The Court after Scalia: The despicable and dispensable exclusionary rule (Corrected)

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University. His new book, The Constitution Today*, contains much more material on several of this essay's themes: the constitutional wrongness of the exclusionary rule, the principled power of originalism, the pending Supreme Court vacancy, and the complex legacy of Antonin Scalia.*

"You despise me, don't you?" simpers Peter Lorre's character, Signor Ugarte, to Rick Blaine, played by Humphrey Bogart. Bogie's blunt response in this early scene from *Casablanca* remains a great line in a film filled with great lines: "If I gave you any thought I probably would."

Think of the modern Supreme Court as Bogart, and the exclusionary rule as Lorre. Although the Court excludes evidence all the time, a Court majority probably despises the exclusionary rule while almost never thinking about it. In countless cases over the last forty years, the Court has held that the Fourth Amendment was violated by the facts at hand, and has thus ordered or upheld evidentiary exclusion. But in almost none of these cases was the exclusionary rule as such at issue. Rather, in these cases the Court granted review, and the Justices opined, only on the scope of the Fourth Amendment right that underlies the rule. But whenever the modern Court has squarely focused on the exclusionary rule itself – giving express thought to whether the rule's contours should be widened or narrowed – the Justices have almost always ruled against the rule, and have done so in case after case dripping with implied or express contempt for it.

Exactly forty years ago this summer – during the Bicentennial week of July 1976, to be precise – the Court held in *United States v. Janis* that the exclusionary rule was categorically inapplicable to civil forfeiture cases, thus enabling government to, quite literally, profit from its own wrongs by pocketing various valuable items (illegal drugs, burglars' tools, getaway vehicles, secret hideaways, and other criminal contraband and instrumentalities) found or identified by the government in concededly unconstitutional searches. That same week, the Court also ruled in *Stone v. Powell* that the exclusionary rule could not be raised in federal habeas cases. In 1984, *United States v. Leon* and *Massachusetts v. Sheppard* prohibited exclusion when cops had procured a faulty warrant in good faith. More recent cases reinforcing or expanding the *Leon/Sheppard* exception include *Illinois v. Krull* in 1987, *Arizona v. Evans* in 1994, *Sanchez-Llamas v. Oregon* in 2006, *Herring v. United States* in 2009, and *Davis v. United States* in 2011. In another long line of cases, the Court has refused to exclude evidence in various situations in which evidence found in or after an unconstitutional search would likely have been found anyway in some alternative universe in which no Fourth Amendment violation ever occurred. Cases creating and/or expanding this "inevitable discovery/likely discovery/possible independent source" exception to the exclusionary rule include *Nix v. Williams* and *Segura v. United States* in 1984, *New York v. Harris* in 1990, *Hudson v. Michigan* in 2006, and *Utah v. Strieff* last Term.

The specific facts of these cases vary widely. In all of them, though, consistently throughout four decades, whenever the Court gave explicit thought to the exclusionary rule itself, the majority view was to despise it. Given this strong antipathy towards the rule, the general lack of thought most of the Justices have given it most of the time is striking.

Consider the legacy of Justice Antonin Scalia. Scalia proclaimed himself an originalist, but refused to follow the light and logic of his professed North

Star. "*Stare decisis*," said he, "is not part of my originalist philosophy; it is a pragmatic exception to it." Huh? If the Constitution itself, as originally understood, is law – as Scalia insisted time and again – then why can judges disregard that law, to which they are oath-bound? If pragmatism authorizes this exception, why no others? Why shouldn't judges be ad hoc pragmatists all the way down, everywhere? As it turns out, these general questions about Scalia's confused jurisprudence are powerfully illustrated by his confused approach, in particular, to the exclusionary rule.

Unlike Scalia, most principled originalists today believe that stare decisis, the doctrine that courts should adhere to principles established by earlier decisions, is and must be part of proper originalist philosophy itself, not some external, ad hoc exception to originalism. The text of the Constitution explicitly vests federal judges with "judicial power"; a certain kind of respect for a certain kind of precedent properly follows from the very idea of "judicial power," which by its nature pays heed to past events, as the Founders themselves clearly understood. The Constitution itself promises "due process," a guarantee that is intimately intertwined with ideas of fair notice to individuals subject to government coercion.

Concretely (and hypothetically): Suppose at time T1 Congress outlaws conduct X, and a Court at T2 holds that statute unconstitutional in *U.S. v. Moe*. The *Moe* ruling is widely viewed as erroneous by citizenry and experts alike. Eventually the Court agrees, in a case decided at T3 involving a similar but distinguishable state statute. The Court in this new case, *State v. Larry,* explicitly declares that "*Moe* was wrong the day it was decided and is hereby overruled." Going forward – at any time after T3 – citizens are on notice that they must refrain from conduct X. In this hypothetical, the congressional statute was never repealed; it has remained on the books and the Court has now made clear that the statute is kosher. But it would be deeply wrong – a violation of basic principles of fair notice and due process, principles internal

to proper originalism and not some ad hoc exception to those principles – to allow a citizen, Curly, who committed conduct X after T2 and before T3 to be prosecuted and convicted. After all, Curly acted in justified reliance on *Moe*. Even if *Moe* was wrong, *Moe* created real and legitimate reliance interests. Curly would have never done X but for *Moe*. Even when *Moe* is properly overruled, Curly should not be placed in a worse position than he would have been in had *Moe* been rightly decided at the outset (in which case, Curly would have refrained from doing X). So precedent does matter, and even erroneous precedents create facts on the ground that must be taken into account and given proper weight by judges of an originalist stripe.

