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The Fourth Amendment, Dark Web Drug Dealers, and the Opioid Crisis

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THE FOURTH AMENDMENT, DARK WEB DRUG DEALERS, AND THE OPIOID CRISIS

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Abstract

This Note addresses whether people who use criminal aliases to send drugs through the mail should retain their Fourth Amendment rights in those packages. While several circuit courts have identified this as an issue, none have resolved it. One district court has been able to conclude, unquestioned by the higher courts, that such people do not retain their Fourth Amendment rights in the packages. This Note disagrees: People who send drugs through the mail using criminal aliases have Fourth Amendment rights in those packages. Because of the growing opioid crisis in the United States, a crisis fueled in part by drug dealers exploiting the dark web to send their customers dangerous illegal drugs through the mail, this Note does not end with an assertion that drug dealers should enjoy Fourth Amendment protections. Instead, this Note explores the exclusionary rule and how courts could apply it to combat the opioid crisis and dark web drug dealing.

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INTRODUCTION

Sending drugs through the mail may not seem like the best idea. However, it may be one of the safest ways to deal drugs, especially when coupled with the protections of the dark web. The dark web,[1] a global online network that allows users to conduct transactions anonymously,

1. Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 STAN. L. REV. 1075, 1077 (2017). The dark web requires a special browser to access it. Eric Jardine, *The Dark Web Dilemma: Tor, Anonymity and Online Policing*, *in* GLOBAL COMMISSION ON INTERNET GOVERNANCE, at 1 (Ser. No. 21, 2015), https://www.cigionline.org/sites/default/files/no.21_1.pdf [https://perma.cc/RAG3-Y6R3]. One of the most popular browsers, Tor, allows users to send requests for a particular video, image, or other content to another computer in the Tor network, which then sends the request to another computer. *Id.* at 1–2. That computer sends the request to another computer that then accesses the content and sends it through a chain of several other computers in the network until the requested information is finally sent to the requester's computer. *Id.* at 2. By bouncing the information to different computers in this way, the internet service provider (ISP) for the requester can only see that the requester is sending a request to the first computer. *Id.* The ISP cannot see the requested content. *Id.* The website that contains the requested content can see the middle computer that accesses the content, but cannot see the requester's computer, which is further down the chain. *Id.* This process makes it exceptionally difficult for someone to identify who the requester, and ultimate receiver, of the information is. *Id.* For additional protection and anonymity, buyers on the dark web use Bitcoin. Wade V. Davies, *Bitcoin Criminals*, 53 TENN. B.J. 24, 24 (2017). Bitcoin is a digital currency that can be exchanged for real currency. *Id.* When Bitcoin transactions are recorded, no personal information is recorded with the transactions. *Id.*

has attracted thousands of drug dealers.[2] Customers purchase drugs through dark web marketplaces, and dark web drug dealers ship the products through the mail.[3] The online transactions themselves are untraceable,[4] and law enforcement may be further frustrated if the drug dealers use aliases to ship the packages. The Fourth Amendment also protects these drug transactions.[5] Because the Supreme Court has held that mail sent through the United States Postal Service (USPS) is subject to Fourth Amendment protection,[6] the United States Postal Inspection Service (USPIS)[7] typically cannot search packages without first obtaining a search warrant based on probable cause.[8] Several circuit courts have concluded that even when packages are addressed to an alias, the packages are subject to Fourth Amendment protection.[9] But what if people use aliases solely for the purpose of doing something illegal, like shipping drugs through the mail?

Considering the prevalence of drugs in the mail,[10] one would expect many court opinions on the issue of whether the criminal nature of an

2. One dark web marketplace that was recently shut down by law enforcement had over 40,000 vendors and 250,000 listings for illegal drugs and toxic chemicals. *AlphaBay, the Largest Online 'Dark Market,' Shut Down*, U.S. DEP'T JUST. (July 20, 2017), https://www.justice.gov/opa/pr/alphabay-largest-online-dark-market-shut-down [https://perma.cc/9VPJ-M73T].

3. Nathaniel Popper, *Opioid Dealers Embrace the Dark Web to Send Deadly Drugs by Mail*, N.Y. TIMES (June 10, 2017), https://www.nytimes.com/2017/06/10/business/dealbook/opioid-dark-web-drug-overdose.html?mcubz=0 [https://perma.cc/555H-V4FH]. A man in South Florida pleaded guilty to drug charges, admitting he sold drugs through the dark web and shipped them using priority mail. Paula McMahon, *South Florida 'Dark Web' Dealer Admits He Sold Drugs Online, Shipped Them Priority Mail*, SUN SENTINEL (Oct. 28, 2016, 9:20 AM), http://www.sun-sentinel.com/local/broward/fl-drugs-dark-web-20161027-story.html [https://perma.cc/X2YD-MT4G].

4. Ghappour, *supra* note 1, at 1079.

5. *See* United States v. Van Leeuwen, 397 U.S. 249, 251 (1970).

6. *Id.*

7. USPIS is a federal law enforcement agency that investigates crimes that affect or use the U.S. Mail, including transportation and distribution of drugs through the mail. *Jurisdiction and Laws*, U.S. POSTAL INSPECTION SERV., https://postalinspectors.uspis.gov/aboutus/laws.aspx [https://perma.cc/98KE-LYHJ]; *Mission Statement*, U.S. POSTAL INSPECTION SERV., https://postalinspectors.uspis.gov/aboutus/mission.aspx [https://perma.cc/UN5U-WH7R].

8. *See* THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 56 (2009).

9. *See, e.g.*, United States v. Garcia-Bercovich, 582 F.3d 1234, 1238 (11th Cir. 2009); United States v. Villarreal, 963 F.2d 770, 774 (5th Cir. 1992).

