing segregation.²²⁰ Professor Capers’s theory is supported by Brunson and Weitzer’s study, for they found that white youth were targeted for stops most often when they walked in black and mixed-race neighborhoods, or when they were with black friends.²²¹ A recent ethnographic study in a small town in Indiana turned up similar police behavior. Police officers who were assigned to black neighborhoods admitted that they found it suspicious when white people walked or drove into the neighborhood and would stop them on that basis.²²²

Whites are harmed by stop-and-frisk and other aggressive and racial policing, this study shows. However, youth from the black communities were much more likely than the youth from the white community to experience police overreach and abuse.²²³ Those respondents who lived in the mixed neighborhood reported unwelcome police encounters that fell in between the frequency of stops in black and white neighborhoods.²²⁴ This fits with other research in this area demonstrating that police officers in American cities target black men and boys at greater numbers than any other ethnic group and that there is more police misconduct in minority neighborhoods.²²⁵ Police officers tend to view black males as more “suspicious” than their white counterparts,²²⁶ but even after they are targeted, black people are treated differently. Police are more likely to use their discretion in favor of white civilians and more likely to stop black civilians.²²⁷ They are also more likely to use force on black civilians.²²⁸

²¹⁸ *Id.* at 867.

²¹⁹ *Id.* at 868.

²²⁰ I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 44–45 (2009).

²²¹ Brunson & Weitzer, *supra* note 191, at 864.

²²² Greg Jeffers, *Proactive Policing in a Majority Black, Urban Community: Restructuring Patrols, Police-Citizen Interactions, and Residents’ Perceptions of the Police* 109 (July 2014) (unpublished Ph.D. thesis, Indiana University) (on file with author).

²²³ Brunson & Weitzer, *supra* note 191, at 864.

²²⁴ *Id.* at 864–65.

²²⁵ See generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Robert Kane, *The Social Ecology of Police Misconduct*, 40 CRIMINOLOGY 867 (2002); Douglas Smith, *The Neighborhood Context of Police Behavior*, 8 CRIME & JUST. 313 (1986); William Terrill & Michael D. Reisig, *Neighborhood Context and Police Use of Force*, 40 J. RES. CRIME & DELINQ. 291, 291–321 (2003).

²²⁶ Meghan Strohshine et al., *The Influence of “Working Rules” on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 318 (2008).

²²⁷ *Id.*

²²⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661 (S.D.N.Y. 2013), analyzed data

The racial disparity in police treatment uncovered in St. Louis approximately ten years ago is consistent with a plethora of other studies since the 1980s that concluded that “African Americans are more likely than other racial groups to be victims of crime, to have negative contacts with the police, to be stopped disproportionately by the police, and to report incidents of police harassment and mistreatment.”²²⁹

“Allegations of physical abuse were prominent features of young men’s experiences,” noted the authors, so much so that some young men even “considered it a routine aspect of neighborhood life.”²³⁰ Though planting evidence was reported as a problem, this behavior was limited to certain “bad apples” within the department.²³¹

In 2014, a research team summarized the qualitative research done by others this way: “Recent studies suggest that *Terry* stops are often harsh encounters in which physical violence, racial/ethnic degradation, and homophobia are commonplace.”²³² Young men who are recipients of unwanted police stops “are often thrown to the ground or slammed against walls.”²³³ Next, social scientists had to determine how the police behavior affected their targets and the communities where this type of proactive policing was common.

B. A Lack of Trust

Most of the research on the effects of stop-and-frisk and other unwanted police attention has focused on how these practices erode trust among minorities. Studies from 1995 onward consistently show that African Americans are more likely to distrust the police than are white Americans.²³⁴ Latinos were also more likely to distrust police than white adults and youth.²³⁵ Not surprisingly, researchers determined that

from New York City from 2004 to 2012. The data showed that blacks who were stopped during the eight-year period scrutinized in *Floyd* were about 14% more likely than whites to be subjected to the use of force. *Id.* at 558. New York City police officers recorded using force in 23% of the stops of blacks and 24% of the stops of Hispanics, but only in 17% of the stops of whites. *Id.* at 559.

