WHAT REMAINS OF THE EXCLUSIONARY RULE?

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INTRODUCTION

The Fourth Amendment exclusionary rule is experiencing death by a thousand cuts. Since the Supreme Court created the rule,[1] its opinions have whittled away at the rule's application with various exceptions and limitations.[2] So it is today that the Court only finds exclusion appropriate where the benefits of suppressing evidence outweigh its costs.[3] That rarely happens, says the Court. After all, what benefit could outweigh the cost of letting the guilty go free?

Apparently not the benefit of deterring the violation of an elementary Fourth Amendment principle: that no officer may conduct an investigatory stop absent reasonable suspicion of criminal wrongdoing.[4] At least not in *Utah v. Strieff*.[5] In that case, decided last summer, the Court held admissible drug-related evidence that an officer obtained after a concededly unconstitutional stop.[6] Why? Because the officer, immediately after stopping Edward Strieff, discovered that Strieff had an outstanding arrest warrant, and this discovery sufficiently

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1. The Court first established the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914). *See* Olmstead v. United States, 277 U.S. 438, 462 (1928); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 799 (2000). Yet the remedy applied only against the federal government. *Weeks*, 232 U.S. at 398. The Court later expanded the scope of the exclusionary rule, reasoning that the Fourteenth Amendment's Due Process Clause made the Fourth Amendment privacy right enforceable against the states. Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

2. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1080 (listing exceptions and limitations); Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule"*, SCOTUSBLOG (Jun. 25, 2011, 8:58 AM), http://www.scotusblog.com/2011/06/opinion-analysis-the-fading-exclusionary-rule/ [https://perma.cc/MT63-F52M] ("A constitutional concept that increasingly seems to contradict its own label, the 'exclusionary rule,' is fading further as a restraint on police evidence-gathering.").

3. Davis v. United States, 564 U.S. 229, 237 (2011).

4. Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

5. 136 S. Ct. 2056 (2016).

6. *Id.* at 2064.

attenuated the connection between the unconstitutional stop and the officer's discovery of the evidence.[7]

This Comment discusses *Utah v. Strieff* in the larger context of the exclusionary rule's movement toward meaninglessness.

I. THE CREATION AND EROSION OF THE EXCLUSIONARY RULE

The exclusionary rule operates by excluding from criminal trials evidence that the government obtained in an unconstitutional search.[8] It also excludes evidence obtained as an indirect result of such a search.[9] A creature of the Supreme Court's creation, the rule first applied only against the federal government.[10] But later, reasoning that the exclusion of unconstitutionally obtained evidence is fundamental to the concept of ordered liberty and "an essential part of the right to privacy," the Court held that the exclusionary rule applies also against the States through the Fourteenth Amendment's Due Process Clause.[11]

The Court has offered various justifications for the rule. In the rule's conception, the Court invoked the Fourth Amendment's prohibition on unreasonable searches and seizures, declaring that protection to be "of no value" if courts permit the government to introduce evidence obtained in an unconstitutional search.[12] The Court has also pointed to the desirability of maintaining judicial integrity and a government that follows its laws.[13] A third justification, however, has a

7. *Id.*

8. Weeks v. United States, 232 U.S. 383, 398 (1914).

9. Wong Sun v. United States, 371 U.S. 471, 484–85 (1963) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)).

10. *Weeks*, 232 U.S. at 398.

11. Mapp v. Ohio, 367 U.S. 643, 654–56 (1961).

12. *Weeks*, 232 U.S. at 393. The Court also balanced the interests of criminal justice and constitutional liberties, finding that the former outweighed by the latter. *See id.* ("The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.").

13. *Mapp*, 367 U.S. at 659; *see also* Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 266 (2010) ("As currently applied by the majority [of Court Justices], the exclusionary rule focuses on ensuring prosecution of seemingly guilty defendants to the exclusion of other equally important interests, such as police integrity, judicial impartiality, and respect for the rule of law.").

very practical effect: deterring police misconduct.[14]

Let's take the Court at its word that this rule is valid, rooted in the Constitution.[15] Why, then, did the Court move so quickly from announcing its conception to limiting its application? A mere fourteen years after the Court decided *Weeks*, in which the rule was born, Chief Justice Taft described the decision as "striking" and its declaration "sweeping," implicitly questioning the exclusionary rule's constitutional origin.[16] The Court has since enunciated various exceptions to the rule that narrow its scope.