10. In 2015, USPIS seized more than 37,000 pounds of illicit drugs. U.S. POSTAL INSPECTION SERV., ANNUAL REPORT: 2016 7 (2017), https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL_web.pdf [https://perma.cc/55Z9-4JZR]. It seems likely that many more pounds of illicit drugs traveled through the mail without being detected and seized by USPIS. However, "no one knows just how much [illicit drugs] successfully make[ ] it through the Postal Service undiscovered." Ross Scully, *Can You Get Away With Mailing Cannabis Through the USPS?*, LEAFLY (July 26, 2016), https://www.leafly.com/news/cannabis-101/mailing-cannabis-through-usps [https://perma.cc/RGZ4-228J].

alias affects a person's ability to invoke the protections of the Fourth Amendment, but that is not the case. Four circuit courts have mentioned the issue, but none have resolved it.[11] The circuit courts' reluctance to clearly answer this question has left district courts free to decide the issue on their own. One district court has done this, deciding that someone who uses an alias solely as part of a criminal scheme has no reasonable expectation of privacy in a package addressed to that alias, and thus has no Fourth Amendment protection.[12] Another district court suggested that it may agree with that analysis, possibly even extending it to areas other than packages.[13]

In Part I, this Note discusses important Supreme Court cases related to the issue of whether a package sent using a criminal alias is subject to Fourth Amendment protections and the circuit court cases that have established that the Fourth Amendment covers packages addressed to aliases in general.[14] Additionally, Part I outlines two cases in which courts addressed whether the criminal nature of an alias affects Fourth Amendment rights: one court decided that the criminal nature of the alias does affect Fourth Amendment rights; and one court indicated that the criminal nature of the alias is irrelevant when applying Fourth Amendment rights. Part II addresses the strengths and weaknesses of these two cases and argues for a proper resolution of whether a package sent using a criminal alias is subject to Fourth Amendment protection. In Part III, this Note addresses the societal concern that has likely led courts to suggest that there should be no expectation of privacy in packages sent using criminal aliases: the dangers of drug trafficking. As the United

11. United States v. Pitts, 322 F.3d 449, 457 (7th Cir. 2003); United States v. Hicks, 59 F. App'x 703, 706–07 (6th Cir. 2003); United States v. Daniel, 982 F.2d 146, 149 (5th Cir. 1993); United States v. Lewis, 738 F.2d 916, 919, 919–20 n.2 (8th Cir. 1984).

12. United States v. Walker, 20 F. Supp. 2d 971, 974 (S.D.W. Va. 1998).

13. United States v. Martin, No. 10-20801-CR-JORDAN/O'SULLIVAN, 2011 WL 13113271, at *4 (S.D. Fla. July 28, 2011); United States v. Moncur, No. 10-20801-CR, 2011 WL 3844096, at *6 (S.D. Fla. July 28, 2011). These cases, both involving cellphones procured through an alias, discussed the possibility that an alias used solely for the purposes of a criminal scheme would defeat a reasonable expectation of privacy, but could not establish that the aliases were used solely as part of a criminal scheme.

14. These cases refer to addressees of a package. *Garcia-Bercovich*, 582 F.3d at 1238; *Villarreal*, 963 F.2d at 774; United States v. Richards, 638 F.2d 765, 770 (5th Cir. 1981). This Note focuses solely on the senders of packages. Not only is it conceptually easier to focus on just senders, senders of illegal drugs are arguably more harmful to society than the recipients of those drugs, which allows for a more meaningful exploration of the issues involved in this Note. The courts' reasoning in these cases should apply with equal force to senders of packages who use aliases; however, these cases are not critical to this Note's conclusion. These cases simply provide contextual background for this Note.

States faces the opioid crisis,[15] the drug trafficking problem is especially salient. This Note argues that this societal problem should not be resolved as a matter of Fourth Amendment rights, but as an application of the exclusionary rule. In conclusion, this Note discusses the idea of a modified application of the modern exclusionary rule, which could further address the dangers of drug trafficking and the opioid crisis.

I. BACKGROUND

A. *Fourth Amendment Jurisprudence: A Brief History*

The Court's Fourth Amendment jurisprudence is complex, and it has evolved over time. Originally, Fourth Amendment cases looked to the explicit text of the amendment[16] and focused on property law concepts.[17] The Court employed this method of analysis in *Ex parte Jackson*[18] when it concluded that sealed letters and packages are subject to the protections of the Fourth Amendment.[19] In that case, the Court stated that sealed packages in the mail are protected from inspection, except for inspection of the packages' exterior and weight.[20] The Court differentiated sealed packages and letters from other forms of mail that would not be subject to the protections of the Fourth Amendment, such as "magazines, pamphlets, and other printed matter, purposely left in a condition to be examined."[21] The Court applied the text of the Fourth Amendment—specifically people's right to be secure in their papers—to reach its conclusion.[22] Later, in *Olmstead v. United States*,[23] the Court continued its use of strict textualism and held that wiretapping is not a search under

15. While the history of opioid abuse and potential crises is long-lasting and rampant throughout both American and global societies, the opioid crisis referred to throughout this article is that which led to the Department of Health & Human Services declaring a nationwide public health emergency in 2017. U.S. Dep't of Health & Human Servs., *Determination that a Public Health Emergency Exists*, PUB. HEALTH EMERGENCY (Oct. 26, 2017), https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioids.aspx [permalink]. *See generally Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/FB8Z-MKVT] (last updated Mar. 2018) (discussing the opioid crisis and its effects).

16. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 621, 622 (1886), *overruled by* Warden v. Hayden 387 U.S. 294 (1967).

17. THOMAS K. KLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 83 (2d ed. 2014).

18. Ex parte Jackson, 96 U.S. 727 (1878).

19. *Id.* at 733.

20. *Id.*

21. *Id.*

22. *Id.*

23. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 346 (1967).

the Fourth Amendment.[24] The Court based this decision on the premise that the Fourth Amendment only protects against physical invasions of real or personal property.[25] Considering the Court's history in deciding Fourth Amendment issues using property concepts, this was not surprising.