²²⁹ Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180, 182 (2009) (citing E. Erez, *Self-defined Desert and Citizens’ Assessment of the Police*, 75 J. CRIM. L. & CRIMINOLOGY 1275, 1275–99 (1984)); J. A. Schafer et al., *Citizen Perceptions of Police Services: Race, Neighborhood Context, and Community Policing*, 6 POLICE Q. 440, 441–42 (2003); Steven Tuch & Ronald Weitzer, *The Polls-Trends: Racial Differences in Attitudes Toward the Police*, 61 PUB. OPINION Q. 642 (1997); see also ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 190–207 (1996).

²³⁰ Brunson & Weitzer, *supra* note 191, at 880.

²³¹ Cf. ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 196 (2014) (where young men in Philadelphia told sociologist Goffman that police routinely stole money from them).

²³² Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014).

²³³ *Id.*

²³⁴ Brunson, *supra* note 111, at 73.

²³⁵ *Id.* at 74.

distrust arises directly from negative interactions during police stops such as those described in the previous section.²³⁶

In addition, sociologists concluded that aggressive policing also affected those who did not directly experience the unwanted contact. Many people who merely observed unfair treatment or heard from their families and friends about police harassment—those who had “[v]icarious experiences”²³⁷ of disrespect or abuse—also came to distrust the police. Understandably, the moral authority wielded by police in affluent neighborhoods disappears in areas where police behave badly. These studies were consistent for adults and for youth.²³⁸

Black youths interviewed in St. Louis viewed police officers as “bullies in uniform,”²³⁹ and a study of police-youth relationships in Chicago found similar attitudes.²⁴⁰ The Chicago police themselves “are a gang” said one gang member, explaining that police behave like other gangs when they “beat on us and abuse us for no reason” and because “their behavior is unpredictable.”²⁴¹ This description fits with journalist Ta-Nehisi Coates’s description of how, as a law-abiding teenager, he viewed the Baltimore police as one more rival gang during his school days.²⁴² Coates explained that “within the community, [there was] no real moral difference from the crews and the gangs and the packs of folks [police] who dispensed violence throughout the neighborhood. The police were another force to be negotiated, [a force] that could dispense violence.”²⁴³

In their 2009 study, Brunson and Weitzer documented some of the feelings caused by stop-and-frisk among teenagers.²⁴⁴ Youth were angered by the frequent stops, they felt hopeless to change police perceptions of themselves as criminal, and that they experienced the “disrespectful language” of police officers as “dehumanizing.”²⁴⁵ Assessing the harm, Brunson and Weitzer concluded that the police activity “weakens police authority in the eyes of the youths and reduces their willingness to comply with police directives.”²⁴⁶ This is problematic in part because failing to comply with directives is a criminal offense so police will then have a legitimate reason to

²³⁶ *Id.*

²³⁷ Browning et al., *supra* note 201, at 3; Brunson, *supra* note 111, at 74.

²³⁸ Brunson, *supra* note 111, at 85.

²³⁹ Brunson & Weitzer, *supra* note 191, at 879.

²⁴⁰ See generally A.J. Lurigio et al., *The Effects of Race on Relationships with the Police: A Survey of African American and Latino Youths in Chicago*, 10 WESTERN CRIMINOLOGY REV. 29–41 (2009).

²⁴¹ *Id.*

²⁴² FRESH AIR, *Ta-Nehisi Coates on Police Brutality, the Confederate Flag, and Forgiveness*, NPR (July 13, 2015, 1:59 PM), <http://www.npr.org/2015/07/13/422554778/ta-nehisi-coates-on-police-brutality-the-confederate-flag-and-forgiveness> [<https://perma.cc/SE63-W8RD>].

²⁴³ *Id.*

²⁴⁴ Brunson & Weitzer, *supra* note 191, at 858.

²⁴⁵ *Id.* at 869.