Of the various exceptions that curb the exclusionary rule's application,[17] only one—the attenuation doctrine—is relevant to this inquiry. The attenuation doctrine looks to proximate causation, admitting evidence where the causal link between the unconstitutional search and the discovery of evidence is "so attenuated as to dissipate the taint" of the constitutional violation.[18] Determining whether an intervening occurrence has broken the causal chain between the unlawful search and the evidence requires a factual evaluation, and the Court has

14. *See* United States v. Calandra, 414 U.S. 338, 348 (1974) ("In sum, the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.").

15. *See Mapp*, 367 U.S. at 649 ("But the plain and unequivocal language of *Weeks* . . . to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed." (citation corrected)). *But see* Akhil Amar, *The Court after Scalia: The Despicable and Dispensable Exclusionary Rule (Corrected)*, SCOTUSBLOG (Sept. 16, 2016, 1:57 PM, http://www.scotusblog.com/2016/09/the-court-after-scalia-the-despicable-and-dispensable-exclusionary-rule/ [https://perma.cc/M2FR-44W8] (arguing that the exclusionary rule has no basis in the Constitution).

16. *See* Olmstead v. United States, 277 U.S. 438, 462 (1928) (noting that *Weeks*'s holding that the Fourth Amendment, "although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment").

17. *See* Kerr, *supra* note 2, at 1080 (listing "retroactivity, the fruit of the poisonous tree, inevitable discovery, independent source, and the good faith exception" as doctrines limiting the exclusionary rule's application).

18. Nardone v. United States, 308 U.S. 338, 341 (1939). *See also* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (noting that the question in exclusion cases is "whether, granting establishment of the primary illegality, the evidence [as] to which instant objection is made has been come at by exploitation of [the unconstitutional search] or instead by means sufficiently distinguishable to be purged of the primary taint") (citation omitted). One scholar defined the attenuation doctrine as marking "the point of diminishing returns of the deterrence principle." Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 390 (1964).

warned against "permit[ting] protection of the Fourth Amendment to turn on . . . a talismanic test."[19] At bottom, the government is not to be "put in a better position than it would have been if no illegality had transpired," but neither is it to be "put in a worse position simply because of some earlier police error."[20]

Exceptions to the Fourth Amendment exclusionary rule aside, the Court has also expressed disfavor of judicially-created remedies for constitutional violations in other contexts. Consider the Court's opinion in *United States v. Patane*,[21] authored by Justice Clarence Thomas. In that case, officers arrested Samuel Patane for violating a restraining order, and Patane admitted to (unlawfully) owning a pistol before the officers gave him a *Miranda* advisement.[22] The Court held that the officers' failure to give Patane a *Miranda* warning did not require suppression of the pistol as evidence at Patane's subsequent criminal trial.[23]

How the Court reached that holding sheds light as to how Justice Thomas, and perhaps a few of the other Justices, thinks about judicially-created remedies. The Court looked primarily to the Constitution's text, finding that it counseled against expanding application of the exclusionary rule in the *Miranda* context in two ways. First, the Court noted that the Self-Incrimination Clause's "core protection" prohibits a criminal defendant from testifying against himself, and therefore the mere "introduction of nontestimonial evidence obtained as a result of voluntary statements" does not violate any Fifth Amendment right.[24] Accordingly, the Court warned that the extension of any "prophylactic rules . . . [that] sweep beyond the actual protections of the Self-Incrimination Clause . . .

19. Brown v. Illinois, 422 U.S. 590, 603 (1975). The *Brown* Court rejected the argument that by giving *Miranda* warnings, officers sufficiently attenuated the causal chain between an unconstitutional arrest and the suspect's subsequent confession. *Id.* at 602. But it did provide some factors to consider. They include the temporal proximity between the constitutional violation and the government's acquisition of evidence, "the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603–04 (internal citations omitted).

20. Nix v. Williams, 467 U.S. 431, 443 (1984).

21. 542 U.S. 630 (2004).

22. *Id.* at 635. Patane was then charged with felon in possession of a firearm. *Id.*

23. *Id.* at 637.