In a landmark decision, *Katz v. United States*,[26] the Court declared that "the Fourth Amendment protects people, not places,"[27]overruling *Olmstead* and seemingly doing away with property law concepts in deciding Fourth Amendment issues. Justice Harlan, in his concurrence, established the new test for analyzing Fourth Amendment issues: (1) whether the person has a subjective expectation of privacy; and (2) whether society is prepared to recognize that expectation as reasonable.[28] In *Katz*, the Court focused its attention on privacy, rather than property, interests.[29]

Fourth Amendment jurisprudence continued to evolve in *Rakas v. Illinois*.[30] In *Rakas*, the Court abandoned the traditional Fourth Amendment standing analysis[31] and instead analyzed whether the government invaded the defendant's Fourth Amendment interest.[32] The *Rakas* language has been taken to mean that if a defendant did not have a reasonable expectation of privacy in the area searched, he could not

24. *Id.* at 466.

25. *Id.*

26. 389 U.S. 347 (1967).

27. *Id.* at 351, 353.

28. *Id.* at 361 (Harlan, J., concurring); Peter P. Swire, Katz *Is Dead. Long Live* Katz., MICH. L. REV. 904, 904 (2004).

29. *See* KLANCY, *supra* note 17, at 88.

30. 439 U.S. 128 (1978).

31. Before *Rakas*, a person could challenge a search under two different theories that had nothing to do with that person's reasonable expectation of privacy in the area searched: possession of what was seized or legitimacy of presence. *See* Jones v. United States, 362 U.S. 257, 263 (1960), *overruled by* United States v. Salvucci, 488 U.S. 83 (1980). In *Jones* the Court ruled that the defendant, a guest in his friend's apartment, had standing to challenge the search of that apartment. *Id.* at 259, 264, 265. The Court held that the defendant had standing to challenge the search because he was in possession of the contraband seized during the search. *Id.* at 264. Additionally, the Court held that the defendant had standing because he was legitimately on the premises where the search was conducted, and the results of the search were used against him. *Id.* at 265, 267.

32. *Rakas*, 439 U.S. at 140. In case there was any doubt that the new "standing" rule in *Rakas* was the only way to challenge a Fourth Amendment search, the Court in *United States v. Salvucci* ruled that being in possession of the contraband seized was not enough, by itself, to grant the defendant the ability to challenge a search. 488 U.S. 83, 92, 96 (1980) ("We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.").

challenge the government's search.[33] The Court confirmed this interpretation of Fourth Amendment rights in *United States v. Jacobsen*,[34] stating that a search "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."[35] The cases in Sections C and D, below, that discuss the issue of whether the Fourth Amendment protects packages sent with criminal aliases use the reasonable expectation of privacy language in their analyses.[36]

B. *A Reasonable Expectation of Privacy in Packages Sent to and from Aliases*

The circuit courts which have ruled on the issue of Fourth Amendment rights in packages sent with aliases have concluded that there is a reasonable expectation of privacy in a package addressed to an alias. Unfortunately, these cases do not provide much insight into how the courts reached that conclusion. Because of this lack of thorough analysis, it is easy for district courts to carve out an exception for aliases used solely for criminal purposes.

In *United States v. Richards*,[37] the Fifth Circuit concluded that there is a reasonable expectation of privacy in packages addressed to aliases.[38] In this case, the defendant, Raymond Richards, opened a post office box under the name "Mehling Arts & Crafts."[39] Shortly after Richards was arrested, the government opened a package that was addressed and delivered to the "Mehling Arts & Crafts" mailbox,[40] tested the contents of the package, and confirmed that it contained heroin—all without a warrant.[41] Because the government was relying on the search results for its case-in-chief, whether the search was constitutional was a critical question.[42] The Fifth Circuit began its analysis by considering whether Richards met the *Rakas* standing requirement and had Fourth Amendment interest in the area searched.[43] The court interpreted the *Rakas* requirement to mean that Richards must have had a "legitimate

33. Christopher Slobogin, *Having it Both Ways: Proof that the U.S. Supreme Court Is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743, 745 (1996).

34. 466 U.S. 109 (1984).

35. *Id.* at 113.

36. United States v. Pitts, 322 F.3d 449, 459 (7th Cir. 2003); United States v. Walker, 20 F. Supp. 2d 971, 974 (S.D.W. Va. 1998).

37. 638 F.2d 765 (5th Cir. 1981).

38. *See id.* at 770.

39. *Id.* at 767.

40. *Id.* at 767, 768.

41. *Id.* at 768.

42. *Id.* at 769.

43. *Rakas*, 439 U.S. at 140.

expectation of privacy in the area searched."[44] The court reasoned that because the package was sealed, and because "Mehling Arts & Crafts" and Richards were essentially one and the same, Richards had a legitimate expectation of privacy, and thus a Fourth Amendment interest, in the package.[45]

The Fifth Circuit reiterated that there is a reasonable expectation of privacy in packages addressed to aliases in *United States v. Villarreal*,[46] citing its decision in *Richards*.[47] In *Villarreal*, the court extended that protection to two defendants because it was unclear to which defendant the alias belonged.[48] The Eleventh Circuit reached the conclusion that a defendant could challenge the search of a package addressed to an alias in *United States v. Garcia-Bercovich*,[49] limiting its analysis on the question to one sentence and simply citing *Villarreal* to support this conclusion.[50]

C. United States v. Walker*: An Argument Against Fourth Amendment Rights in Packages Sent with Criminal Aliases*

In *United States v. Walker*,[51] the court concluded that there is no reasonable expectation of privacy in a package addressed to[52] an alias used solely as part of a criminal scheme.[53] The defendant tried to challenge the search of a package containing illegal drugs that was addressed to his alias.[54] To reach its conclusion that the defendant had no reasonable expectation of privacy in the package, the court relied on dicta

44. *Richards*, 638 F.2d at 769.

