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Introduction

Thirteen years, eleven months, twenty-two days, and approximately forty-six police stops filled the time between Philando Castile's first and final traffic stop.[1] The majority of Mr. Castile's interactions with Minnesota's law enforcement officers were initiated pursuant to minor traffic infractions and only six stop records detailed traffic violations that the stopping officer could have been aware of from outside the car, such as speeding, blocking an intersection, or improperly displaying his license plate.[2] On July 6, 2016, Officer Jeronimo Yanez reported to dispatch that he was pulling over Mr. Castile's vehicle because the occupants "just look like the people that were involved in a robbery . . . . [T]he driver looks more like one of our suspects just because of the wide set [sic] nose."[3] After being pulled over, Mr. Castile and Officer Yanez exchanged greetings, and Officer Yanez requested Mr. Castile's driver's license and proof of insurance.[4] Shortly after handing

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1. Eyder Peralta & Cheryl Corley, *The Driving Life and Death of Philando Castile*, NPR (July 15, 2016, 4:51 AM), http://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile.

2. *Id.*

3. Felony Criminal Complaint at 3, Minnesota v. Yanez, (Minn. Dist. Ct. 2016) (No. 62-CR-16-8110), 2016 WL 6800872; Riham Feshir, *At Castile Stop, Uneasy Questions of Race and Police Training*, MINN. PUB. RADIO NEWS (July 14, 2016), http://www.mprnews.org/story/2016/07/14/philando-castile-shooting-race-police-training. As of January 2017, no individuals have been arrested or charged with the July 2, 2016 robbery Officer Yanez referenced when pulling over Mr. Castile. Tad Vezner, *Robbery Investigation Mentioned in Philando Castile Stop Remains Open*, TWIN CITIES PIONEER PRESS (Oct. 2, 2016, 11:05 AM), http://www.twincities.com/2016/10/01/robbery-investigation-mentioned-in-philando-castile-stop-remains-open/.

4. Felony Criminal Complaint, *supra* note 3.

Officer Yanez his insurance card, Mr. Castile told Officer Yanez, "Sir, I have to tell you that I do have a firearm on me."[5] Approximately eight seconds later, Officer Yanez fired seven rounds into the vehicle occupied by Mr. Castile, his girlfriend, and her young daughter.[6] Mr. Castile was fatally wounded.[7]

On November 16, 2016, Ramsey County Attorney John Choi announced that his office had filed one charge of second degree manslaughter and two counts of felony intentional discharge of a dangerous weapon against Officer Yanez.[8] Prosecutors alleged that, "[n]o reasonable officer—knowing, seeing and hearing what Officer Yanez did at the time—would have used deadly force under these circumstances."[9] Nevertheless, on June 16, 2017, a jury acquitted Officer Yanez of all charges.[10] Mr. Castile's story is not unique.[11] The series of events—from Officer Yanez's decision to pull Mr. Castile over, to the ensuing escalation that culminated in Mr. Castile's death, and finally, the jury's acquittal—are not unusual, especially among Blacks, Hispanics, and other racial minorities.[12]

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5. *Id.*

6. *Id.*

7. Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?_r=0.

8. *See id.* (outlining the events leading up to the shooting of Mr. Castile and Mr. Choi's decision to file charges); *see also* Jon Collins, Riham Feshir & Tim Nelson, *Officer Charged in Castile Shooting*, MINN. PUB. RADIO NEWS (Nov. 16, 2016), https://www.mprnews.org/story/2016/11/16/officer-charged-in-castile-shooting ("I know my decision will be difficult for some in our community to accept, but in order to achieve justice we must be willing to do the right thing no matter how hard it may seem.").

9. Capecchi & Smith, *supra* note 7.

10. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html?_r=0.

11. *See* Jana Kooren, *The Minneapolis Police Department Is Finally Sharing Data on Police Stops. Other Departments Should Follow.*, ACLU: SPEAK FREELY (Sept. 12, 2017, 4:45 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/minneapolis-police-department-finally-sharing (explaining that the Minneapolis Police Department's new data system provides the public with information on traffic stops; the data shows that "Black people make up around 36 percent of people stopped but are only 18 percent of the population, while Native Americans are 4 percent of the stops but only account for 2 percent of the population. The disparities could be even greater because race was marked unknown for 24.4 percent of the people stopped."); *see also* Madison Park, *Police Shootings: Trials, Convictions Are Rare for Officers*, CNN (June 24, 2017, 8:18 PM), http://www.cnn.com/2017/05/18/us/police-involved-shooting-cases/index.html (listing the names and stories of victims of police shootings and noting that officers who killed the following individuals were either acquitted or charges were dropped: Lamar Anthony Smith, Sylville Smith, Philando Castile, Terence Crutcher, and Freddie Gray).

12. *See* Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in*

Despite widespread awareness of blatant police brutality and lethality,[13] the Supreme Court's recent ruling in *Utah v. Strieff* effectually undercuts the legal protections available to racial minorities who experience unconstitutional and discriminatory law enforcement actions.[14] This Note will argue that *Strieff* and its antecedents—*Whren*, *Devenpeck*, and *Herring*—cumulatively authorize state-sponsored racial profiling and will amplify low-level harassment of racial minorities by law enforcement officers, resulting in an increase in instances of non-lethal and lethal use of force against racial minorities.

Part I of this Note examines the integration of racial profiling into law enforcement practice nationwide and surveys the legal mechanisms intended to protect individuals from such actions. Part II discusses the compounding effects of four United States Supreme Court decisions, *Whren*, *Devenpeck*, *Herring*, and *Strieff*, that narrow individuals' Fourth Amendment rights. Part III analyzes the impact of the Supreme Court's construction of Fourth Amendment protections by mapping the holdings of *Strieff* and its antecedents onto data exposing the prevalence of racial profiling. Finally, Part IV argues that *Strieff* and its antecedents incentivize the practice of racial profiling and urges the adoption of a two-prong approach to combat these dangerous policies: First, the Supreme Court must acknowledge the role its decisions play in advancing racial profiling and police brutality and halt the progression of its precedent by endorsing Justice Sotomayor's dissent in *Strieff*. Second, law enforcement precincts must adopt recruitment and training requirements that counter racial profiling.

Police Use of Force 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016).

13. *See* Reg Chapman, *'No Faith in This System': Activists React to Philando Castile Squad Car Video*, CBS MINN. (June 20, 2017, 6:39 PM), http://minnesota.cbslocal.com/2017/06/20/community-reaction-castile-video/ (quoting local activist and attorney Nekima Levy-Pounds, "Thinking about a situation in which he [referring to her son] could be pulled over like that—shot and killed—and the officer simply being able to say, 'I was afraid for my life,' being used as a justification under the law—it boils my blood."); *see also About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Nov. 29, 2017) ("We are working for a world where Black lives are no longer systematically targeted for demise.").