²⁴⁶ *Id.* at 880.

arrest the disaffected teenager. Moreover, police view disrespect for their authority as a transgression that should be punished even if a citizen has engaged in no rule-breaking, so the lack of trust can lead to use of force as well as improper arrests.²⁴⁷

Distrust in police often flares out into distrust in the criminal justice system as a whole. Here is how researchers Jamie L. Flexon, Arthur J. Lurigio, and Richard G. Greenleaf explained the consequences of creating antagonistic police-civilian relationships in their study of Chicago high school students:

Why should the police care about juvenile trust? For several reasons, they should. Police officers are often the first and only contact that young people have with the juvenile justice system (citation omitted). They embody the law and legal system, leaving lasting impressions on youths that can affect their attitudes toward the law and legal authorities.²⁴⁸

Since police are often the primary government actors that citizens interact with in over-policed communities, police encounters can foster distrust in state government and in democracy itself.²⁴⁹

Ironically, unwanted police encounters, such as stop-and-frisk, may actually encourage criminal behavior among the targeted population, the opposite of its stated goal. Law Professor David Harris argued that when police cultivate antagonistic relationships in communities, this could result in increased verbal and physical assaults against police officers.²⁵⁰ Sociologist Jamie Flexon and her research team wrote:

In the short-term, unfavorable impressions of the police can weaken youths' ties to school and strengthen their ties to gangs. In the long-term, they can make youths less likely to cooperate with and trust the police in adulthood, undermining community policing and other programs that depend on close ties between police officers and community members.²⁵¹

²⁴⁷ Lawrence Sherman, *Learning Police Ethics*, 1 CRIM. JUST. ETHICS 10, 14 & n.2 (1982).

²⁴⁸ Flexon et al., *supra* note 229, at 188.

²⁴⁹ See Amy Lerman & Vesla M. Weaver, *Staying out of Sight? Concentrated Policing and Local Political Action*, 651 ANN. AM. ACAD. POL. SOC. SCI. 202, 206 (2014); *id.* at 202 (“[A] high degree of stops that feature searches or the use of force, especially when they do not result in an arrest, have a chilling effect on neighborhood-level outreach to local government.”).

²⁵⁰ See generally DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* (2005).

²⁵¹ Flexon et al., *supra* note 229, at 188 (“[C]ommunity policing demands that citizens and police authorities work together closely in the coproduction and maintenance of public safety and order. Nonetheless, without trust between police officers and community residents, such

Community policing is the theory of crime-control model most often practiced in American cities today.²⁵² To reduce and solve crime, community policing relies on civilians to inform the police about crimes and relies on cooperation between officers and civilians. People who distrust police are less likely to call police for assistance, report crimes, or assist police in their investigations.²⁵³ Without this help, police will be less successful in solving crime and preventing crime.²⁵⁴ Thus, the unpleasant use of *Terry* stops creates antagonistic relationships between officers and civilians that undermine crime-prevention efforts. Rather than preventing crime, stop-and-frisk creates a climate where it is more difficult for police to bring dangerous criminals to justice.

Even aside from boorish or impolite police behavior, the stops may offend their targets and the community if they are viewed as racial profiling or racial harassment.²⁵⁵ *Terry* stops and harassment that appear to be based on racial profiling or racial bias “can have lasting, adverse effects” on how an African-American community perceives the police.²⁵⁶

Overall, the data has been consistent and thorough in connecting police methods to individual community distrust and has explored the various ways that distrust harms communities, individuals, and police. Nevertheless, this research does not tell the whole story about how police abuse affects individuals and communities. Distrust is merely one of many negative consequences of intensive policing methods. More recently, researchers took up the task of looking at other manifestations of individual and community harms.

partnerships can never be fully formed or sustained.”) (citing Wesley G. Skogan, *Asymmetry in the Impact of Encounters with Police*, 16 POLICING & SOC’Y 99 (2006)); see also EGON BITTNER, ASPECTS OF POLICE WORK (1990); Yolanda G. Hurst, *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING: AN INT’L J. POLICE STRATEGIES MGMT. 37, 41–42 (2000).

²⁵² See generally Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 989 (2003).

²⁵³ See generally *id.*

²⁵⁴ See generally Sampson et al., *supra* note 192; Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (2004).

²⁵⁵ See generally Tyler, *supra* note 254.

²⁵⁶ Rod K. Brunson, *Beyond Stop Rates: Using Qualitative Methods to Examine Racially-Based Policing*, in RACE, ETHNICITY, AND POLICING: NEW ESSENTIAL READINGS 221, 222 (Stephen K. Rice & Michael D. White eds., 2010) (internal quotations omitted) (citing Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435 (2002)). Note that in a book about racism generally, sociologists Feagin and Sikes write that “experiences with serious discrimination not only are very painful and stressful in the immediate situation and aftermath but also have a cumulative impact on particular individuals, their families, and their communities.” JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 16 (1994).