45. *Id.* at 770.

46. 963 F.2d 770 (5th Cir. 1992).

47. *Id.* at 774 (citing *Richards*, 638 F.2d at 770).

48. *Id.* at 775.

49. 582 F.3d 1234 (11th Cir. 2009).

50. *Id.* at 1238 (citing *Villarreal*, 963 F.2d at 774).

51. 20 F. Supp. 2d 971 (S.D.W. Va. 1998).

52. The court discussed addressees only because the factual scenario did not implicate people sending packages. *Id.* at 972. The nature of the court's reasoning suggests that its conclusion applies with equal force to senders of packages who use aliases. If an addressee who uses an alias to receive packages does not have a reasonable expectation of privacy simply because he expects privacy in receiving his illegal goods, a sender who uses an alias to send drugs should not have a reasonable expectation of privacy simply because he expects he will not get caught due to the use of the alias.

53. *Id.* at 974. Another court explained the significance of the alias being used solely as part of a criminal scheme. *See* United States v. Martin, No. 10-20801-CR-JORDAN/O'SULLIVAN, 2011 WL 13113271, at *4 (S.D. Fla. July 28, 2011) (clarifying that a defendant using an alias solely as part of a criminal scheme means the defendant used the alias for the purpose of frustrating law enforcement).

54. *Id.* at 972.

from the Fifth and Eighth Circuits.[55] The Fifth Circuit simply stated, "Furthermore, even if we accept the Government's assertion that 'Lynn Neal' was Daniel's alias, we still question whether Daniel would have Fourth Amendment 'standing' to assert the claim, particularly when the use of that alias was obviously part of his criminal scheme."[56] The Eighth Circuit, in a lengthy footnote, offered a bit more analysis.[57] The Eighth Circuit likened a mailbox attached to a false name used to receive fraudulent mailings to a burglar breaking into a summer cabin during the off season:[58] where the burglar expects he will not get caught because no one is present during the off season, the criminal who opens a post office box using an alias expects that the fraudulent mailings received through the alias will not be traced back to him. The Supreme Court has used this analogy twice, though in different contexts.[59] Essentially, this analogy illustrates that just because someone expects that his activities are private, society does not necessarily view those expectations as reasonable.[60]

In *United States v. Jacobsen*, an opinion on which the Eighth Circuit relied, the Court stressed the importance of society being prepared to recognize an expectation of privacy as reasonable.[61] The *Walker* court noted that the cases that state there is a reasonable expectation of privacy in packages addressed to aliases did not contradict its holding because those cases did not take the Court's opinion in *Jacobsen* into account.[62]

D. United States v. Pitts*: An Argument for Fourth Amendment Rights in Packages Sent with Criminal Aliases*

In *United States v. Pitts*,[63] the Seventh Circuit suggested in dicta that there is a reasonable expectation of privacy in packages sent or received using a criminal alias.[64] In this case, Raymond Pitts mailed drugs through USPS using the name James Reed, Sr.[65] The package was addressed to James Reed, Jr., though the intended recipient was really named Erik T.

55. *Walker*, 20 F. Supp. 2d at 973, 974 (citing United States v. Daniel, 982 F.2d 146, 149 (5th Cir. 1993); United States v. Lewis, 738 F.2d 916, 919–20 n.2 (8th Cir. 1984)).

56. *Daniel*, 982 F.2d at 149.

57. *Lewis*, 738 F.2d at 919–20 n.2.

58. *Id.* at 920 n.2.

59. United States v. Jacobsen, 466 U.S. 109, 122–23 n.22 (1984) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978)); *Rakas*, 439 U.S. at 143–44 n.12.

60. *Lewis*, 738 F.2d at 920 n.2.

61. *Jacobsen*, 466 U.S. at 122.

62. United States v. Walker, 20 F. Supp. 2d 971, 974 (S.D.W. Va. 1998).

63. 322 F.3d 449 (7th Cir. 2003).

64. *Id.* at 459. For the reasonable expectation of privacy analysis, this case did not differentiate between senders and addressees of packages. This helps illustrate that the analysis in the previous cases applies to both senders and addressees of packages.

65. *Id.* at 451.

Alexander.[66] The government intercepted this package, which eventually led to the arrest of both Pitts and Alexander.[67] The two defendants moved to suppress the evidence found in the package, but the lower court denied the motion, concluding that the defendants did not have a reasonable expectation of privacy in the package because they had used aliases.[68]

While the Seventh Circuit decided the case on other grounds, it did discuss the alias issue in dicta.[69] It stated that the nature of an alias, whether criminal or innocent, is irrelevant when analyzing whether someone has a reasonable expectation of privacy under the Fourth Amendment.[70] The majority was responding to the concurrence's assertion that society is not prepared to recognize a privacy interest in drugs sent through the mail using a false name.[71] The majority noted there are two ways of looking at the concurrence's conclusion.[72] First, the concurrence could mean that because some people use false names for illegal reasons, everyone who uses a false name, even for legitimate purposes, must forfeit privacy rights in packages sent with those names.[73] Second, the concurrence could mean that those who use aliases for legitimate reasons retain their privacy rights while those who use theirs for criminal purposes forfeit their privacy rights.[74] This reasoning relies on an after-the-fact justification for the search, namely that drugs were found.[75] The majority posited that this would allow law enforcement to enter anyone's home without a warrant and, if drugs were found, justify the otherwise illegal search.[76] The majority stated that neither of these outcomes comports with the Fourth Amendment.[77] Further, the majority said that society is prepared to recognize that there is a reasonable expectation of privacy in a package sent or received using a false name.[78]

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66. *Id.*

67. *Id.* at 451, 453.