14. *Compare* Utah v. Strieff, 36 S. Ct. 2056 (2016) (holding that evidence discovered pursuant to an unlawful stop is admissible if an officer discovers an active warrant after the illegal arrest), *with* Devenpeck v. Alford, 543 U.S. 146 (2004) (holding that an officer's subjective reason for initiating a stop need not be closely related to the offense upon which the arrest is ultimately made), *and* Whren v. United States, 517 U.S. 806 (1996) (holding that pretextual stops are not unconstitutional because courts do not look at the subjective intent of law enforcement officers).

I. Background

a. Empirical Evidence of Racial Profiling in Law Enforcement Practice

In the United States, approximately 42% of face-to-face interactions between individuals and law enforcement officers originate from suspected traffic violations.[15] In 2011, 13% of Black drivers, 10% of White drivers, and 10% of Hispanic drivers were pulled over.[16] Of all drivers stopped by the police, Black drivers were more likely to be ticketed than either White or Hispanic drivers even though White drivers comprised a larger percentage of total drivers.[17] A recent examination of law enforcement data on traffic stops and tickets in Cleveland found that Black drivers comprised 38.4% of the driving population and yet they received 59% of all tickets; in contrast, White drivers comprised 54.6% of drivers but received 33% of all tickets.[18] The research evidences that Black drivers are 2.5 times more likely to receive a ticket than White drivers.[19] Other racial minorities are 1.8 times as likely to receive a ticket than White drivers.[20]

Racial disparities permeate deeper than disproportionate stops and tickets. To initiate a search of a vehicle, law enforcement officers must either have a warrant, be granted consent by the individual being searched, or conduct a search incident to an arrest.[21] Across the United States, 3% of all drivers stopped by police were subjected to a search; broken down by race, 2% of all White drivers were searched by police compared to 6% of Black drivers and 7% of Hispanic drivers.[22] Despite searching Black and Hispanic drivers far more frequently than White drivers, law enforcement officers' searches of Black and Hispanic drivers were

15. LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 at 3 (Sept. 2013).

16. *See id.* at 1 (noting that Langton & Durose use "Latino" and "Hispanic" interchangeably).

17. *Id.* at 7 (noting that 7% of Black drivers and 6% of Hispanic drivers were ticketed, whereas 5% of White drivers were ticketed).

18. Ronnie A. Dunn, *Racial Profiling: A Persistent Civil Rights Challenge Even in the Twenty-First Century*, 66 CASE W. RES. L. REV. 957, 974 (2016).

19. *Id.* at 973.

20. *Id.*

21. *See* 5 Wayne R. LaFave, Search and Seizure § 5.2(b), 131–37 (5th ed. 2012); Seth W. Stoughton, *Modern Police Practices:* Arizona v. Gant's *Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727, 1727 (2010).

22. LANGTON & DUROSE, *supra* note 15, at 9.

not found to have resulted in the discovery of higher rates of contraband possession.[23]

The justification upon which law enforcement officers initiate a stop and search of minority drivers often differs from that used to support a stop and search of White drivers.[24] The authors of a study "of 4.5 million traffic stops conducted by the 100 largest police departments in North Carolina"[25] submit that Hispanic and Black drivers "face discrimination in search decisions."[26] Law enforcement officers' disproportionate stopping and searching of Hispanic and Black drivers creates a cycle of self-fulfilling prophecies: multiple studies indicate that Black and Hispanic drivers are surveilled, stopped, and ticketed more frequently than White drivers.[27] Cumulatively, these practices rewrite crime narratives and lead "many officers [to] *believe* that querying vehicles with African Americans produces more 'hits.'"[28] This results in an abundance of adverse consequences for Black and Hispanic drivers, including the disproportionate revocation of driver's licenses which leads to skewed arrest rates.[29] These findings expose the widespread and systematic integration of racial profiling into law enforcement tactics throughout the nation.

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23. Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 THE ANNALS OF APPLIED STATISTICS 1193, 1203 (2017) (finding in an empirical study of traffic stops in North Carolina that the rate of contraband possession pursuant to a search is 32% for Whites, 29% for Blacks, and 19% for Hispanics).

24. *See id.* at 1202–06 ("In nearly all the departments we consider, the inferred search thresholds for [B]lack and Hispanic drivers are lower than for [W]hites, suggestive of discrimination against these groups.").

25. *Id.* at 1194.

26. *Id.* at 1194, 1213.

27. *See* Dunn, *supra* note 18, at 991; Timothy Bates, *Driving While Black in Suburban Detroit*, 7 DU BOIS R. 133, 138 (2010) (indicating that in suburban Detroit, Black drivers were disproportionately ticketed compared to White drivers and were more likely than White drivers to receive multiple tickets); Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUST. Q. 399, 422 (2006) ("Profiling, as measured by the proactive surveillance of African American drivers, significantly increases as African Americans travel farther from '[B]lack' communities and into whiter neighborhoods.").

28. Meehan & Ponder, *supra* note 27, at 418 (2006) (emphasis in original); *see License Suspensions & Revocations*, DEP'T. OF MOTOR VEHICLES, http://www.dmvnv.com/dlsuspension.htm (last visited Oct. 30, 2017) (noting that a finding of failure to pay child support, a conviction of graffiti violation, or underage purchase, drinking, or possession of alcohol results in either a driver's license revocation or suspension).

29. *See* Dunn, *supra* note 18, at 979 ("In that [B]lacks were the overwhelming majority of those cited for 'driving under suspension or revocation' (seventy-nine percent), they were likewise the majority of those arrested. . . . [B]lacks were arrested at 1.86 times their percentage of all motorists.").