C. Health Consequences to Stop-and-Frisk

The World Health Organization (WHO) now treats violence—whether performed by the state or the individual—as a health problem.²⁵⁷ In 2002, a report of the WHO identified a relationship between violence and excessive use of force by police.²⁵⁸ On the one hand, excessive use of force by police, especially deadly force, creates physical injuries and is therefore a type of violence in itself.²⁵⁹ Additionally, when society tolerates excessive use of force by police, even non-deadly forms of force, this encourages other types of violence in a society, the report found.²⁶⁰

In 2015, a researcher at the University of Maryland, Joseph Richardson Jr. wrote: “Despite growing recognition of violence and its health consequences and the World Health Organization’s classification of police officers’ excessive use of force as a form of violence, public health investigators have produced scant research characterizing police-perpetrated abuse.”²⁶¹ While Professor Richardson sought to document the extent of physical injuries caused by police, other researchers began to consider the effects of stress on individuals and communities.

One of the first studies to squarely examine whether the experience of being stopped and frisked affected an individual’s mental health was undertaken by Amanda Geller, a Clinical Associate Professor of Sociology at New York University, along with Jeffrey Fagan, the Columbia law professor who served as the expert witness on statistical data analysis for the plaintiffs in *Floyd v. City of New York*, and Bruce Link, also affiliated with Columbia University.²⁶² Published in 2014 in the American Journal of Public Health, *Aggressive Policing and the Mental Health of Young Urban Men*, postulated that aggressive policing might cause emotional trauma, stigma, stress, and depressive symptoms.²⁶³ “Despite the heated debate on police practices,” Geller and co-authors write, “little is known about the health implications of involuntary contact with the police.”²⁶⁴

Building on other studies such as Brunson and Weitzer’s study discussed above, Geller notes that the “rough manner” in which police perform *Terry* stops creates a risk of physical injury, but the authors expected to find emotional trauma as well.²⁶⁵

²⁵⁷ WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE & HEALTH SUMMARY 4 (2002), http://www.who.int/violence_injury_prevention/violence/world_report/en/summary_en.pdf [<https://perma.cc/69LM-YBZV>].

²⁵⁸ *Id.* at 9.

²⁵⁹ Joseph B. Richardson, *Who Shot Ya? How Emergency Departments Can Collect Reliable Police Shooting Data*, J. URB. HEALTH: BULL. N.Y. ACAD. MED. (2015), http://aasd.umd.edu/sites/aasd.umd.edu/files/pubs/Richardson2015_whoshotya.pdf [<https://perma.cc/MZ74-PEYG>].

²⁶⁰ *See* WORLD HEALTH ORG., *supra* note 257, at 9.

²⁶¹ *See* Richardson, *supra* note 259.

²⁶² *See generally* Geller et al., *supra* note 232.

²⁶³ *Id.* at 2321.

²⁶⁴ *Id.* at 2322.

²⁶⁵ *Id.* at 2321.

They note that even unwarranted accusations of wrongdoing may cause stress, and when participants believe that they will be targeted because of their race, this “anticipated racism” generally causes stress.²⁶⁶

Geller and her co-authors interviewed men aged 18 to 26 years old in New York City during the period when patrol officers were required to engage in stop-and-frisk policing²⁶⁷ and asked them about their experiences. Eighty percent of the respondents were minorities and 85% had been stopped at least once while 5% had been stopped more than twenty-five times.²⁶⁸ In the first model, researchers recorded self-reported mental health factors and measured them against the number of times the person had been stopped.²⁶⁹ As anticipated, greater police contact correlated with higher anxiety scores, that is, “more trauma symptoms among respondents reporting more lifetime stops.”²⁷⁰

Researchers found an even higher correlation between the intensity of police stops and Post-Traumatic Stress Disorder (PTSD) “with more invasive stops predicting higher levels of trauma.”²⁷¹ The scale of intrusion was measured on a scale of zero to fifteen, based upon whether the respondent’s most “critical encounter” included a frisk, verbal insults, force or other variables.²⁷² PTSD symptoms rose sharply among those reporting intrusiveness levels of five to fourteen.²⁷³ “We found that young men reporting police contact, particularly more intrusive contact . . . display higher levels of anxiety and trauma associated with their experiences.”²⁷⁴

²⁶⁶ *Id.* (footnotes omitted). A few earlier studies were undertaken to understand how blacks experience policing and these indicated that invasive police encounters had health consequences for those targeted. *See generally* JAMES D. UNNEVER & SHAUN L. GABBIDON, *A THEORY OF AFRICAN AMERICAN OFFENDING: RACE, RACISM, AND CRIME* (2011).