68. *Id.* at 453. Relying in part on the same dicta from *United States v. Daniel* that the *Walker* court relied on, the lower court concluded that society is not prepared to recognize a reasonable expectation of privacy in a package sent using an alias as part of a criminal scheme. *Id.* The appeal was a prime opportunity for the Seventh Circuit to address the issue of whether a package sent using a criminal alias is subject to Fourth Amendment protection, but the court reached its conclusion on other grounds. *See id.* at 455–56 (finding that the defendants abandoned the property, thus forfeiting their Fourth Amendment rights).

69. *Id.* at 457.

70. *Id.* at 458.

71. *Id.* at 460 (Evans, J., concurring).

72. *Id.* at 458 (majority opinion).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 458–59.

77. *Id.* at 458.

78. *Id.* at 459.

After all, there is nothing inherently wrong with wanting to remain anonymous.[79]

II. PROPERTY RIGHTS VS. REASONABLE EXPECTATION OF PRIVACY

A. Walker*: Ignoring Property Rights*

As discussed above, the *Walker* court primarily supported its conclusion using *United States v. Lewis*[80] and *Jacobsen*.[81] While *Katz* established the concept that a person's expectation of privacy must be one that society recognizes as reasonable,[82] the *Jacobsen* Court perhaps made this concept a bit clearer when it stated, "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" and illustrated this concept with the cabin analogy.[83] By defining a search in this way, the Court was likely hoping to remove any doubts courts had about the proper analysis to apply in deciding Fourth Amendment issues. However, the *Jacobsen* Court really did not say anything new, or provide a uniquely clarifying opinion. Whether society is prepared to view the expectation of privacy as reasonable has always been a piece of the reasonable expectation of privacy analysis. Even if the courts that concluded that there is a reasonable expectation of privacy in packages addressed to aliases did not explicitly articulate this society prong, they did so implicitly by concluding there was a *reasonable* expectation of privacy. Because of this, the *Walker* court's argument that those cases do not conflict with its conclusion because those cases did not take *Jacobsen* into account[84] ignores the implicit analysis in those cases.

Additionally, and more importantly, the *Walker* and *Lewis* courts ignored key language from the *Rakas* opinion, language that the *Jacobsen* court quoted in the portion of its opinion upon which *Walker* relied. In the very same footnote where the *Rakas* Court offered the burglar hypothetical, the Court went on to say, "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[85] The

79. *Id.*

80. 738 F.2d 916 (8th Cir. 1984).

81. United States v. Walker, 20 F. Supp. 2d 971, 974 (S.D.W. Va. 1998).

82. United States v. Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

83. United States v. Jacobsen, 466 U.S. 109, 113, 122, 122–23 n.22 (1984).

84. *Walker*, 20 F. Supp. 2d at 974 ("The contrary Fifth Circuit decisions that hold individuals may assert a reasonable expectation of privacy in packages addressed to them under fictitious names are unpersuasive because they fail to consider the weighty factor voiced in *Jacobsen*, i.e., the extent to which the law and society should recognize subjective privacy expectations as reasonable." (citations omitted)).

85. Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978).

Jacobsen Court fully quoted this portion of the *Rakas* opinion,[86] but the courts in *Walker* and *Lewis* ignored it. This sentence from the *Rakas* opinion shows that there is more to the Fourth Amendment analysis, as well as more to the burglar analogy. It shows, as applied to the respective facts and analogies, that drawing similarities between a burglar and a person sending a package with an alias (even if it is to send drugs) is ill-founded.

The *Walker* and *Lewis* courts overlooked property law, and it is property law that undermines the analogy between a burglar robbing a summer cabin and someone using an alias to send drugs through the mail. The burglar does not own the cabin and cannot assert property rights over it. Furthermore, society is not prepared to recognize that a burglar has a reasonable expectation of privacy in his victim's home.[87] In contrast, the drug dealer does have property rights in the package.[88] As the Court said in *Rakas*, society either needs to be prepared to view the expectation of privacy as reasonable *or* there must be property rights.[89] If the Court meant what it said in *Rakas*, then it does not matter that society is not prepared to recognize a reasonable expectation of privacy in a package sent using an alias for the purpose of shipping drugs. It does not matter

86. *Jacobsen*, 466 U.S. at 122–23 n.22 (quoting *Rakas*, 439 U.S. at 143–44 n.12).

87. Even thinking about whether a burglar should have a reasonable expectation of privacy in his victim's home brings up property law: one cannot help but think that the burglar should not have a reasonable expectation of privacy in a victim's home since it does not belong to the burglar and the burglar does not have permission to be there.

88. In *Ex parte Jackson*, the Court placed packages in the "papers" category of the property listed in the text of the Fourth Amendment. 96 U.S. 727, 733 (1878) ("Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."). Additionally, in *United States v. Jones*, the Court suggested that a bailment would create sufficient property rights for challenging a Fourth Amendment search. 565 U.S. 400, 404 n.2 (2012). A strong argument can be made for why a bailment is created when a package is shipped through USPS. The Second Circuit stated that USPS has a bailment relationship with the senders of packages. Lerakoli, Inc. v. Pan Am. World Airways, Inc., 783 F.2d 33, 36 (2d Cir. 1986). Additionally, Justice Brennan and Justice Marshall characterized U.S. Postal workers as bailees. California v. Greenwood, 486 U.S. 35, 55 (1988) (Brennan & Marshall, JJ., dissenting) ("Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox . . . with the 'express purpose' of entrusting it to the *postal officer* or a private carrier; those *bailees* are just as likely as trash collectors . . . to 'sor[t] through' the personal effects entrusted to them . . . ." (emphasis added)). Further, the Federal Government has waived sovereign immunity for loss and damage of packages sent through USPS, which suggests a bailment is created, even though the government does not explicitly state that in the statute or the case interpreting the statute. 28 U.S.C. § 2680(b) (2012); Dolan v. U.S. Postal Serv., 546 U.S. 481, 489 (2006).

