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Predicting *Utah v. Streiff's* Civil Rights Impact

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INTRODUCTION

The Supreme Court's recent *Utah v. Strieff* decision declined to apply the exclusionary rule to evidence seized as a result of an arrest that followed an unconstitutional stop. The opinion, in conjunction with Justice Sotomayor's dissent, has reanimated discussions regarding when, if ever, criminal defendants can expect the exclusionary rule to apply.[1] When applied, the exclusionary rule renders inadmissible evidence recovered through "unconstitutional police conduct"; the evidence's exclusion reinforces the Fourth Amendment's ban on unreasonable searches and seizures.[2] Unlike most discussions of *Strieff*, which focus on its implications for criminal defendants, this Essay examines how *Strieff* will impact civil rights plaintiffs' ability to recover damages for unconstitutional stops under 42 U.S.C. § 1983.

Strieff is just one of several recent cases in which the Court has declined to apply the exclusionary rule. The Court's decreased application of the exclusionary rule has been accompanied by its increased faith in the threat that Section 1983 civil liability poses to law enforcement officers.[3] For example, in *Hudson*

1. *See, e.g.*, Orin Kerr, *Opinion Analysis: The Exclusionary Rule Is Weakened but it Still Lives*, SCOTUSBLOG (June 20, 2016, 9:35 PM), http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/ [http://perma.cc/2QXX-6QCX] ("[T]he majority's approach practically invites police officers to make illegal stops.").

2. Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016).

3. *See* Smith v. Kelly, No. C11-0623-RAJ-JPD, 2013 WL 5770344, at *24 n.22 (W.D. Wash. May 2, 2013) (magistrate judge's report and recommendation) (noting that "the United States Supreme Court has gradually chipped away at the exclusionary rule" because

v. Michigan, the Court declined to apply the exclusionary rule to a knock-and-announce violation.[4] It described how Section 1983 liability, expanded significantly since it was first made available in 1961's *Monroe v. Pape* decision,[5] would stand in for the exclusionary rule in producing the desired deterrent effect.[6]

In Fourth Amendment jurisprudence, both the exclusionary rule and Section 1983 are cited as different means to the same hypothetical end: deterring future constitutional violations. The exclusionary rule suppresses illegally seized evidence in circumstances where applying the rule is such a severe penalty that the risk of future application prevents illegal law enforcement conduct.[7] The rule only applies when the need for its deterrent effect outweighs the rule's "substantial social costs,"[8] including the risk that the guilty go free.[9] In contrast, Section 1983 purportedly deters law enforcement officers from engaging in constitutional violations with the threat of having to pay damages to the victim of the violation.[10]

Section 1983 sufficiently deters police); *see also* Hudson v. Michigan, 547 U.S. 586, 598 (2006) ("As far as we know, civil liability is an effective deterrent here . . . ."); United States v. Langford, 314 F.3d 892, 894-95 (7th Cir. 2002) ("42 U.S.C. § 1983 and the *Bivens* doctrine have made tort damages an effective remedy for constitutional violations by federal or state law enforcement officers.").

4. *Hudson*, 547 U.S. at 599.

5. Monroe v. Pape, 365 U.S. 167, 187-88 (1961).

6. *Hudson*, 547 U.S. at 597 ("Dollree Mapp could not turn to [§ 1983] for meaningful relief; *Monroe v. Pape* . . . , which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities . . . . [And] [c]itizens whose Fourth Amendment rights were violated by federal officers could not bring suit until 10 years after *Mapp*, with this Court's decision in *Bivens v. Six Unknown Fed. Narcotics Agents*." (citations omitted)).

7. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (declining to require application of the exclusionary rule in parole board proceedings).

8. *Id.* at 363 (citing United States v. Leon, 468 U.S. 897, 907 (1998)).

9. United States v. Leon, 468 U.S. 897, 907 (1984) ("An objectionable collateral consequence of [the exclusionary rule] . . . is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains.").