²⁶⁷ Geller et al., *supra* note 232, at 2322. The surveys took place from 2012 to March 2013. *Id.* In 2012, New Yorkers were stopped by the police 532,911 times. *See* NEW YORK CIVIL LIBERTIES UNION (NYCLU), *Stop-and-Frisk Data*, NYCLU, <http://www.nyclu.org/content/stop-and-frisk-data> [<https://perma.cc/S2Q7-566U>]. “In 2013, New Yorkers were stopped by the police 191,558 times.” *Id.*

²⁶⁸ Geller et al., *supra* note 232, at 2323.

²⁶⁹ *Id.* at 2322.

²⁷⁰ *Id.* at 2324.

²⁷¹ *Id.* (citing L. Derogatis & N. Melisaratos, *The Brief Symptom Inventory: An Introductory Report*, 13 *PSYCHOL. MED.* 595 (1983) (measuring anxiety levels using the Brief Symptom Inventory anxiety subscale and employing three subscales (intrusion, avoidance, and hyper-arousal) summed to measure posttraumatic stress disorder).

²⁷² *Id.* at 2322.

²⁷³ *Id.* at 2324.

²⁷⁴ *Id.* Note that there was some previous work done for target populations. “Among adolescents, substance users, and sex workers, associations have been found between police contact and reports of mental health problems, problem behaviors, and HIV-risk behavior.” Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 *J. URB. HEALTH* S43 (Supp. 2016) (citing Kim M. Blankenship & Stephen Koester, *Criminal Law, Policing Policy, and HIV Risk in Female Street Sex Workers and Injection Drug Users*, 30 *J. LAW, MED. & ETHICS* 548–59 (2002);

The results “raise public health concerns for the individuals and communities most aggressively targeted by police.”²⁷⁵ Researchers note that earlier research linked poor health to incarceration. “The criminal justice system has been recognized increasingly as a threat to physical and mental health.”²⁷⁶ The 2014 study confirmed the suspicions of Professor Geller and the other authors that even without arrest or prosecution, stop-and-frisk creates a risk of serious health consequences. Professor Geller’s study should be mandatory reading for anyone weighing the positive and negative effects of stop-and-frisk as a method of combatting crime.

Recently, Abigail A. Sewell, an assistant professor from Emory University Department of Sociology, explored a new angle on the harm caused by stop-and-frisk in a study published in 2016 in the *Journal of Urban Health*.²⁷⁷ While Professor Geller and her co-authors had focused on harms of those targeted by police, Professor Sewell studied the effect of stop-and-frisk on the whole community in a study titled *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*.²⁷⁸ And instead of measuring the psychological harms directly, as Professor Geller had done, Professor Sewell quantified physical symptoms associated with stress, (for previous research established that “everyday stressors produce wear and tear on the body, which has been shown to increase physiological strain and limit disease resistance”).²⁷⁹

Ann F. Garland et al., *Racial and Ethnic Differences in Utilization of Mental Health Services Among High-Risk Youths*, 162 AM. J. PSYCHIATRY 1336–43 (2005); J.E. Hathaway et al., *Health Status and Health Care Use of Massachusetts Women Reporting Partner Abuse*, 19 AM. J. PREV. MED. 302–07 (2000); Matt McGue & William G. Iacono, *The Association of Early Adolescent Problem Behavior with Adult Psychopathology* 162 AM. J. PSYCHIATRY 1118–24 (2005)).

²⁷⁵ Geller et al., *supra* note 232, at 2326.

²⁷⁶ *Id.* at 2321 (footnotes omitted). *See generally* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Cynthia Golembeski & Robert Fullilove, *Criminal (In)justice in the City and Its Associated Health Consequences*, 95 AM. J. PUB. HEALTH 1701 (2005); Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates Among African American Women and Men*, 52 J.L. & ECON. 251 (2009).