24. *Id.*

must be justified by its necessity for the protection of the actual right."[25] And second, the Court pointed out that the Self-Incrimination Clause has "its own exclusionary rule," providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[26] This textual protection, the Court reasoned, "supports a strong presumption against expanding the *Miranda* rule any further."[27]

The Court also looked to whether expanding the exclusionary rule to evidence obtained after a failure to provide *Miranda* warnings would create a deterrent effect. Noting that the Self-Incrimination Clause protects a trial right, and that an officer's failure to provide *Miranda* warnings itself does not violate a suspect's constitutional rights, the Court reasoned that a constitutional violation occurs only if the government introduces "unwarned statements into evidence at trial."[28] The Court therefore concluded that there is nothing to deter with respect to failures to provide *Miranda* warnings.[29]

II. THE CASE

And then along came Edward Strieff, whose case pitted the eroding exclusionary rule against a Court that has recently evinced a wariness of judicially-created remedies for constitutional violations. His story begins when Officer Fackrell, a Salt Lake City Policeman, was surveilling a home that an anonymous tipster connected with "narcotics activity."[30] The officer watched visitors enter and exit the home, and he became suspicious that its occupants were indeed dealing drugs.[31] So when Strieff exited the home, Officer Fackrell followed him to a nearby convenience store, where he detained Strieff, identified himself, asked Strieff what he had been doing at the home, and requested Strieff's identification.[32] After relaying Strieff's information to a dispatcher, Officer

25. *Id.* at 639.

26. *Id.* at 640 (quoting U.S. CONST. amend. V). The Court distinguished this so-called exclusionary rule, which is "self-executing," from "the Fourth Amendment's bar on unreasonable searches." *Id.*

27. *Id.*

28. *Id.* at 641.

29. *Id.* at 642. When discussing deterrence, the Court further distinguished failures to warn from "unreasonable searches under the Fourth Amendment." *Id.*

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

31. *Id.*

32. *Id.* at 2060.

Fackrell learned "that Strieff had an outstanding arrest warrant for a traffic violation."[33] Officer Fackrell arrested Strieff, searched him, and discovered a bag of methamphetamine and drug paraphernalia.[34]

At a suppression hearing in Strieff's criminal trial,[35] the State "conceded that Officer Fackrell lacked reasonable suspicion for the stop" but argued that his discovery of the warrant "attenuated the connection between the unlawful stop and the discovery of the contraband."[36] The trial court agreed, and the Utah Court of Appeals affirmed.[37] But the Utah Supreme Court reversed, reasoning that only "a voluntary act of a defendant's free will (as in a confession or consent to search)" may break the causal link between an unconstitutional search and the discovery of evidence.[38]

The United States Supreme Court reversed, holding that the officer's discovery of Strieff's warrant sufficiently attenuated the connection between the unlawful stop and the officer's discovery of the drugs.[39] But before the Court even applied the attenuation doctrine, it noted that prior to the exclusionary rule "individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help."[40] Then, after rejecting the Utah Supreme Court's conclusion that the attenuation doctrine applies only where a defendant independently and freely confesses a crime or consents to a search,[41] the Court turned to the *Brown v. Illinois*[42] factors to determine whether the attenuation doctrine applied.[43]

The Court concluded that the *Brown* factors favored admitting the evidence.[44] Looking to the first *Brown* factor, the

33. *Id.*
34. *Id.*
35. The State charged Strieff with a possession offense. *Id.*
36. *Id.*
37. *Id.*
38. State v. Strieff, 357 P.3d 532, 536 (Utah 2015).
39. *Strieff*, 136 S. Ct. at 2063.
40. *Id.* at 2061 (citing Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 625 (1999)). For a discussion on how the Court has limited the availability of these historic remedies, see Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687 (2011).
41. *Strieff*, 136 S. Ct. at 2061.
42. 422 U.S. 590, 603–04 (1975).
43. *Strieff*, 136 S. Ct. at 2061.
44. *Id.* at 2063.