10. *See* Carey v. Piphus, 435 U.S. 247, 256-57 (1978). The deterrence principles underlying Section 1983 and the exclusionary rule are not one and the same. *Compare* United States v. Calandra, 414 U.S. 338, 347 (1974) ("The purpose of the exclusionary rule is . . . 'calculated to prevent, not to repair.'") *with* Monroe v. Pape, 365 U.S. 167, 174 (1961) (asserting that through Section 1983, Congress sought "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice"). In Section 1983 actions, even if an officer is found liable for constitutional violations, he or she is likely indemnified by his or her employer and will never personally pay a plaintiff following a judgment, a fact that "undermine[s] assumptions of financial responsibility relied up-

Like *Hudson*, *Strieff* assumes that when the exclusionary rule is not applied, Section 1983 will adequately deter future unconstitutional stops. This Essay challenges that conclusion. First, it examines how *Strieff* may limit civil rights plaintiffs' ability to recover meaningful damage awards for the events caused by unconstitutional stops. Second, it explains that in a civil rights case arising out of a *Strieff*-like scenario, civil rights plaintiffs will only be able to recover nominal damages. Third, it explains that the damages limitation will discourage attorneys from representing civil rights plaintiffs like Edward Strieff. It concludes that Section 1983 is an inadequate surrogate for the exclusionary rule, and that as a result, absent the exclusionary rule, there is no real deterrent preventing police power abuse.

I. THE MAJORITY OPINION DECLINES TO APPLY THE EXCLUSIONARY RULE

In an opinion by Justice Thomas, the *Strieff* Court declined to apply the exclusionary rule to incriminating evidence seized during a search incident to an arrest, even though the arrest followed a suspicionless investigatory stop.[11] In December 2006, Salt Lake City narcotics detective Douglas Fackrell spent a week surveilling a home occupied by individuals that he believed to be dealing drugs. Fackrell stopped Edward Strieff after Strieff was seen exiting the home and walking to a nearby convenience store. Following the stop, Fackrell relayed information from Strieff's Utah identification card to a police dispatcher, and discovered that Strieff was subject to an arrest warrant.[12] Strieff was quickly arrested and searched, and Fackrell found methamphetamine and drug paraphernalia on his person.[13] During suppression motion hearings, the prosecution conceded that the original stop was made without reasonable suspicion.[14] Still, the Court declined to exclude the evidence seized following the arrest because the original stop was "sufficiently attenuated" by the valid warrant for Strieff's arrest.[15]

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on in civil rights doctrine." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014). Officers may nevertheless wish to avoid Section 1983 cases because of the inconvenience of protracted litigation or the public scrutiny such a case may bring. But in assuming that Section 1983 functions as a powerful deterrent, the Supreme Court has focused solely on the financial consequences of Section 1983 litigation.

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

12. *Id.* at 2060.

13. *Id.*

14. *Id.*

15. *Id.* at 2063.

In a powerful dissent, Justice Sotomayor argued that the Fourth Amendment should prohibit admitting evidence seized as a result of an unconstitutional stop.[16] Like the Utah Supreme Court, she would have excluded the evidence because "the officer exploited his illegal stop" to discover it.[17] She described the humiliation, helplessness, fear, and loss that such suspicionless stops cause their targets, who are most often people of color: the individuals stopped are not "citizen[s] of a democracy but the subject[s] of a carceral state."[18]

Justice Kagan's dissent warned that, following *Strieff*, an officer who lacks reasonable suspicion for a stop will make it anyway because the stop "may well yield admissible evidence."[19] That is, in *Strieff*-like circumstances, the exclusionary rule's deterrent effect is gone. Before *Strieff*, an officer about to stop someone without reasonable suspicion might have paused to consider the risk of rendering relevant evidence inadmissible. After *Strieff*, that same officer has no reason to hesitate.

The Court rejected the dissenters' view and Strieff's argument that, without the exclusionary rule's deterrent effect, "police will engage in dragnet searches,"[20] stopping people for no reason in an attempt to discover outstanding warrants and to make arrests based on those warrants. The Court ultimately concluded—unjustifiably—that Section 1983 civil liability deters suspicionless stops intended to trap people with outstanding warrants.[21]

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

17. *Id.* at 2066 (Sotomayor, J., dissenting).