Racial profiling refers to the use of an individual's race or ethnicity as a "proxy for suspicion of involvement in some form of criminal activity or threat."[30] Proving the use of racial profiling as an illegal practice is an extremely difficult task that requires demonstrable proof that an officer acted with discriminatory intent.[31] To challenge racial profiling under the Equal Protection Clause, an individual must prove both discriminatory intent *and* discriminatory effect.[32] One particularly salient and culturally-relevant example of racial profiling, "driving while black or brown," refers to a common law-enforcement practice where police routinely stop Black and Hispanic drivers, based on the color of their skin, with the assumption that the driver is breaking a non-moving traffic regulation, such as not wearing a seatbelt, or is in possession of illicit materials.[33] Any traffic violation discovered after an allegedly pretextual stop, regardless of gravity, establishes sufficient probable cause to validate the stop, even if the initial basis for the stop lacked the requisite probable cause.[34] This is disturbing given the near impossibility of an officer knowing prior to a stop that an individual is not wearing a seatbelt, lacks car insurance, or has an invalid driver's license, raising the question as to what valid probable cause warranted the stop.[35]

The Cleveland study found that Black drivers received 83% of all citations for seatbelt violations and 88% of all citations for

30. Dunn, *supra* note 18, at 961.

31. Meehan & Ponder, *supra* note 27, at 403; s*ee, e.g.*, United States v. Davis, 11 F. App'x 16 (2d Cir. 2001) (unpublished) (holding that the defendant did not prove that he was subjected to intentional racial profiling, noting that the government provided evidence stating that 6.1% of the driving citations given by the particular officer in a three-year period were issued to Blacks and that the defendant was the only individual cited for the failure to display a registration sticker); Lee v. City of South Charleston, 668 F. Supp. 2d 763 (S.D. W. Va. 2009) (noting that despite providing evidence of the disparate treatment of minority drivers throughout the state, cities, and counties, the study provided by the defendant did not provide evidence of racial profiling for the specific city where the defendant was pulled over).

32. *See* Kimberly J. Winbush, *Racial Profiling by Law Enforcement Officers in Connection with Traffic Stops as Infringement of Federal Constitutional Rights or Federal Civil Rights Statutes*, 91 A.L.R. Fed. 2d 1, 3.

33. DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (June 1999), https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways.

34. Thomas Fusco, *Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop for Traffic Offense, to Investigate Matters Not Related to Offense*, 118 A.L.R. Fed. 567.

35. *See* Dunn, *supra* note 18, at 987, 989 (noting that not wearing a seatbelt and driving after suspension constitute traffic violations that are not readily observable by law enforcement officers).

driver's license offenses;[36] another study of a medium-sized suburban city evidenced that as Black drivers entered predominantly White communities, the likelihood of law enforcement conducting a "rolling check" skyrocketed.[37] Law enforcement officers conduct a "rolling check" by contacting dispatch, who will run a vehicle's information and the social security number that corresponds with the license plate.[38] In the wealthiest neighborhoods of Cleveland, Black drivers are subjected to "rolling checks" at rates that are between 325% and 383% higher than their representation in the driving population.[39] Law enforcement officers' belief that "rolling checks" of Black and Hispanic drivers will unearth more traffic violations than "rolling checks" of Whites implicitly motivates officers to target Blacks and Hispanics, causing racial biases to guide police practice.[40]

Evidence of improper motivation within police departments can also be found within the Department of Justice's (DOJ) investigation into Ferguson, Missouri's law enforcement and judicial practices.[41] The investigation, initiated after the fatal shooting of Michael Brown, found that revenue generation, rather than concern for public safety, structured Ferguson's law enforcement practices.[42] The DOJ found that in 2013, the Ferguson municipal court issued more than 9,000 arrest warrants, largely for low-level offenses such as parking violations, traffic infractions, and housing code violations.[43] Within Ferguson, Black defendants were 50% more likely to have an arrest warrant issued than Whites, and Blacks accounted for a stunning 92% of all arrest warrants issued, despite comprising only 67% of the population in Ferguson.[44] The DOJ also found that during a six-month period, of those brought to

36. *Id.* at 982.

37. Meehan & Ponder, *supra* note 27, at 417.

38. Dunn, *supra* note 18, at 988.

39. Meehan & Ponder, *supra* note 27, at 417.

40. *Id.*

41. *See generally* U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (March 4, 2015) https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (investigating the unlawful practices and conduct in the Ferguson Police Department) [hereinafter FERGUSON INVESTIGATION].

42. *Id.* at 2.

43. *See id.* at 3 ("Jail time would be considered far too harsh a penalty for the great majority of these code violations, yet Ferguson's municipal court routinely issues warrants for people to be arrested and incarcerated for failing to timely pay related fines and fees."). Apart from the legal consequences that Blacks and Hispanics face due to practices of racial profiling, these drivers also experience the use of non-lethal force at higher rates. Fryer, Jr., *supra* note 12, at 47 tbl.2A.

44. FERGUSON INVESTIGATION, supra note 41, at 6.

jail due only to an outstanding warrant, 96% were Black.[45] Similarly, during a two-year period, the Ferguson Police Department arrested 460 individuals during traffic stops due only to outstanding arrest warrants; of those arrested, 96% were Black.[46] The racial disparities in warrant issuance creates further challenges for minorities because "violations that would normally not result in a penalty of imprisonment can, and frequently do, lead to municipal warrants, arrests, and jail time."[47]

Increased latitude to target racial minorities can turn lethal when combined with law enforcement officers' proclivity for unsafe and escalated use-of-force tactics. A recent DOJ investigation into the City of Chicago's Police Department (CPD) examined whether the department employed unlawful policies and practices.[48] After interviewing hundreds of CPD staff, community organizations, and families of individuals killed by CPD, and after reviewing CPD policies, procedures, and training programs, the DOJ concluded that "CPD officers' force practices unnecessarily endanger themselves and others and result in unnecessary and avoidable shootings and other uses of force," in violation of the United States Constitution.[49] Specifically, the report found that CPD officers, contrary to CPD policy, employ tactics that place themselves and the public in danger: shooting at vehicles, unsafely using their vehicles, and initiating "tactically unsound and unnecessary" foot pursuits that often conclude "with officers unreasonably shooting someone—including unarmed individuals."[50] The DOJ report details unnecessary, fatal interactions: CPD officers fired forty-five rounds at an unarmed man, fatally shot an unarmed man in the back, and shot an unarmed man lying on the ground three times in the back, killing him.[51] The DOJ found that the CPD's use of non-lethal and lethal force violated the Fourth Amendment as well as CPD policy.[52]

Discriminatory use of force is not limited to Chicago: it plagues communities across the nation. In 2016, Roland Fryer published a working paper detailing findings of racial disparities in

45. *Id.* at 5.

46. *Id.* at 57.

47. *Id.* at 9.

48. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT, EXECUTIVE SUMMARY (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download.

49. *Id.* at 2, 4.

50. *Id.* at 5.

51. *Id.* at 25–26.