temporal proximity between the unlawful stop and the search, the Court reasoned that the short amount of time—"only minutes"—between Officer Fackrell's stop and finding the drug contraband favored suppression.[45] But the Court reasoned that the second and third *Brown* factors, the presence of intervening circumstances and the purpose and flagrancy of the misconduct, favored admitting the evidence. The intervening circumstance, said the Court, was the pre-existing warrant, which authorized the officer to arrest Strieff and search him incident to arrest.[46] And the officer's conduct was only negligent; he merely made "two good-faith mistakes" in stopping Strieff without reasonable suspicion of criminal activity and failing to instead engage in a consensual encounter.[47] This "isolated instance of negligence," the Court reasoned, did not amount to "any systemic or recurrent police misconduct."[48]

The Court's opinion elicited two dissents, one from Justice Sotomayor and the other from Justice Kagan. Justice Sotomayor first observed that the Court's opinion allowed the officer to exploit his own illegal conduct—precisely what the exclusionary rule aimed to prevent.[49] She then challenged the Court's application of *Segura*, distinguishing that case by noting that the officer's illegal stop of Strieff "was essential to his discovery of an arrest warrant."[50] She also challenged the majority's conclusion that the officer's mistakes were negligent and made in good faith, noting that the officer's "sole purpose

45. *Id.* at 2062.

46. *Id.* The Court relied on *Segura v. United States*, in which officers awaiting a warrant that had not yet issued entered a home to conduct a search and found evidence of drug activity while conducting a protective sweep inside. 468 U.S. 796, 800–01 (1984). About nineteen hours after the initial search, the warrant issued and the officers again searched the home, finding additional evidence of unlawful activity. *Id.* at 801. Applying the independent source exception to the exclusionary rule, the Court held that the evidence was admissible because the information supporting the search warrant was "wholly unconnected with the [initial] entry and was known to the agents well before the initial entry." *Id.* at 814. And the Court noted that "evidence will not be excluded as 'fruit' [of an illegal search] unless the illegality is at least the 'but for' cause of the discovery of the evidence." *Id.* at 815. Interestingly, the Court has since stated that "but for" causation is a necessary, but not sufficient, condition for suppression. Hudson v. Michigan, 547 U.S. 586, 592 (2006).

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

48. *Id.*

49. *Id.* at 2066.

50. *Id.* at 2067.

was to fish for evidence."[51] If the Fourth Amendment permits these negligent and isolated constitutional violations, Justice Sotomayor mused, what would happen in places where extraordinary numbers of citizens have outstanding warrants?[52] Finally, and writing only for herself,[53] Justice Sotomayor highlighted the consequences of diminished constitutional requirements in the Fourth Amendment context—stops for almost any reason, searches, arrest, invasive post-arrest searches, and civil death by arrest record—and questioned the vitality of our justice system today.[54]

Justice Kagan applied the *Brown* factors, and through her reasoning argued that suppression was appropriate. Although she reached the same conclusion as did the majority with respect to the first factor,[55] her conclusions as to the second and third factors differed. The officer's discovery of a warrant hardly constituted an intervening circumstance, Justice Kagan reasoned, because, as with the doctrine of proximate causation, "a circumstance counts as intervening only when it is unforeseeable—not when it can be seen coming from miles away."[56] Because officers routinely check for warrants, and because so many people have outstanding warrants, it is hardly unforeseeable that an officer would discover a warrant after a stop.[57] And the officer's conduct was hardly mistaken—the officer's seizure "was a calculated decision, taken with so little justification that the State has never tried to defend its legality" and was admittedly without constitutional basis.[58] Like Justice Sotomayor, Justice Kagan feared that the majority's opinion would incentivize officers to stop people without reasonable suspicion, "exactly the temptation the exclusionary rule is supposed to remove."[59]

51. *Id.*
52. *Id.* at 2068.
53. Justice Ginsburg joined the previous parts of Justice Sotomayor's dissent. *Id.* at 2064.
54. *Id.* at 2069–71.
55. *Id.* at 2072.
56. *Id.* at 2073.
57. *Id.*
58. *Id.* at 2072.
59. *Id.* at 2074.