²⁷⁷ Sewell & Jefferson, *supra* note 274.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at S43. The physical health outcomes measured in this study were diabetes, high blood pressure, and obesity, as well as self-reported overall health. *Id.* (citing Michelle Billies, *Surveillance Threat as Embodied Psychological Dilemma*, 21 PEACE & CONFLICT: J. PEACE PSYCHOL. 168, 168–86 (2015); Cooper et al., *supra* note 197, at 1109–18; Arline T. Geronimus et al., “Weathering” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 826–33 (2006)). Similarly, hypervigilance “produce[s] harmful physiological responses, such as elevated blood pressure, heart rate, and stress biomarkers.” *Id.* (citing Vickie M. Mays et al., *Race, Race-Based Discrimination and Health Outcomes Among African Americans*, 58 ANN. REV. PSYCHOL. 201–25 (2008)).

It may be self-evident that violence can cause harm to communities, not just individuals. When Michael Brown's body was callously left in the street in Ferguson, one civilian tweeted that the neighbors: "could walk out of their homes and see a dead body in the street as it was lying there for four hours. You can preach due process to everyone but this remains a point of fact . . . A lot of people were traumatized."²⁸⁰ Thus, it is eminently logical that police activity would have a psychological impact beyond those individuals who experienced aggressive policing firsthand.

Psychologists have found that adults and children can become alarmed and disturbed simply by seeing another person in distress.²⁸¹ It stands to reason that people who see others stopped may become hypervigilant in order to avoid unwanted police encounters themselves. Hypervigilance produces unhealthy side effects, including elevated blood pressure, increased heart rates, and stress biomarkers, particularly among those who cope with this anxiety producing state for extended periods of time.²⁸² Discrimination has been tied to health outcomes also. Studies have documented that African Americans have raised blood pressure and other negative health consequences that correlate to perceptions of race discrimination, and these findings suggest that negative health consequences would flow from a perception of racially discriminatory police practices.²⁸³

Professor Sewell looked beyond the individuals who were subjected to stop-and-frisk firsthand to consider the larger communities where these unwanted contacts are frequent. Her study compared two large sets of data from New York City in the years 2009–2012.²⁸⁴ One was an annual random-digit-dial health survey of 10,000

²⁸⁰ Julia Lurie, *10 Hours in Ferguson: A Visual Timeline of Michael Brown's Death and Its Aftermath*, MOTHER JONES (Aug. 27, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/08/timeline-michael-brown-shooting-ferguson> [<https://perma.cc/5FJ4-69MN>]. Mike Jones, an African-American chief aide to the St. Louis County Executive, explained "[y]ou'll never make anyone black believe that a white kid would have laid in the street for four hours." Richard Prince, *Why Michael Brown's Body Was Left on the Street for So Long*, ROOT (Sept. 17, 2014), http://www.theroot.com/blog/journal-isms/why_michael_brown_s_body_was_left_on_the_street_for_so_long/ [<https://perma.cc/2LQL-4C3X>].

²⁸¹ Daphne Blunt Bugental et al., *Influences of Witnessed Affect on Information Processing in Children*, 63 CHILD DEV. 774, 774 (1992). See generally C. Daniel Batson et al., *Distress and Empathy: Two Qualitatively Distinct Vicarious Emotions with Different Motivational Consequences*, 55 J. PERSONAL. 19 (1987).

²⁸² Mays et al., *supra* note 279, at 204.

²⁸³ Pew Research found that in 2009, "More than three times as many blacks as whites said they had very little confidence in their local police to treat the races equally (34% vs. 9%)." PEW RESEARCH CTR., *Views of Law Enforcement, Racial Progress and News Coverage of Race: Pew Research Center Data Note: Attitudes About Race*, PEW RES. CTR. (Mar. 30, 2012), <http://www.people-press.org/2012/03/30/blacks-view-of-law-enforcement-racial-progress-and-news-coverage-of-race/> [<https://perma.cc/2AQQ-GYJ9>]; see also Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, *Social Forces*, 83 SOC. FORCES 1009, 1010 (2005).

²⁸⁴ Sewell & Jefferson, *supra* note 274, at S44.