52. *Id.* at 25, 32.

police use of force.[53] Fryer's team controlled for demographics, including age and gender, as well as encounter characteristics such as whether the civilian gave the officer identification, if the location of the interaction was in a high- or low-crime area, and how the civilian reportedly behaved.[54] The study confirmed that law enforcement is more likely to touch, push, handcuff, use pepper spray or a baton, or draw and point their weapons at Blacks and Hispanics than Whites.[55] Controversially, the study did not find evidence of racial bias in police shootings of civilians.[56]

According to Fryer, as a law enforcement officer increases the level of force used—for example when an encounter escalates from pushing an individual against the wall to the use of pepper spray—the likelihood that the civilian, regardless of race, is subjected to further increased use of force decreases.[57] Despite the lower likelihood of higher-level uses of force, Fryer found that law enforcement officers' use of both lethal and non-lethal force disproportionately impacts Blacks and Hispanics.[58] For example, compared to Whites, Blacks and Hispanics are approximately 53% more likely to have force used against them.[59] Amongst all civilians, there is a 0.26% likelihood that a law enforcement officer will draw their weapon; however, law enforcement officers are 21.3% more likely to draw their weapon when interacting with Blacks than Whites.[60] Upon arrest, Blacks and Hispanics are approximately 7% more likely to be subjected to the use of force than Whites.[61] The racial difference in the use of force by law enforcement does not change based on the civilian's gender or the race of the officer.[62] Fryer concludes that compared to Whites, Blacks and Hispanics,

> have very different interactions with law enforcement—interactions that are consistent with, though definitely not proof of, some form of discrimination. Including myriad controls designed to account for civilian demographics,

53. Fryer, Jr., *supra* note 12.

54. *See id.* at 3 (noting that none of the controls altered the findings of the study).

55. *Id.* at 4; Quoctrung Bui & Amanda Cox, *Surprising New Evidence Shows Bias in Police Use of Force but Not in Shootings*, N.Y. TIMES (July 11, 2016), http://www.nytimes.com/2016/07/12/upshot/surprising-new-evidence-shows-bias-in-police-use-of-force-but-not-in-shootings.html.

56. *See* Bui & Cox, *supra* note 55 (quoting Roland G. Fryer, "[i]t is the most surprising result of my career").

57. Fryer, Jr., *supra* note 12, at 4.

58. *Id.* at 4.

59. *Id.* at 4, 16.

60. *Id.* at 4.

61. *Id.* at 19.

62. *Id.* at 21.

> encounter characteristics, civilian behavior, eventual outcomes of the interaction and year reduces, but cannot eliminate, racial differences in non-lethal use of force.[63]

b. Evidence of the Judiciary Endorsing Police Practices of Racial Profiling

Prior to the holdings of *Strieff* and its antecedents—*Whren v. United States*, *Devenpeck v. Alford*, and *Herring v. United States*—an average motorist who obeyed traffic laws and vehicle safety requirements could rationally presume, absent a valid warrant or their explicit consent, that police could not legally stop and search their vehicle.[64] Previously, the Supreme Court maintained that vehicles, due to their mobility, would only be subject to a search without a warrant so long as an officer had probable cause to believe that there was contraband in the vehicle.[65] The probable cause standard requires that an officer have "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."[66] However, *Strieff* and its antecedents, combined with the common practice of racial profiling, eviscerate that expectation for motorists, disproportionately so for racial minorities.

In 1996, the Supreme Court had its first opportunity to address law enforcement's use of racial profiling in traffic stops when it heard *Whren v. United States*.[67] In *Whren*, plainclothes law enforcement officers observed a vehicle occupied by two young Black men waiting at a stop sign for more than twenty seconds.[68] Officers turned their vehicle around and began to pursue the vehicle, which had begun to drive away at an "unreasonable" speed.[69] After pulling their squad car alongside the vehicle, one of the officers approached the vehicle and saw two bags filled with white powder.[70] Both the driver and the passenger were arrested.[71] The defendants challenged the legality of the stop and seizure of the contraband,

63. *Id.*

64. *See* David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 819 (2002).

65. *See* Carroll v. United States, 267 U.S. 132, 153–54 (1925); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause . . . .").

66. *Probable Cause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

67. 517 U.S. 806 (1996).

68. *Id.* at 808, 810.

69. *Id.*

70. *Id.* at 809.

71. *Id.*

arguing that the initial traffic stop was pretextual and that the officers lacked both the probable cause and reasonable suspicion necessary to initiate the search for drugs.[72]

The Court ruled that the constitutionality of a traffic stop neither hinges on "the actual motivations of the individual officers involved" nor the "collective consciousness of law enforcement."[73] This decision established that an individual law enforcement officer's subjective motivations for conducting a traffic stop, even if admittedly pretextual, do not invalidate a stop and search, "even if a reasonable officer" in the same situation "would not have stopped the motorist."[74] Additionally, the Court held that future challenges to discriminatory policing must be pursued through the Equal Protection Clause rather than the Fourth Amendment.[75] In order for a law enforcement officer's stop and search to survive a Fourth Amendment challenge, the officer must simply demonstrate that they had probable cause to initiate the stop.[76]

Building upon *Whren*, the Court, in *Devenpeck v. Alford*, was asked to decide whether an officer's arrest of an individual without probable cause invalidates subsequent arrest-able offenses that are not "closely related" to the initial offense.[77] In November 1997, the defendant saw a vehicle stopped on the side of the road, pulled his car over, and began assisting the stranded driver.[78] Shortly after the defendant started helping the motorist, a law enforcement officer arrived.[79] Upon seeing the law enforcement officer, the defendant returned to his car and drove away.[80] The stranded motorist informed the officer that they had the impression that the defendant was a police officer.[81] The law enforcement officer, believing that the defendant was impersonating a police officer, pulled over the defendant.[82] The defendant recorded his interaction with the officer and was arrested for the unrelated and *legal* act of recording a law enforcement officer.[83]

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72. *Id.*
73. *Id.* at 813, 815.
74. *Id.* at 806.
75. *Id.* at 813.
76. *Id.* at 818.
77. 543 U.S. 146, 148 (2004).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 150.