18. *Id.* at 2070-71 (Sotomayor, J., dissenting).

19. *Id.* at 2074 (Kagan, J., dissenting).

20. *Id.* at 2064.

21. *Id.* The Court described the hypothesized dragnet searches as unlikely because "[s]uch wanton conduct would expose police to civil liability." *Id.* Though "wanton" is a term relevant to a Section 1983 Eighth Amendment claim, "wanton conduct" by law enforcement does not necessarily guarantee victory for a civil rights plaintiff alleging an unconstitutional stop under the Fourth Amendment violation. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 319 (1986) (stating that cruel and unusual punishment affecting the "interests or well-being of a prisoner" is forbidden by the Eighth Amendment when it involves "the unnecessary and wanton infliction of pain") (citations omitted). Wanton is a standard that governs the infliction of pain. *See* Hudson v. McMillian, 503 U.S. 1, 5 (1992) ("What is necessary to establish an 'unnecessary and wanton infliction of pain' . . . varies according to the nature of the alleged constitutional violation."). To the extent "wanton" is a relevant standard in the context of the Fourth Amendment, it is not with respect to suspicionless stops, but rather to allegations of excessive force following a detention. *See* Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (explaining that "the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the Fourth Amendment" and "the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the Eighth Amendment").

II. *STRIEFF* LIMITS SECTION 1983 RECOVERY AND CANCELS ITS DETERRENT POTENTIAL

Though the Court has often referred to Section 1983 damages as powerful deterrents,[22] Section 1983 does not necessarily deter the kind of unconstitutional stop described in *Strieff*. Before *Strieff*, an unconstitutional stop would typically lead to the exclusion of the drugs found on Strieff's person.[23] Without key evidence, a prosecution for a crime like Strieff's (drug possession) was more likely to fail. Now, a motion to suppress will not result in the exclusion of incriminating evidence like that found on Strieff. Because the incriminating evidence is now likely admissible, a conviction also becomes more likely. Recognizing that he might be convicted if the drug evidence were ultimately admitted, Strieff "conditionally pleaded guilty" to lesser charges while reserving his right to appeal the denial of his suppression motion.[24]

A guilty plea (even to lesser charges) and a conviction establish probable cause for arrest, thus barring a plaintiff from bringing a false arrest claim pursuant to Section 1983.[25] Successful false arrest claims allow plaintiffs to recover compensatory damages "for loss of liberty" and "physical and emotional distress."[26] Wrongful arrest and imprisonment claims have resulted in significant damages awards that compensate plaintiffs for each hour of confinement at rates ranging from $1,500 to $8,889 per hour.[27] The Second Circuit affirmed a compensatory damages award of $360,000 for false arrest "where the plaintiff was in custody for 19 hours, [and] had not been physically assaulted, but had experienced sleeplessness, anxiety, and suicidal ideation as a result of his arrest."[28] If a plaintiff like Strieff pleads guilty during his criminal trial, his ar-

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22. *See* Hudson v. Michigan, 547 U.S. 586, 597-99 (2006) (concluding that Section 1983 is a "substantial" deterrent for violations of the knock-and-announce rule); Kastigar v. United States, 406 U.S. 441, 470-71 (1972) (Marshall, J., dissenting) (noting that an unconstitutional interrogation "may provide the basis for . . . a civil action for damages" under Section 1983 or *Bivens v. Six Unknown Named Federal Narcotics Agents*, 403 U.S. 388 (1971)).

23. *See Strieff*, 136 S. Ct. at 2065 (Sotomayor, J., dissenting) ("When 'lawless police conduct' uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence." (quoting Terry v. Ohio, 392 U.S. 1, 12 (1968)).

24. *Id.* at 2060.

25. *See, e.g.*, Johnson v. Pugh, No. 11-CV-385 RRM MDG, 2013 WL 3013661, at *2 (E.D.N.Y. June 18, 2013) (noting that, because the plaintiff's "plea and conviction established probable cause for his arrest . . . [the plaintiff] cannot state a claim for false arrest").