New Yorkers that was subdivided by neighborhoods.²⁸⁵ The other data source was stop-and-frisk statistics from the same years collected by the New York Police Department.²⁸⁶ New York City police were required to fill out forms for every police stop and over two million stops were recorded during the three-year period studied. The NYPD database included the location of each stop as well as other pertinent information, such as the race of the subject and whether force was employed.²⁸⁷

There were greater health consequences in communities with higher levels of frisking and higher level of force during police stops, researchers found. “In areas where pedestrian stops are more likely to culminate in frisking,” the researchers explained, “the prevalence of poor/fair health, diabetes, high blood pressure, past year asthma episodes, and heavier body weights is higher.”²⁸⁸ Similarly, in neighborhoods where force was used against minorities at a significantly higher rate than police used in conducting *Terry* stops of white people, people in these neighborhoods reported diabetes, high blood pressure, obesity or overweight, and overall worse health conditions.²⁸⁹ Interestingly, in neighborhoods where blacks were targeted for stops at a much higher rate than whites, but where police frisked less and reported less use of force, individuals reported better health.²⁹⁰ The paper “provides a starting point to evaluate the relationship between health and invasive aspects of *Terry* stops.”²⁹¹ Overall, the researchers’ statistical analysis revealed that *Terry* stops were “associated with poor health” for over 80% of the health indicators measured.²⁹²

In a second study, Sociology Professor Abigail Sewell and her team broke down the effects of stop and frisk on communities based on gender.²⁹³ Again, they control for “neighborhood socioeconomic status” and for “robbery complaints as an objective measure of neighborhood crimes” so that the health outcomes shown are not simply a result of these factors. It turned out that men who live in neighborhoods where pedestrians are more likely to be frisked and where pedestrians are more likely to have force used against them by police had different health outcomes than women who lived in the same neighborhoods. Men were “more likely to report

²⁸⁵ *Id.*

²⁸⁶ *Id.* This is a subset of the data used in the seminal lawsuit, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 572–76 (S.D.N.Y. 2013), that examined the constitutionality of the NYPD stop-and-frisk policy.

²⁸⁷ See Sewell & Jefferson, *supra* note 274, at S44 (New York City Stop, Question, and Frisk Database from 2009, 2010, 2011, & 2012).

²⁸⁸ *Id.* at S54.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* Sewell separated out the usual variations in health caused by crime and poverty, by “holding constant crime levels, segregation measures, and known sociodemographic correlates of health.” See *id.*

²⁹² *Id.*

²⁹³ Sewell et al., *supra* note 4, at 1. This study uses similar data, although the NYC Stop-Question-and-Frisk data is from 2009 to 2011, while the health data is from the 2012 NYC Community Health Survey. See *id.*

feelings of nervousness and worthlessness and more severe psychological distress” while women were not affected psychologically.²⁹⁴ This makes sense given that police target men and boys for pedestrian stops over eighty-five percent of the time.²⁹⁵ “Our findings show that living in aggressively policed communities is of detriment to the health of male residents in the neighborhood.”²⁹⁶

“People do not have to be inside the criminal justice system to feel the effects of the criminal justice system[,]” concluded Sewell.²⁹⁷ Aggressive policing “shape[s] the health of people who have not yet entered into its gates.”²⁹⁸ This is a chilling statement. In deciding whether stop-and-frisk is good policy, these widespread health consequences should be part of the equation.

CONCLUSION

When, as a presidential candidate, Hillary Clinton was asked to respond to a video showing a Chicago police officer continuing to shoot Laquan McDonald as the young man lay harmless on the ground, she said simply: “The mothers I met recently in Chicago are right; we cannot go on like this.”²⁹⁹ The same should be said about stop-and-frisk policing as a method of neighborhood control. As the mayors, legislators, and police chiefs around the country are rethinking their policing methods, they should ask not whether stop-and-frisk is constitutionally permitted, but whether it is good policy. Then, to answer the question, the policy-makers should look at the statistics that show that stop-and-frisk does not reduce crime and weigh that against the harms uncovered by social scientists.

For more than a decade now, social scientists studied stop-and-frisk and its effect on who is targeted for repeated stops.³⁰⁰ The news is grim. In the neighborhoods studied, stop-and-frisk is often accomplished by orders to get against the wall, disrespectful language, and the use of force or aggressive bodily contact, namely

²⁹⁴ *Id.* at 9. In fact, in some cases, living in a neighborhood with a high percentage of police use of force proved protective of women’s mental health. *Id.* The authors suggest that for some women, the police presence may “mitigate against concerns about neighborhood violence and safety.” *Id.*

²⁹⁵ “The number of women stopped by officers in 2011 represented 6.9 percent of all police stops.” Wendy Ruderman, *For Women in Street Stops, Deeper Humiliation*, N.Y. TIMES (Aug. 6, 2012), http://www.nytimes.com/2012/08/07/nyregion/for-women-in-street-stops-deeper-humiliation.html?_r=2&pagewanted=all; see also DUNN, *supra* note 116.