In deciding *Devenpeck*, the Court held that an officer's subjective rationale for conducting a stop "need not be the criminal offense as to which the known facts provide probable cause."[84] The Court, building off the holding in *Whren* that an officer's subjective intent is immaterial, articulated that the offense which establishes probable cause does not need to be "closely related" to the violation used to justify the arrest.[85] The Court voiced its concern that invalidating an arrest based on a law enforcement officer's expressed subjective rationale for arresting an individual, such as racial bias, would arbitrarily expand individuals' Fourth Amendment protections and encourage officers to either cease explaining to arrestees the reason for their arrest or officers would feel pressured to list every possible reason for an arrest.[86] Ultimately, the Court validated an arrest for a non-existent offense.[87] Combined, *Whren* and *Devenpeck* effectively shield law enforcement officers' racially-motivated, pretextual reasons for arrest from judicial scrutiny even if the underlying basis for the stop and search was improper.[88]

The Court's permissive attitude toward law enforcement's practice of racial profiling is further weaponized in *Herring v. United States*. In *Herring*, the Court was asked to determine whether an individual who was arrested pursuant to a law enforcement officer's inaccurate belief that there was an active arrest warrant suffered a constitutional violation.[89] When law enforcement officers learned that Mr. Herring was retrieving an item from his impounded vehicle, they investigated whether he had any active warrants.[90] After learning there was an outstanding warrant for Mr. Herring, officers arrested him and found that he was in possession of methamphetamine and a firearm.[91] However, the warrant that facilitated the arrest had been recalled months earlier but, due to a clerical error, still appeared in the database.[92] Mr. Herring challenged the legality of the stop and search and

84. *Id.* at 153–54.

85. *Id.*

86. *Id.* at 154–55.

87. Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261, 319 (2010).

88. *Id.*

89. Herring v. United States, 555 U.S. 135, 136–37 (2009).

90. *Id.* at 137.

91. *Id.* (noting that Herring, as a felon, could not possess a firearm).

92. *Id.* at 137–38.

asked that the Court apply the exclusionary rule to the unlawfully seized evidence.[93]

The Court accepted the factual finding that the clerk who failed to maintain accurate records did not do so deliberately and held that the exclusionary rule would not apply to the evidence obtained in the search of Mr. Herring.[94] The Court stated that the mere violation of a constitutional right does not automatically make a stop and search unreasonable and expanded the breadth of the ruling by holding that a probable cause determination based on false information does not necessitate the application of the exclusionary rule.[95] The Court's decision to withhold the exclusionary rule in cases of clear error denies defendants an important remedy when their Fourth Amendment rights have been violated.[96]

Most recently, in *Utah v. Strieff*, the Court was asked to determine whether incriminating evidence obtained pursuant to a law enforcement officer's unconstitutional stop and search of an individual, which resulted in the discovery of a valid arrest warrant, was admissible.[97] In 2006, a law enforcement officer saw Mr. Strieff leave a suspected narcotics house.[98] The officer followed Mr. Strieff and requested he produce his identification, which, when ran, turned up an active arrest warrant for a minor traffic violation.[99] Accordingly, the officer searched Mr. Strieff, discovered drug paraphernalia and methamphetamine, and arrested him.[100]

Despite finding that the officer may have acted negligently and did not have probable cause to stop Mr. Strieff, the Court validated the admission of the evidence discovered after the illegal stop because, the Court rationalized, nothing legally precluded the officer from approaching the suspect and the officer's actions were not indicative of systemic violations of individuals' Fourth Amendment rights.[101] As pertains to the exclusionary rule, the Court found that evidence discovered pursuant to an unlawful stop is admissible if an officer discovers an active warrant after the illegal stop.[102] Ultimately, the Court's decision overlooks illegal law

93. *Id.* at 138.
94. *Id.* at 146.
95. *Id.* at 141.
96. *Id.* at 152–53 (Ginsburg, J., dissenting).
97. 136 S. Ct. 2056, 2059 (2016).
98. *Id.* at 2060.
99. *Id.*
100. *Id.*
101. *Id.* at 2063.
102. *Id.*

enforcement stops so long as the illegal stop results in the discovery of an outstanding warrant for even very minor offenses.[103]

II. *Whren*, *Devenpeck*, *Herring*, and S*trieff*: The Gutting of Fourth Amendment Protections

In the early twentieth century, the Supreme Court restricted the right of law enforcement officers to initiate a search incident to arrest.[104] The Court required that the search be limited to the accused individual, the premises subject to their physical control, and that the object sought be either a weapon or object used to commit a crime.[105] The Court's holdings in *Strieff* and its antecedents undercut these restrictions and validate racially motivated, pretextual stops that lack probable cause and are found to have been unwarranted ex post facto.

In *Whren*, the Court held that a law enforcement officer's pretextual, racially motivated stop does not constitute a Fourth Amendment violation.[106] The Court's ruling allows the subjective, racially discriminatory motivations of law enforcement officers to be scrubbed from the factual record, ultimately sanitizing offensive facts from judicial review. The Court, by ignoring racially motivated police actions, endorses a panoply of blatantly pretextual, racial profiling tactics.[107] In practice, these rulings enabled an increase in pretextual, racially motivated stops.[108] The *Whren* Court further damaged the ability of arrestees to combat improper stops when it redirected legal challenges to racially motivated police actions to the Equal Protection Clause rather than the Fourth Amendment.[109] By relegating future legal actions to the Equal Protection Clause, the Court requires defendants to provide

103. *Id.* at 2064 (Sotomayor, J., dissenting).

104. P. A. Agabin, Annotation, *Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation*, 10 A.L.R.3d Art. 1 (2017).

105. *Id.*

106. *See* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884 (2015).

107. *See id.* at 884–85. *See generally* Brooks Holland, *Racial Profiling and a Punitive Exclusionary Rule*, 20 TEMP. POL. & CIV. RTS. L. REV. 29 (2010) (arguing that the Court has too narrowly prohibited the subjection of racial profiling to constitutional scrutiny).

108. *See* David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional and Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 384 (2010).

109. *See* Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Chin & Vernon, *supra* note 106, at 919 (noting that despite the unconstitutionality of discriminatory conduct, discriminatory law enforcement actions often survive the Fourth Amendment's reasonableness test).

evidence of a facially discriminatory law or policy, or a facially neutral law or policy that was passed due to explicit racial animus; contrastingly, Fourth Amendment challenges only require evidence that the stop and search was unreasonable.[110]

In *Devenpeck*, the Court ruled that an officer's subjective reason for initiating a stop, so long as it satisfies the low threshold of probable cause, does not need to be "closely related" to the offense that the officer ultimately stops the suspect for.[111] When combined with *Whren*, *Devenpeck* permits law enforcement officers, to stop an individual for pretextual, racially motivated reasons and conduct an arrest for an offense completely unrelated to the supposed offense that established sufficient probable cause to validate the stop.[112] For example, an officer seeing a Black driver can stop that individual despite the individual not having visibly broken any laws. If the officer discovers that the individual is in violation of a law, for example by not wearing a seatbelt or driving with a revoked driver's license, the officer may arrest the individual, *even if* the stop was founded on racist beliefs.