III. FROM A CONSTITUTIONAL NECESSITY TO AN AFTERTHOUGHT

How did that happen? The Court in *Mapp* found the exclusionary rule to be part and parcel of the Fourth Amendment and so necessary to ordered liberty that it made the rule applicable against the states through the Fourteenth Amendment.[60] But today the Court finds that exclusion is appropriate only where the benefits of deterrence outweigh exclusion's substantial costs.[61] It used to be that the Court cited bringing effect to the Constitution's protections and judicial integrity in defense of excluding evidence.[62] Yet now the Court permits the government to benefit from an officer's indefensible constitutional violation, so long as his conduct isn't flagrant.[63]

The Court in *Utah v. Strieff* got it wrong. In part because the Court strayed too far from its attenuation doctrine precedent, and perhaps also in part because at least some Justices wish to narrowly tailor—if not entirely eliminate—judicially-created remedies, the Court has again weakened the exclusionary rule, perhaps creating an open invitation for officers to violate constitutional rights in their searches for evidence.[64]

Recall that the attenuation doctrine aims to prevent police from reaping the benefits of a constitutional violation without punishing lawful policing because of an earlier error.[65] That balance weighs against suppression where the causal link between an officer's constitutional violation and his subsequent acquisition of evidence is weak enough to render the violation effectively harmless.[66] Such a determination is necessarily fact

60. Mapp v. Ohio, 367 U.S. 643, 654–56 (1961)

61. Hudson v. Michigan, 547 U.S. 586, 594 (2006).

62. Weeks v. United States, 232 U.S. 383, 393 (1914); Mapp, 367 U.S. at 659.

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

64. *Id.* at 2074 (Kagan, J., dissenting). *See also* Orin Kerr, *Opinion Analysis: The Exclusionary Rule is Weakened but it Still Lives*, SCOTUSBLOG (Jun. 20, 2016, 9:35 PM), http://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives/ [https://perma.cc/ZD4M-8LBR] (agreeing with Justice Kagan's assessment and predicting that "[a]t the margins . . . officers will be encouraged to treat almost anything as reasonable suspicion to justify a stop").

65. *See supra* text accompanying note 20.

66. *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963) (holding admissible a statement given to police after an unlawful arrest where the

intensive. But the Court seems to overlook the fact that "but for" the officer's constitutional violation, he would never have discovered the evidence of Strieff's drug paraphernalia. And by avoiding a serious inquiry into proximate causation and instead applying the *Brown* factors like a scientific formula, the Court in *Utah v. Strieff* did exactly what the *Brown* Court warned against: it "permit[ted] protection of the Fourth Amendment to turn on . . . a talismanic test."[67]

Perhaps the Court's reasoning in *Patane* justifies this treatment of the exclusionary rule.[68] If courts should only enforce this judicially-created remedy to the extent that it narrowly fits with the Fourth Amendment's text and creates a deterrent to violations thereof,[69] the exclusionary rule does not warrant much enforcement. After all, the Fourth Amendment prohibits only "unreasonable searches and seizures," not introducing at trial evidence obtained from an unlawful search or seizure.[70] And the extent to which the exclusionary rule deters unreasonable searches is questionable, especially given that searches are often distant from suppression hearings and trial.[71]

But if that is so, the justifications underlying the exclusionary rule in its inception are now meaningless, and bringing effect to the Fourth Amendment and maintaining judicial integrity have fallen to the cost-benefit analysis and, in cases implicating the attenuation doctrine, the rigid application of the *Brown* factors.

declarant voluntarily returned to the police station days after the arrest to provide his statement).

67. Brown v. Illinois, 422 U.S. 590, 603 (1975).

68. As a reminder, the Court in *Patane* suggested that judicially-created remedies for constitutional violations should be narrowly tailored to the Constitution's text and apply only where they deter violations of the Constitution's express protections. United States v. Patane, 542 U.S. 630, 639, 642 (2004).

69. *See id.* at 637, 639, 642.

70. U.S. CONST. amend IV.

71. *See generally* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669 (1998) (questioning the deterrent value of the exclusionary rule).

CONCLUSION

Utah v. Strieff is an example of a particularly egregious constitutional violation that did not result in suppression. It's also a notable point on the exclusionary rule's trend from bedrock Fourth Amendment doctrine to a disfavored remedy. Regardless of whether the Court in *Strieff* rightfully interpreted the Fourth Amendment to allow such police conduct without requiring suppression as a remedy, the case raises a troublesome question: What *would* require suppression?