89. *Rakas*, 439 U.S. at 144 n.12.

because of the secondary basis for the Fourth Amendment protection: property rights.

B. Pitts*: A Reasonable Expectation of Privacy Analysis*

The *Pitts* opinion is interesting because the court states that society *is* prepared to recognize that an expectation of privacy in a package addressed to an alias, even for criminal purposes, is reasonable.[90] The court made a compelling argument when it said the Fourth Amendment demands more than an after-the-fact rationalization for an otherwise illegal search.[91] However, there are some problems with this argument. Namely, the *Walker* court's burglar analogy could be used to rebut this argument. The conclusion that a burglar does not have a reasonable expectation of privacy in his victim's home could also be an after-the-fact rationalization for an otherwise illegal search. For example, police could illegally search a home, find the burglar inside, and the search would become legal, at least against the burglar. While this argument may seem ridiculous due to the odd nature of the analogy, the analogy is one that the Supreme Court seems to approve of.[92] Because the *Pitts* analysis could be countered by existing opinions, the stronger analysis for this issue is property rights.[93]

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90. United States v. Pitts, 322 F.3d 449, 459 (7th Cir. 2003).

91. In *Jacobsen*, the Court placed packages in the "effects" category of the property listed in the text of the Fourth Amendment. *Id.* at 114 ("Letters and sealed packages are in the general class of effects [under the Fourth Amendment] . . . ."). Additionally, in *United States v. Jones*, the Court suggested that a bailment would create sufficient property rights for challenging a Fourth Amendment search. 565 U.S. 400, 404 n.2 (2012). A strong argument can be made for why a bailment is created when a package is shipped through USPS. The Second Circuit stated that USPS has a bailment relationship with the senders of packages. Lerakoli, Inc. v. Pan Am. World Airways, Inc., 783 F.2d 33, 36 (2d Cir. 1986). Additionally, Justice Brennan and Justice Marshall characterized U.S. Postal workers as bailees. California v. Greenwood, 486 U.S. 35, 55 (1988) (Brennan & Marshall, JJ., dissenting) ("Were it otherwise, a letter or package would lose all Fourth Amendment protection when placed in a mailbox . . . with the 'express purpose' of entrusting it to the *postal officer* or a private carrier; those *bailees* are just as likely as trash collectors . . . to 'sor[t] through' the personal effects entrusted to them . . . ." (emphasis added)). Further, the Federal Government has waived sovereign immunity for loss and damage of packages sent through USPS, which suggests a bailment is created, even though the government does not explicitly state that in the statute or the case interpreting the statute. 28 U.S.C. § 2680(b) (2012); Dolan v. U.S. Postal Serv., 546 U.S. 481, 489 (2006).

92. For instances of the Supreme Court using this analogy, see *United States v. Jacobsen*, 466 U.S. 109, 122–23 n.22 (1984) and *Rakas*, 439 U.S. at 143–44 n.12.

93. It is also the stronger analysis because property rights may be the *only* analysis one day. In a recent Fourth Amendment case, two Justices, including the newest member of the bench, questioned the *Katz* reasonable expectation of privacy test. Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas & Gorsuch, JJ., concurring) ("I have serious doubts about the 'reasonable expectation of privacy test from *Katz* . . . .").

C. United States v. Jones*: Further Support for the Property Rights Analysis*

It would be easy enough to dismiss what the Court said in *Rakas* as dicta. However, in *United States v. Jones*,[94] the Court made it clear that property rights are still at the heart of the Fourth Amendment.[95] The test articulated in *Jones* did not eliminate the *Katz* reasonable expectation of privacy test; it merely supplemented *Katz* by adding, or rather reviving, an alternative test.[96]

In *Jones*, the Court concluded that attaching a GPS tracking device to a car and gathering location data from that device was a search under the Fourth Amendment.[97] The Court stated that *Katz* did not eliminate traditional trespassory invasions of constitutionally protected areas by the government from the definition of searches.[98] The Court clarified the trespassory invasion standard by stating that trespass alone does not constitute a search.[99] The government must also have attempted to find something or to obtain information through the trespass.[100] Additionally, the Court noted that unless a trespassory search is conducted upon one of the enumerated items in the Fourth Amendment—persons, houses, papers, and effects—it is not subject to Fourth Amendment protections.[101] In summary, to establish a search under the *Jones* test, a defendant must show that (1) the government trespassed (2) upon a person, house, paper, or effect (3) for the purpose of finding something or obtaining information. In reaching its conclusion that the facts of *Jones* constituted a Fourth Amendment search, the Court reasoned that a car is an "effect" under the Fourth Amendment.[102] The Court further reasoned that the government physically intruded upon the car when it attached the GPS device.[103] Finally, the Court noted that the government had done this in order to obtain information about the defendant's location.[104]

Under the *Jones* analysis, a package sent using a criminal alias would be afforded Fourth Amendment protection. In *United States v. Jacobsen*,

94. 565 U.S. 400 (2012).

95. *Id.* at 405 ("The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." (quoting U.S. CONST. amend. IV)).

96. *Id.* at 411.

97. *Id.* at 404.

98. *Id.* at 409.

99. *Id.* at 408 n.5.

100. *Id.*

101. *Id.* at 411 n.8.

102. *Id.* at 404.

103. *Id.*

104. *Id.*

the Court placed packages in the category of "effects" under the Fourth Amendment.[105] Therefore, packages meet the property rights prong of the *Jones* analysis. If placing a GPS device on the underside of a car is a physical intrusion,[106] opening a package is certainly a physical intrusion under *Jones*. Additionally, in a situation in which a USPIS agent would open a package, it no doubt would be to find contraband of some sort. Because all three requirements from *Jones* would be satisfied, the Fourth Amendment must protect packages sent through the mail from government intrusion without a warrant, regardless of whether the packages are sent using a criminal alias.