In *Herring*, the Court held that negligent record keeping that results in an otherwise illegal arrest does not necessarily render evidence inadmissible.[113] In *Strieff*, the Court ruled that evidence obtained pursuant to an unconstitutional stop is admissible so long as the officer discovers that the individual has an active warrant.[114] Justice Sotomayor's dissent in *Strieff* outlines the dangerously expansive implications of the majority opinion:

> 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. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the

110. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny . . . .") (citations omitted); *see also* Chin & Vernon, *supra* note 106, at 884–886 ("Although *Whren* recognized that another provision of the Constitution, the Equal Protection Clause of the Fourteenth Amendment, prohibited racial discrimination, the Court did not mention that successful claims of selective enforcement are vanishingly small.").

111. *See* 543 U.S. 146, 153 (2004).

112. *See id.*; *Whren*, 517 U.S. at 806.

113. *See* Herring v. United States, 555 U.S. 135, 147–48 (2009) ("We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule.").

114. *See* 136 S. Ct. 2056, 2059 (2016).

warrant.[115]

The aggregate effect of *Strieff* and its antecedents is the judicial validation of racially motivated stops that lack the requisite probable cause, so long as the individual being stopped is retroactively found to have an active warrant, even if the warrant is no longer active, but still in the system due to administrative negligence.[116]

III. The Cumulative Impact of S*trieff* and its Antecedents on Racial Minorities' Likelihood of Low-Level Harassment by Law Enforcement

In 2014, forty states reported that they maintained warrant files within a statewide database.[117] Among those forty states, there are more than 7,800,000 active warrants.[118] Of those warrants, approximately 725,000 are felony level, almost 3,900,000 are misdemeanor warrants, and nearly 860,000 are for "other" offenses.[119] In light of *Strieff* and its antecedents, the prevalence of active warrants is cause for concern for all individuals walking or driving the streets of the United States.[120] The astronomical number of active warrants means that millions of individuals, particularly racial minorities, are at risk of being stopped for pretextual reasons and searched incident to the existence of a

115. *Id.* at 2064 (Sotomayor, J., dissenting).

116. *Compare id.* at 2059 (holding that evidence discovered pursuant to an unlawful stop is admissible if an officer discovers an active warrant after the illegal arrest), *with Devenpeck*, 543 U.S. 146 (holding that an officer's subjective reason for initiating a stop does not need to be "closely related" to the offense for which the officer ultimately arrests the suspect), *Herring*, 555 U.S. 135 (holding that negligent recordkeeping that results in an otherwise illegal arrest does not necessarily render illegally obtained evidence inadmissible), *and Whren*, 517 U.S. 806 (holding that a law enforcement officer's pretextual, racially motivated stop does not constitute a Fourth Amendment violation); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 340 (2009) ("We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.").

117. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS tbl.5, https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf (Dec. 2015) (excluding Arkansas, Georgia, Louisiana, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, South Carolina, and Tennessee).

118. *Id.* at 4.

119. *Id.* at tbl.5a (noting that several states, though reporting that they maintain a warrant database, did not provide data on the number of "felony," "misdemeanor," and "other" warrants within their state).

120. *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1664 (2012) ("[I]n light of police secrecy and defects in recordkeeping, data on searches and warrants is scarce.").

warrant, even if the warrant is for a low-level offense or has been withdrawn.

The majority of active arrest warrants are for low-level offenses, such as unpaid fines or misdemeanor offenses—offenses which disproportionately impact racial minorities, suggesting that the negative effects of *Strieff* and its antecedents will be more potent in Black and Hispanic communities than in White communities.[121] Because some law enforcement officers believe that targeting racial minorities is a good and effective practice, these decisions will aggressively mutate racial profiling from an ineffective practice into a technique that law enforcement officers can employ to over-criminalize Black and Hispanic communities.[122] *Strieff* and its antecedents' legal accommodation for racial profiling, when grafted onto the abundance of readily available criminal offenses[123] and the devastating number of outstanding warrants, transforms the United States into a chilling landscape: law enforcement officers can stop an individual for pretextual reasons and retroactively validate the discriminatory action by arresting the individual for an unrelated offense or by discovering an apparently active arrest warrant.[124] These rulings allow law enforcement officers to (continue to) focus their efforts on racial minorities,[125] target specific neighborhoods, and incarcerate racial minorities at rates that exceed their percentage of both the general and crime-committing populations.[126] Combined, these cases embolden the

121. *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 381 (2012) ("[D]ebtor's prison has persisted in other ways and, like mass incarceration, is based on race and class status.").

122. *See* Dunn, *supra* note 18, at 990; Meehan & Ponder, *supra* note 27, at 418.

123. *See* Jonathan Blanks, *America's Stupidest Criminal Laws*, WASH. POST (June 25, 2014), https://www.washingtonpost.com/posteverything/wp/2014/06/25/americas-stupidest-criminal-justice-laws/?utm_term=.da5ccafbfd2e ("Throwing the book at offenders with well-meant but misguided lawmaking has wreaked havoc on correctional budgets while breaking up families and damaging local economies in the process.").

124. *See* Utah v. Strieff, 136 S. Ct. 2056 (2016); Devenpeck v. Alford, 543 U.S. 146 (2004); Whren v. United States, 517 U.S. 806 (1996).

125. *See, e.g.*, Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821–22 (2007) (discussing the results of an analysis of New York's "Stop-and-Frisk" policy, researchers found that, "the NYPD's records indicate that they were stopping [B]lacks and Hispanics more often than [W]hites, in comparison to both the populations of these groups and the best estimates of the rate of crimes committed by each group. . . . A related piece of evidence is that stops of [B]lacks and Hispanics were less likely than those of [W]hites to lead to arrest, suggesting that the standards were more relaxed for stopping minority group members.").

126. *See* Foley, *supra* note 87, at 340–341.

use of racial profiling and bar victims of these practice from utilizing the Fourth Amendment to protect themselves from these reprehensible violations of their constitutional rights.