²⁹⁶ Sewell et al., *supra* note 4, at 9.

²⁹⁷ Sewell & Jefferson, *supra* note 274, at S55.

²⁹⁸ *Id.*

²⁹⁹ Colleen Connolly, *Clinton, Sanders Speak Out After Release of Laquan McDonald Video*, NBCCHI., <http://www.nbcchicago.com/blogs/ward-room/Clinton-Sanders-Speak-Out-After-Release-of-Laquan-McDonald-Video-354045531.html> [<https://perma.cc/Z8ZU-MFVX>].

³⁰⁰ See, e.g., Weitzer & Tuch, *supra* note 283.

“pushing, shoving, rifling through pockets, [and/or] forcibly undressing suspects.”³⁰¹ From its inception, the frisk was recognized as an intrusive invasion of a person’s privacy, but the data reveals that stop-and-frisk is an aggressive form of policing, more invasive and demeaning than the Supreme Court Justices might have predicted in 1968 when they decided *Terry v. Ohio*.³⁰²

There is a large cost to current policing methods. Current policing creates distrust of law enforcement among the individuals targeted and in the community at large. Although stop-and-frisk is supposed to be a method of reducing crime, ironically, the distrust generated by stop-and-frisk makes it harder for police to solve or prevent crimes. Police aggression risks undermining a young person’s trust in all government institutions, even weakening a young person’s ties to school, for example.³⁰³ While the full range of damaging collateral consequences of distrust continue to be studied, the evidence is conclusive that stop-and-frisk, as practiced in cities such as St. Louis, Chicago, and New York, leads to a breakdown in trust by both the person subjected to one or more unwanted encounters, and by those who witness them.

More recently, social science has begun to *investigate* the connection between aggressive policing and health. It appears that aggressive use of stop-and-frisk is bad for the health of the individual and also for the community as a whole.³⁰⁴ It is one thing to recognize that policing creates lasting distrust among a demographic and another to realize that stop-and-frisk policing may cause stress, PTSD, and bad physical health, such as diabetes and high blood pressure. Just as hyperincarceration has been framed as an economic issue, stop-and-frisk’s financial costs will soon be able to be tabulated. More studies in this area would be helpful, but the new research brings a new urgency to the problem. Health consequences create a moral imperative as well as a financial argument against stop-and-frisk practices.

The data may also prove vital to the Supreme Court. It has been almost fifty years since *Terry v. Ohio* created the stop-and-frisk exception to the Fourth Amendment’s probable cause standard, and it did so based on a cost-benefit analysis. In weighing the costs and benefits of excluding evidence when police lacked probable cause to detain and search, the *Terry* Court famously recognized that police harassed black citizens, but concluded that requiring probable cause for short detentions and frisks would do little to deter these abuses. In the interim, the New York Police Department collected more than a decade’s worth of data on their stop-and-frisk practices, and social scientists have mined that data as well as created other studies.³⁰⁵ There is now data available for a Court to test its assumptions about the benefits and harms of stop-and-frisk.

³⁰¹ Brunson & Weitzer, *supra* note 191, at 871.

³⁰² *See id.* at 866.

³⁰³ *See* Brunson, *supra* note 111, at 93.

³⁰⁴ Sewell & Jefferson, *supra* note 274, at S54.

³⁰⁵ *Id.* at S44.

Although Justice Sotomayor has not yet persuaded her colleagues of the urgency of policing problems, her dissent in *Strieff* may convince more Justices to measure theory against honest data when undertaking cost-benefit analyses. Civil libertarians may be encouraged to ask the Supreme Court to reconsider its holdings in *Terry v. Ohio* and now *Utah v. Strieff*, armed with studies and data that flesh out the cost-benefit analysis of this proactive policing method. Although *Terry v. Ohio* was decided almost fifty years ago, the doctrine is ripe for review.