III. THE EXCLUSIONARY RULE: A DIFFERENT APPROACH TO COMBATING THE OPIOID CRISIS

A. *Why Drug Dealers Should Retain Fourth Amendment Rights*

As the United States faces the opioid crisis,[107] giving drug dealers more Fourth Amendment protection may not seem attractive. This is especially true given that fentanyl, a substance substantially more dangerous than heroin,[108] is often sold online and shipped through the mail.[109] Why, then, should drug dealers retain their Fourth Amendment

105. Ex parte Jackson, 96 U.S. 727, 733 (1878) ("Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be."). Alternatively, the bailment argument could support property rights. *See supra* note 88 and accompanying text.

106. *Jones*, 565 U.S. at 404.

107. *See generally Opioid Overdose Crisis*, *supra* note 15 (discussing the opioid crisis). The President has declared the opioid crisis a "national public health emergency." *Remarks by President Trump on Combatting Drug Demand and the Opioid Crisis*, WHITE HOUSE (Oct. 26, 2017, 2:26 PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-combatting-drug-demand-opioid-crisis/ [https://perma.cc/HC63-WZXM]. It is estimated that over 115 Americans die each day due to opioid overdoses. *Opioid Overdose Crisis*, *supra* note 15. In 2015, the opioid crisis cost the U.S. economy approximately $504 billion, which accounts for 2.8% of the GDP. COUNCIL OF ECON. ADVISORS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf [https://perma.cc/2QVY-3CWW].

108. United States v. Jacobsen, 466 U.S. 109, 114 (1984) ("Letters and sealed packages are in the general class of effects [under the Fourth Amendment] . . . ."). Alternatively, the bailment argument could support property rights. *See supra* note 91 and accompanying text.

109. Popper, *supra* note 3; *Buying Drugs Online: Shedding Light on the Dark Web*, ECONOMIST (July 16, 2016), https://www.economist.com/news/international/21702176-drug-trade-moving-street-online-cryptomarkets-forced-compete [https://perma.cc/8KF3-CLRC] (stating that the amount of American customers on dark web drug websites increased from 8% in 2014 to 15% in 2016). While the dark web still accounts for only a small percentage of all drug

rights when they ship drugs through the mail using aliases to avoid detection by law enforcement? There is more to the argument of why these drug dealers should retain their rights than the fact that, under *Jones*, the Constitution and the Court require it.[110] There is also more to this argument than the Court's statement that it "is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.'"[111] Legal reasons are, of course, compelling, but there are reasons with which people other than lawyers can sympathize.

If courts conclude that the Fourth Amendment does not protect packages shipped using criminal aliases, there will be no way to differentiate between a petty criminal who shipped himself marijuana once while visiting Colorado and a dark web drug dealer whose fentanyl is killing people. If the government searched either person's package without a warrant, there would be no Fourth Amendment violation, and both people would be charged with a crime with no means of objecting to the search or the use of the evidence found in the packages.

Law-abiding individuals would suffer as well. Law enforcement, knowing that packages shipped with criminal aliases are not subject to the protections of the Fourth Amendment, would be free to search any package suspected of being sent with an alias for contraband.[112] If

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sales, the dark web drug market is growing quickly. *Id.*; *see also* U.S. DEP'T JUST., *supra* note 2 (noting that the largest marketplace in 2017 had over 250,000 listings for illegal drugs, compared to the largest marketplace in 2013, which had 14,000 listings total, including non-drug contraband). One study found that dark web marketplaces quickly recovered from law enforcement takedowns, suggesting takedowns may be ineffective. Kyle Soska & Nicolas Christin, *Measuring the Longitudinal Evolution of the Online Anonymous Marketplace Ecosystem*, 24 USENIX SECURITY SYMP. 33, 47 (2015). In 2015, even after the most popular dark web drug marketplace was shut down by law enforcement in 2013, the dark web drug market was still making over $100 million per year in illegal drug sales. Andy Greenberg, *Crackdowns Haven't Stopped the Dark Web's $100M Yearly Drug Sales*, WIRED (Aug. 12, 2015, 11:00 AM), https://www.wired.com/2015/08/crackdowns-havent-stopped-dark-webs-100m-yearly-drug-sales/ [https://perma.cc/G4Z3-DSA8]. After another dark web drug marketplace was shut down by law enforcement, a court filing stated the marketplace had made $450 million between May 2015 and February 2017. Thomas Fox-Brewster, *Forget Silk Road, Cops Just Scored Their Biggest Victory Against the Dark Web Drug Trade*, FORBES (July 20, 2017, 10:57 AM), https://www.forbes.com/sites/thomasbrewster/2017/07/20/alphabay-hansa-dark-web-markets-taken-down-in-massive-drug-bust-operation/#326d19cb5b4b [https://perma.cc/M59A-ZLCG]. Despite this victory, the FBI acknowledged there were still other active dark web drug markets and that more would soon become active. *Id.*

110. *See supra* Part II.C.

111. Florida v. Bostick, 501 U.S. 429, 439 (1991).

112. USPIS detection methods currently include package profiling and drug-sniffing dogs. Steven Nelson, *Marijuana-Stuffed Mail Intercepts Hit Another High, Postal Inspectors Say*, U.S. NEWS (Apr. 7, 2014, 4:29 PM), https://www.usnews.com/news/articles/2014/04/07/marijuana-stuffed-mail-intercepts-hit-another-high-postal-inspectors-say. In that article, the inspector did not elaborate on what package profiling was, but cases provide some insight. *See, e.g.*, United

contraband was found, law enforcement could conclude that the package was shipped with a criminal alias and prosecute the person with no repercussions. If the package contained, for example, a manuscript sent by an author under his pseudonym,[113] law enforcement could tape it back up and send it on its way. People who send packages to their significant others using cute nicknames would be subject to having their packages searched. Overall, everyone who sent a package using an alias would lose their privacy rights. Due to the nature of mail, this is an especially dangerous precedent because this infringement would occur behind closed doors in the Post Office, unbeknownst to the victims of the Fourth Amendment violation. Because of this, the victims could not seek any sort of vindication.[114] How, then, can courts combat the opioid crisis while maintaining Fourth Amendment protections? The exclusionary rule provides an answer to this question.