IV. A Perverse Incentive With a Negative Impact

The rulings of *Strieff* and its antecedents perversely incentivize the expansion of racial profiling by law enforcement officers. The rulings fail to prohibit racially motivated stops and permit law enforcement officers to retroactively justify illegal stops by either finding another reason to initiate an arrest or by discovering an arrest warrant.[127] These cases add racial profiling to law enforcement officers' toolboxes, restrict and endanger the physical liberties and physical safety of racial minorities, and disassemble the constitutional barriers to discriminatory policing.[128] To weed out the widespread practice of racial profiling, a two-pronged approach must be adopted: (a) the Supreme Court must overturn *Strieff* and its antecedents and take accountability for its complicity in the practice of racial profiling; (b) because judicial rulings provide legal cover for—but are not the genesis of—racial profiling, law enforcement precincts and academies must actively combat racially motivated practices by utilizing recruitment and training programs that acknowledge and confront racial profiling.

a. Prong 1: Overturn Strieff and its Antecedents and End the Era of Judicial Complicity in Racial Profiling

Roland Fryer's empirical study of police use of force examined multiple data sets from across the United States to determine whether different racial groups are disparately subjected to police use of lethal and non-lethal force.[129] One of the programs Fryer examined was New York City's Stop, Question, and Frisk Program ("Stop and Frisk").[130] Through the Stop and Frisk Program,[131] law

127. *Compare Strieff*, 136 S. Ct. at 2059 (holding that evidence discovered pursuant to an unlawful stop is admissible if an officer discovers an active warrant after the illegal stop), *with Devenpec*k, 543 U.S. at 146 (holding that an officer's subjective reason for initiating a stop does not need to be "closely related" to the offense for which the officer ultimately arrests the suspect), *and Whren*, 517 U.S. at 806 (holding that a law enforcement officer's pretextual, racially motivated stop does not constitute a Fourth Amendment violation).

128. *See* Winbush, *supra* note 32 (detailing how to mount a Fourth Amendment challenge to racial profiling).

129. *See* Fryer, Jr., *supra* note 12, at 2–6.

130. *Id.* at 2.

131. *See* RUN THE JEWELS, *Early*, *on* RUN THE JEWELS 2 (Mass Appeal) (2014)

enforcement officers could stop an individual, question them, and search, or frisk, that person for weapons or illicit items.[132] Fryer's team examined approximately five million instances of police interactions with individuals through Stop and Frisk.[133] Stop and Frisk is relevant to this Article because it mirrors the results of *Strieff* and its antecedents in that neither requires law enforcement officers to have probable cause prior to initiating a stop.[134] Moreover, under both, once a stop has been initiated, law enforcement officers have a plethora of options to retroactively validate an otherwise illegal stop and search.[135]

Fryer's analysis of Stop and Frisk sheds valuable insight into the possible repercussions of the Supreme Court's holdings in *Strieff* and its antecedents. After controlling for a number of variables,[136] which, did notably "little to alter the results,"[137] the study found that Blacks, who comprised 58% of all stops, were the most likely to be stopped, followed by Hispanics, who experienced 25% of stops, and Whites, who represented a paltry 10% of all stops.[138] If these numbers reflected a policy of randomly stopping individuals on the street, Blacks would proportionally comprise 25.5% of stops—less than half the rate revealed by the study.[139]

(hinting at the use of retroactive justification and explaining the experience of being subjected Stop and Frisk tactics as well as the personal repercussions, Killer Mike raps, "[c]ould it be that my medicine's the evidence, for pigs to stop and ask me when they rollin' round on patrol? And ask why you're here? I just tell 'em cause it is what it is, I live here and that's what it is . . . . Please don't lock me up in front of my kids and in front of my wife, man, I ain't got a gun or a knife. You do this and you ruin my life.").

132. Fryer, Jr., *supra* note 12, at 2.

133. *Id.*

134. Sheree Davis & Marie Fitzgerald, *Stop and Frisk*, 23 HOW. L.J. 155, 155 (1980) (noting that in *Terry v. Ohio*, the Supreme Court required only that an officer have "reasonable suspicion" that a stopped individual was involved in a crime and was armed and dangerous).

135. *Compare* Utah v. Strieff, 36 S. Ct. 2056, 2059 (2016) (holding that evidence discovered pursuant to an unlawful stop is admissible if an officer discovers an active warrant after the illegal stop), *with* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (holding that an officer's subjective reason for initiating a stop does not need to be "closely related" to the offense for which the officer ultimately arrests the suspect), *and* Whren v. United States, 517 U.S. 806, 806 (1996) (holding that a law enforcement officer's pretextual, racially motivated stop does not constitute a Fourth Amendment violation).

136. Fryer, Jr., *supra* note 12, at 49 tbl.3 ("We control for gender, a quadratic in age, civilian behavior, whether the stop was indoors or outdoors, whether the stop took place during the daytime, whether the stop took place in a high crime area or during a high crime time, whether the officer was in uniform, civilian ID type, whether others were stopped during the interaction, and missings in all variables.").

137. *Id.* at 4.

138. *Id.* at 39–40 tbl.1A.

139. *Id.* at 9.

Equally concerning are Fyer's findings regarding the use of non-lethal force against racial minorities through Stop and Frisk. During the Stop and Frisk program, after controlling for civilian behavior, Blacks and Hispanics were nearly 53% more likely to have force used against them compared to Whites.[140] While the use of high-level force—such as the use of a baton or pepper spray—is less likely than low-level uses of force—such as an officer placing their hands on an individual or pushing them into a wall—high-level uses of force were more likely to be used against Blacks than Whites.[141] After examining "perfectly compliant individuals and control[ling] for civilian, officer, encounter and location variables, [B]lack civilians are 21.1[%] more likely to have any force used against them compared to [W]hite civilians with the same reported compliance behavior."[142]

In 2013, the United States District Court for the Southern District of New York held that New York's Stop and Frisk was racially discriminatory.[143] The court's decision relied on evidence that the New York City Police Department (NYPD) stopped Blacks and Hispanics at higher rates than Whites, that the stops occurred in certain pockets of the city, that disproportionate amounts of force were used by law enforcement against Blacks and Hispanics compared to Whites, and that the stops of Blacks and Hispanics were initiated with less legal justification than the stops of Whites.[144] The court also acknowledged the failure of courts to combat racial profiling, stating "courts should 'not condone racially motivated police behavior' and must 'take seriously an allegation of racial profiling.'"[145] Unfortunately, neither the district court's holding nor its admonishment motivated the Supreme Court to introspectively examine its role in furthering racial profiling and the impacts of its holdings on racial minorities when it ruled in *Strieff*.[146]

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140. *Id.* at 16.

141. *Id.* at 18.

142. *Id.* at 31.

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

144. Joseph Ferrandino, *Minority Threat Hypothesis and NYPD Stop and Frisk Policy*, 40 CRIM. JUST. REV. 209, 211 (2014).

145. *Floyd*, 959 F. Supp. 2d at 660 (citing United States v. Davis, 11 F. App'x 16, 18 (2d Cir. 2001)).

146. *See* Utah v. Strieff, 136 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) ("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.") (citations omitted).