26. Alla v. Verkay, 979 F. Supp. 2d 349, 371 (E.D.N.Y. 2013).

27. Abdell v. City of New York, No. 05-CV-8453 RJS, 2014 WL 3858319, at *3 (S.D.N.Y. Aug. 5, 2014).

28. *Alla*, 979 F. Supp. 2d at 372.

rest becomes privileged, and he can no longer recover the substantial damage awards available for false arrest. In fact, he may only be able to recover nominal damages, at best.

In any Section 1983 action, a plaintiff must overcome the nearly insurmountable obstacle presented by a defendant's ability to assert qualified immunity, which "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[29] If a qualified immunity defense is defeated, a Section 1983 plaintiff basing his or her claim for damages on an unconstitutional stop that leads to an arrest will nevertheless be limited to damages caused by the unconstitutional stop alone.[30] These damages differ significantly from those recoverable for false arrest. They must be "directly related to the invasion of [a plaintiff's] privacy."[31] More importantly, they are limited to the short time period in which the unconstitutional stop occurs.

In *Strieff*, the stop did not cause physical injury or property damage, and lasted for a fraction of the short time that passed between the discovery of drugs on Strieff and the initial detention.[32] Moreover, as Professor Nancy Leong has stated, some Fourth Amendment violations, like the suspicionless stop suffered by Strieff, "may be difficult to quantify in financial terms."[33] Were the matter tried, the damages "may appear to be nominal to some juries."[34] In other words, although *Strieff* identified Section 1983 liability as a

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29. Messerschmidt v. Millender, 132 S. Ct. 1235, 1244 (2012) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011)).

30. *See, e.g.*, Whitmore v. Harrington, 204 F.3d 784, 784-85 (8th Cir. 2000); Gonzalez v. Entress, 133 F.3d 551, 553-55 (7th Cir. 1998); Morgan v. City of New York, No. 12-CV-704, 2014 WL 3407714, at *5 (E.D.N.Y. July 10, 2014) (noting that if an arrest is supported by probable cause preceded by a suspicionless stop, then the plaintiff "may only seek recovery for damages that accrued from the time of the stop until the moment that [probable cause] was found").

31. Townes v. City of New York, 176 F.3d 138, 148 (2d Cir. 1999); *see also* Davenport v. Cty. of Suffolk, No. 99-CV-3088 JFB, 2007 WL 608125, at *6-7 (E.D.N.Y. Feb. 23, 2007) (denying a motion for summary judgment as to an unreasonable search and seizure claim because the plaintiff did not seek damages for arrest and prosecution, but rather for "the alleged unreasonable stop and seizure prior to his arrest").

32. Utah v. Strieff, 136 S. Ct. 2056, 2062 (2016).

33. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 432 (2012).

34. David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 354 (2001); *see also* David Cole, *The Difference Prevention Makes: Regulating Preventive Justice*, 9 CRIM. L. & PHIL. 501, 513 (2015) ("It is generally not worth it for any one individual to sue civilly for such an encounter, as the damages are likely to be minimal . . . ."); Kaitlyn Fallon, *Stop and Frisk City: How the NYPD Can Police Itself and Improve a Troubled Policy*, 79 BROOK. L. REV. 321, 331 (2013) ("[M]onetary damages could be limited for those whose rights are violated by an improper stop and frisk, but suffered no significant injuries or losses."); Katherine E. Kin-

viable substitute for the exclusionary rule's deterrent effect, that liability will likely only result in nominal damages. If civil suits only produce nominal damages, then they are unlikely to deter constitutional violations.[35] Plaintiffs will also struggle to recover punitive damages for stops that last only minutes.[36] Punitive damages require proof of a defendant's recklessness—evidence that will be difficult to gather from interactions that are constitutionally illegitimate but limited in time and likely unaccompanied by any physical injury to the plaintiff.