What does all of this mean for the exclusionary rule going forward – for the fate of Scalia's philosophy in the larger legal culture, for today's Court, and especially for the jurist ultimately chosen to succeed Scalia, a jurist who will need to confront hard jurisprudential questions both in the confirmation process and on the high bench? Just this: The exclusionary rule has no sound footing in any originalist legal source material. None. Nothing in the text as originally understood supports it; no framer ever endorsed it; no judge in America for the first century after independence ever followed the exclusionary rule or any genuine prototype of it. On one of the very few occasions when a lawyer tried to argue for exclusion before 1876, the lawyer was laughed out of court by America's preeminent jurists, led by Joseph Story.

Yet Antonin Scalia – who never denied any of the facts in the preceding paragraph, and who fancied himself a paragon of originalism – excluded evidence day in and day out and never thought clearly about what he was doing. On the rare occasions when he did think about the exclusionary rule, he usually disparaged it and tried to cabin it. Why did this self-proclaimed originalist not simply junk the offending rule altogether, as principles of originalism would have dictated? Because of his muddy and muddled vision

of stare decisis, which wrongly led him to defer to exclusionary rule precedents that predated his judicial tenure even if these precedents were clearly erroneous as an original and originalist matter.

For sound adherents of originalism, stare decisis kicks in when erroneous precedents – even outrageously erroneous precedents – have created real reliance interests that must be taken into account as a matter of proper judicial power and due process. But, contrary to Scalia's jurisprudence, none of that applies in exclusionary rule situations! The Curlies of the world do not commit crimes hoping that the cops will goof and they will then walk. Even if some stooges did think this, this is not the stuff of legitimate reliance interests entitled to judicial weight. And even if it were, the proper judicial response would simply be to overrule the entire exclusionary rule prospectively, allowing exclusion for all crimes committed prior to the Court's new announcement AND NO OTHER CRIMES, HENCEFORTH.

Justice Scalia was not alone in his confusion and thoughtlessness on the exclusionary rule. Scalia often contrasted his own view of stare decisis to that of Justice Clarence Thomas: "If a constitutional line of authority is wrong, he [Justice Thomas] would say let's get it right. I wouldn't do that." And in certain quadrants of constitutional law over the last quarter century, Justice Thomas was indeed a more consistent and principled originalist than was Justice Scalia. But consider what Justice Thomas, writing for the Court, declared at the outset of last Term's biggest Fourth Amendment case, *Utah v. Strieff*:

> [At the Founding] individuals subject to unconstitutional searches or seizures historically enforced their rights through tort suits or self-help. In the 20th century, however, [!!] the exclusionary rule—the rule that often requires trial courts to exclude unlawfully seized evidence in a criminal trial—became the principal judicial remedy to deter Fourth Amendment

> violations. . . . Under the Court's precedents . . . .

Coming as it did from Justice Thomas, this head-snapping high-speed U-turn seems odd at best, almost thoughtless – inattentive to the originalist approach that Justice Thomas has championed in most other quadrants of constitutional law.

Nor did the dissenters shine in *Strieff*. For example, Justice Sonia Sotomayor waxed eloquent on various facets of Fourth Amendment rights, with special emphasis on issues of race and class in street encounters between cops and the communities they must serve. But these issues were irrelevant to the case at hand. The scope of the Fourth Amendment was not properly before the Court in *Strieff*; only the contours of the exclusionary rule were at issue.

The preceding paragraphs have singled out three particularly powerful voices on the modern Court – but in truth, these lapses are far from unique to Justices Scalia, Thomas, and Sotomayor. No Justice in the modern era has been deeply thoughtful on the issue of the exclusionary rule. None has shown that the rule is right as a matter of originalist first principles; and none has shown that, even if the rule was wrong when first promulgated by judges, proper reliance principles justify retaining its costly command to toss out undeniably reliable evidence in case after case.

The problem is not just that no Justice has done either thing. The problem is that no Justice or scholar can do either thing – including the next Justice, whoever that might be. It is impossible to persuasively root the rule in either first principles of text, history, or structure or, alternatively, in the sound principles of justifiable reliance that undergird stare decisis, properly understood.

My challenge today goes beyond those jurists who care about originalism. Even those judges and scholars who start with precedents need to

understand the theory of precedent itself. Most of today's most important constitutional precedents come from the Warren Court. But the Warren Court itself tossed a vast number of precedents out the window – on Jim Crow, on malapportionment, on incorporation of the Bill of Rights, on organized prayer in the schools, on free speech, and on other topics besides. Was the Warren Court wrong to do this? Any principled advocate of precedent must honestly confront this question, yet almost none of our modern jurists or scholars has done so.

Here is my answer: The Warren Court did the right thing because the earlier cases were wrong as an original matter. The Constitution really does promise free speech, a right to an equal vote, racial equality, religious equality, and protection against violation by state governments of basic fundamental rights. No proper reliance interests stood in the way of righting earlier judicial wrongs and giving American citizens what the Constitution in fact promised them. Precedent itself requires taking the Warren Court seriously, and taking that Court seriously requires taking the Constitution itself seriously, which the Warren Court generally did, contrary to the view of its many uninformed critics, then and now. Ironically, the Warren Court's biggest mistakes involved the exclusionary rule itself. These mistakes may now properly be corrected by the Roberts Court, just as the Warren Court acted to correct the biggest mistakes it inherited.

The driving intellectual force behind the Warren Court was Justice Hugo Black, who was a more gifted and more consequential originalist than either Antonin Scalia or Clarence Thomas, and was also every bit as eloquent and passionate a civil libertarian as Sonia Sotomayor. Today's jurists – and especially our next Justice – would do well to ponder Black and the Warren Court this Term and every Term. If they do not, to borrow again from Bogie, they will regret it. Maybe not this Term, maybe not next Term. But soon and for the rest of their lives.

[Correction: This post has been updated to reflect what the author believes is a more accurate characterization of *Utah v. Strieff*.]

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