The documented racial disparities in the use of force stemming from Stop and Frisk and the similarities between Stop and Frisk and *Strieff* and its antecedents substantiates concerns that the Court's recent rulings may increase law enforcement officers' propensity to harass racial minorities. Moreover, the potential for low-level harassment to escalate to non-lethal force and lethal force demands that the Court follow Justice Sotomayor's dissent, heed the lower court's warning, and rigorously re-examine *Strieff* and its antecedents.[147]

b. Prong 2: All Levels of Law Enforcement Must Proactively Counter Their Role in Perpetuating Racial Profiling

In light of Donald Trump's statements during his 2016 presidential campaign endorsing New York City's unconstitutional Stop and Frisk program[148] and his administration's commitment to restore "law and order,"[149] it is unlikely that the current Executive branch will act to correct the damaging practices and outcomes stemming from the Supreme Court's Fourth Amendment jurisprudence.[150] Without federal encouragement and guidance in changing the nationwide equivalent of Stop and Frisk, and the improbability of the judiciary overturning *Strieff* and its antecedents, individual law enforcement precincts should take the initiative to combat racial profiling and the subsequent use of force.[151]

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147. *See The Weeds: Basic Income and Police Shootings*, VOX (July 15, 2016) (noting Ezra Klein's assertion that "if you've been stopped 52 times [referencing Philando Castile], often for not very much reason at all, that's 52 opportunities for something to go wrong . . . . [I]t may be the case that on a given stop police are not more likely to shoot you if you're African-American. But, if it is the case that police have X% chance of shooting anyone and they're stopping African-Americans twenty times more, then we would expect a much higher rate of African-Americans being shot by the police. And Fryer's data doesn't contradict that, it is within that . . . .") (quote begins at 41:56).

148. *See* Jim Dwyer, *What Donald Trump Got Wrong on Stop-and-Frisk*, N.Y. TIMES, Sept. 27, 2016, https://www.nytimes.com/2016/09/28/nyregion/what-donald-trump-got-wrong-on-stop-and-frisk.html.

149. *See* STANDING UP FOR OUR LAW ENFORCEMENT COMMUNITY, https://www.whitehouse.gov/law-enforcement-community (last visited Nov. 14, 2017).

150. *See id. Contra* Harry Bruinius, *Obama, in Surprise Move, Wades Into NYPD 'Stop and Frisk' Lawsuit*, CHRISTIAN SCI. MONITOR (June 13, 2013), http://www.csmonitor.com/USA/Justice/2013/0613/Obama-in-surprise-move-wades-into-NYPD-stop-and-frisk-lawsuit ("The New York Police Department's controversial 'stop and frisk' policy received a kick in the shins this week, when the Obama administration took the unusual step of outlining its preferred remedy in the event a federal judge examining the NYPD tactic rules it to be unconstitutional.").

151. *See* Radley Balko, *Jeff Sessions Dismisses DOJ Reports on Police Abuse*

Strieff and its antecedents, when taken to their natural end, will increase police brutality which will further damage relationships between law enforcement and Black and Hispanic communities.[152] One way precincts can combat racial profiling is to require that law enforcement academies provide more comprehensive training to recruits. Outside of field training, law enforcement recruits complete approximately 840 hours of training.[153] Approximately 96% of training academies utilize a classroom structure for basic training.[154] Between 2006 and 2013, the number of academies that included training on community policing increased from 92% to 97% percent.[155] However, on average, academies only required trainees to complete 43 hours of community policing training, of which only 12 hours were dedicated to cultural diversity and human relations.[156] Despite an abundance of data exposing the prevalence and inefficiency of racial profiling, law enforcement academies spend an inadequate amount of time teaching recruits about how to professionally interact with racial minorities. Without proper training, it is possible that law enforcement officers will be guided by racial animus, instead of best practice, in deciding who to stop, when to search, and what level of force to exact upon racial minorities.

Data concerning the average training requirements for de-escalation tactics was lumped into the broad category of "use of force" requirements, which, in total, averaged a meager 21 hours.[157] Precincts ought to demand that academies increase the number of hours of training concerning de-escalation techniques in order to

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Without Bothering to Read Them, WASH. POST (Feb. 28, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/02/28/jeff-sessions-dismisses-doj-reports-on-police-abuse-without-bothering-to-read-them/?utm_term=.3a34464d06f7 (quoting Attorney General Jeff Sessions, who commented on the Chicago and Ferguson Justice Department reports, stating that "[s]ome of it was pretty anecdotal and not so scientifically based," and explaining that Sessions' statement came amidst reports that Sessions is undecided on whether or not the Department of Justice will implement reforms to the Chicago and Ferguson Police Departments).

152. *See* U.S. DEP'T OF JUSTICE, CMTY. RELS. SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING, IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING, https://www.justice.gov/crs/file/836486/download (last accessed Nov. 14, 2017) (emphasizing the importance of law enforcement relationships with communities they interact with).

153. U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 (July 2016) at 4, https://www.bjs.gov/content/pub/pdf/slleta13.pdf.

154. *Id.* at 3.

155. *Id.* at 7.

156. *Id.* at 7 tbl.8.

157. *Id.* at 5.

reduce unnecessary escalation, which predominantly impacts racial minorities. As evidenced in the case of Philando Castile and noted in the DOJ report on its investigation of the Chicago Police Department, racially imbalanced, lethal escalation is ingrained in everyday policing and has fatal consequences—it is the duty of academies and precincts to proactively counter this practice by comprehensively educating law enforcement officers on de-escalation techniques as well as teaching officers how to avoid escalation in the first case.

Conclusion

The Supreme Court's decisions in *Strieff* and its antecedents concurrently expand legal protections for law enforcement officers' discriminatory actions while gutting constitutional protections for individuals. The effects of these decisions, when mapped onto the widespread use of racial profiling by law enforcement, legalize law enforcement officers' rampant practice of exploiting racial biases to stop and search racial minorities without probable cause. Over time, this practice will further transform racial profiling into a self-fulfilling prophecy: law enforcement officers will monitor and over-criminalize the otherwise legal activities of racial minorities. Combined, these cases will increase law enforcement officer's low-level, and potentially high-level, harassment of racial minorities, resulting in an increase in law enforcement officers' use of non-lethal and potentially-lethal force against racial minorities. To combat this, a two-prong approach is necessary: First, the Supreme Court must endorse Justice Sotomayor's dissent in *Strieff* and overturn its rulings in *Strieff* and its antecedents. Second, law enforcement precincts and training academies should increase recruits' required training on community policing and de-escalation techniques.