Given the lack of monetary damages available to plaintiffs like Strieff, will any lawyer file the suits *Strieff* envisions as having enough of a deterrent effect to prevent unconstitutional stops? The Court has speculated that suits resulting in nominal damages may still deter unconstitutional damages because the attorneys' fees in such cases could be significant enough to act as a deterrent.[37] The Court has also assumed that civil rights actions yielding nominal damages are still attractive to civil rights counsel because counsel may be able to recover

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sey, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 232 (2014) (describing unreasonable stops or searches damages as "negligible").

35. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 611 (2006) (Breyer, J., dissenting) ("To argue that there may be few civil suits because violations may produce nothing 'more than nominal injury' is to confirm, not to deny, the inability of civil suits to deter violations."); Smith v. Kelly, No. C11-0623-RAJ-JPD, 2013 WL 5770344, at *24 n.22 (suggesting that, by ignoring nominal damages' limited deterrent effect, the Supreme Court has shown "willful blindness" to the *actual* "utility of 42 U.S.C. § 1983 as a deterrence substitute for the exclusionary rule").

36. Smith v. Wade, 461 U.S. 30, 56 (1983) (noting that punitive damages are available in Section 1983 actions only when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others"). Although civil rights plaintiffs like Strieff could theoretically seek injunctions, the deterrent effect of Section 1983 litigation is typically characterized as the ability of a civil rights plaintiff to recover money from an officer who acts unconstitutionally. *See* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772 (2012); Chatman v. Slagle, 107 F.3d 380, 383 (6th Cir. 1997) (describing the availability of money damages as key police misconduct "disincentive"); Ryan E. Meltzer, *Qualified Immunity and Constitutional-Norm Generation in the Post-*Saucier *Era: "Clearly Establishing" the Law Through Civilian Oversight of Police*, 92 TEX. L. REV. 1277 (2014). Moreover, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), imposes an almost insurmountable standing bar for Section 1983 plaintiffs seeking injunctive relief to halt unconstitutional police conduct. *See also* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1115 n.201 (2002) ("[Restrictive standing rules would make it all but impossible to secure a federal-court injunction against future illegal searches.").

37. *Cf. Hudson*, 547 U.S. at 598 (hypothesizing that even if the Court "thought that only large damages would deter police misconduct (and that police somehow are deterred by 'damages' but indifferent to the prospect of large § 1988 attorney's fees)," the Court still would not know how many claims settled or produced only a nominal recovery).

attorneys' fees.[38] This assumes, of course, that there are attorneys willing to litigate cases like Strieff's in the first place.

The availability of attorneys' fees does not necessarily make *Strieff*-like cases attractive. To obtain attorneys' fees, a civil rights plaintiff must prevail. Prevailing requires obtaining a judgment or a consent decree through which the plaintiff receives a "'judicially sanctioned change in the legal relationship of the parties.'"[39] Private settlement agreements excluded from an order of dismissal will not justify fee awards.[40] Like all civil cases, most civil rights cases settle. Civil rights defense attorneys know how to craft terms that purposefully limit the potential for fee recovery. They know how to ensure that an order of dismissal excludes settlement terms indicating that a plaintiff has prevailed. Typically, the parties will file a stipulation of dismissal that includes settlement terms and precludes attorneys' fees.[41] The court will then enter an order dismissing the case, with no mention of the private settlement terms. If a plaintiff is not a prevailing party, then his or her counsel is entitled to nothing more than a contingency fee, which is typically one-third of the plaintiff's settlement recovery. A fraction of an already small recovery is hardly enough incentive to take on a civil rights suit that will involve difficult motion practice surrounding qualified immunity.

Finally, representing a client like Strieff in a civil rights action presents significant practical difficulties. The statute of limitations for his unconstitutional stop claim may run while Strieff is still incarcerated, meaning that his civil rights action will proceed, at least in part, while Strieff is difficult to reach. Contact with a client like Strieff is expensive, requiring travel to and from prison. Discovery is difficult to obtain from an incarcerated client. If the case proceeds to trial, and the plaintiff wishes to appear, plaintiff's counsel will need to litigate a myriad of issues such as how and where the plaintiff will be held during the trial,[42] whether the plaintiff will be handcuffed at trial,[43] whether the

38. *Id.* at 597-98.

39. CRST Van Expedited, Inc. v. E.E.O.C., 136 S. Ct. 1642, 1646 (2016) (citing Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health and Hum. Res., 532 U.S. 598, 604-605 (2001)).

40. Bell v. Bd. of Cty. Comm'rs of Jefferson Cty., 451 F.3d 1097, 1102-03 (10th Cir. 2006); *see also* Zessar v. Keith, 536 F.3d 788, 795-96 (7th Cir. 2008); Raab v. City of Ocean City, No. CIV. 11-6818 RBK/KMW, 2015 WL 1530908, at *3 (D.N.J. Apr. 6, 2015); Abraham v. District of Columbia, 338 F. Supp. 2d 113, 120 (D.D.C. 2004).

41. *See, e.g.*, Stipulation for Dismissal with Prejudice, 15-cv-00513-BLW, Doc. No. 17 (D. Idaho May 18, 2016) (providing for dismissal of plaintiff's Section 1983 action following settlement, and indicating that each party would bear its "own attorneys' fees and costs" and that no party prevailed).

42. If a plaintiff is in state custody, a federal judge may need to issue a writ of habeas corpus to allow the plaintiff's temporary relocation to federal detention for the duration of the federal

plaintiff will be allowed to don a suit when in the presence of the jury,[44] and whether the plaintiff will be able to appear at trial at all.[45] Incarceration imposes a real burden on the attorney-client relationship—one that may be heavy enough to dissuade competent counsel from taking on a case involving a plaintiff like Strieff.

CONCLUSION

Strieff ensures that suspicionless stops "attenuated" by the existence of an arrest warrant will not trigger application of the exclusionary rule, resulting in the potential admission of evidence seized following a search incident to a warrant-based arrest. As Justice Sotomayor warns, this will likely result in numerous suspicionless stops made solely to run warrant checks. If a warrant exists, the suspicionless stop becomes retroactively sanctioned. It will not result in evidence exclusion; it might in fact result in a criminal conviction.

Stops made for the purpose of performing warrant checks are common, and disproportionately target people of color.[46] The warrants in question often arise from minor infractions, such as an unpaid ticket for biking on a sidewalk. *Strieff* has implicitly endorsed stops made only to perform warrant checks. The victims of unconstitutional stops will be left without any meaningful remedy in their criminal trials *or* as civil rights plaintiffs. With neither Section 1983 damages nor application of the exclusionary rule in criminal trial available as deter-

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civil rights trial. This is not cheap: the plaintiff must be transported and supervised throughout the trial, and housing and food must be provided in what might be an already overcrowded and underfunded federal facility.

43. The Second Circuit has required that a district court consider whether a prisoner civil rights plaintiff's "due process right not to appear before the jury in shackles and manacles [is] outweighed by considerations of security." Davidson v. Riley, 44 F.3d 1118, 1125 (2d Cir. 1995).

44. I appeared as plaintiff's counsel in a prisoner civil rights action in the Central District of California in 2008. Pre-trial motion practice involved not only plaintiff's attire, but also his right to, for example, take notes at trial with a pen. Defendants' counsel opposed any request that would have de-emphasized my client's incarcerated status, or otherwise humanized him in the eyes of the jury.

45. *See, e.g.*, Henderson v. Bramlet, No. 3:08-CV-15-DGW, 2012 WL 1679836, at *1 (S.D. Ill. May 14, 2012) (holding that an incarcerated civil rights plaintiff has no right to appear at trial).

46. The Department of Justice has found that "many innocent people are subjected to the humiliations of these unconstitutional searches." Utah v. Strieff, 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting). However, as Justice Sotomayor emphasized, "it is no secret that people of color are disproportionate victims of this type of scrutiny." *Id.* (citing MICHELLE ALEXANDER, THE NEW JIM CROW 95-136 (2010)).

rence, *Strieff* has, perhaps inadvertently, cleared the way for continued unconstitutional stops.

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