B. *The History of the Exclusionary Rule*

The exclusionary rule precludes a prosecutor from using evidence obtained through an illegal search or seizure in the prosecutor's case-in-chief.[115] The Court first adopted the exclusionary rule for federal Fourth

States v. Huerta, 655 F.3d 806, 809 (8th Cir. 2011) (stating that a United States Postal Inspector seized a package because the name of the sender was unrelated to the return address, the sender's telephone number had been disconnected, the seams of the package were taped, the label was handwritten, it was sent from California, it was shipped from a post office with a different zip code than the return address, and one of the numbers on the return address had been scratched out). If a package is suspected to contain narcotics, USPS workers will send for a drug-sniffing dog. *See, e.g.*, Christina Elmore, *Drug Traffickers Find Anonymity via USPS, Private Mail Services, Authorities Say*, POST & COURIER (Jan. 31, 2016), https://www.postandcourier.com/archives/drug-traffickers-find-anonymity-via-usps-private-mail-services-authorities/article_dfb15016-0bfd-5742-a4cc-213400453fd3.html [https://perma.cc/PC9Q-LYPR]. Eliminating this step is likely attractive to law enforcement as calling a drug dog takes time and resources that could be saved if USPS workers could simply open a package sent using an alias. U.S. POSTAL INSPECTION SERV., ANNUAL REPORT: FY 2015 15 (2016), https://postalinspectors.uspis.gov/radDocs/2015%20AR(single).pdf [https://perma.cc/BRY7-DTGT] (stating that, in 2015, USPIS paid local law enforcement more than $10 million for their services, specifically noting canine services); *see also* United States v. Lozano, 623 F.3d 1055, 1061 (9th Cir. 2010) (stating that it took almost twenty-two hours to obtain a drug-sniffing dog to check a package).

113. This is similar to one of the examples used in *Pitts* to show that there are legitimate reasons for wanting to use an alias when shipping a package. *See* United States v. Pitts, 322 F.3d 449, 457–58 (7th Cir. 2003).

114. In *Bivens*, the Court held that a person could be entitled to civil damages for injuries suffered as the result of a federal agent's violation of that person's Fourth Amendment rights. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971). Of course, one cannot bring a *Bivens* claim unless one knows one's rights were violated.

115. KLANCY, *supra* note 17, at 725.

Amendment violations in *Weeks v. United States*.[116] In that case, the United States Marshals searched the defendant's room without a warrant and seized some papers.[117] Upon the defendant's request for an order that the government return the papers, the lower court ordered the District Attorney to return the papers not pertinent to the case, but allowed the District Attorney to keep pertinent ones.[118] The Court stated that if evidence seized in violation of the Fourth Amendment could be admitted at trial, the Fourth Amendment "might as well be stricken from the Constitution."[119] The Court concluded that the lower court committed a prejudicial error when it allowed the papers to be used at trial.[120] *Weeks* made it clear that the exclusionary rule was required by the Constitution.[121]

In *Wolf v. Colorado*,[122] the Court waivered in its conclusion that the exclusionary rule was a constitutional requirement.[123] After the Court found that the Fourth Amendment right against unreasonable searches and seizures applied to the States through the Fourteenth Amendment Due Process Clause, the Court was faced with the issue of whether the exclusionary rule should also be incorporated.[124] The Court examined how the states had responded to the *Weeks* decision, noting that the majority of them rejected the use of the exclusionary rule.[125] Holding that a state's failure to use the exclusionary rule did not violate the Fourteenth Amendment,[126] the Court reasoned that while the exclusionary rule may serve to deter law enforcement from infringing upon people's Fourth Amendment rights, the states can use other means to deter law enforcement without using the exclusionary rule.[127] This decision seemed to divorce the exclusionary rule from the Constitution.

The Court changed its mind again in *Mapp v. Ohio*,[128] concluding that the exclusionary rule was constitutionally required and must be

116. Hudson v. Michigan, 547 U.S. 586, 590 (2006) (citing Weeks v. United States, 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961)) (stating that the Court adopted the exclusionary rule in *Weeks*); Andrew Guthrie Ferguson, *Constitutional Culpability: Questioning the New Exclusionary Rules*, 66 FLA. L. REV. 623, 630 (2014).

117. *Weeks*, 232 U.S. at 386.

118. *Id.* at 387, 388.

119. *Id.* at 393.

120. *Id.* at 398.

121. MCINNIS, *supra* note 8, at 184.

122. 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

123. MCINNIS, *supra* note 8, at 184.

124. *Wolf*, 388 U.S. at 28.

125. *Id.* at 29.

126. *Id.* at 33.

127. *Id.* at 31.

128. 367 U.S. 643 (1961).

incorporated through the Fourteenth Amendment.[129] In *Mapp*, the Court stated that the constitutionality of the exclusionary rule "remains entirely undisturbed," even after *Wolf*.[130] The Court's change of heart was due to the fact that since *Wolf*, the majority of states had adopted some form of the exclusionary rule from *Weeks*.[131] *Wolf* rested partly upon the states' overwhelming rejection of the exclusionary rule, but that factual consideration was no longer controlling.[132] The Court also noted that California had expressed its frustration with trying to find a means of deterring law enforcement from committing Fourth Amendment violations other than the exclusionary rule.[133] In addition to the States' rejection of *Weeks*, the *Wolf* Court relied on the assumption that the states could employ other means of deterring law enforcement.[134] The *Mapp* Court found California and other states' experience compelling enough to conclude that methods other than the exclusionary rule are completely ineffective in deterring law enforcement from infringing upon people's Fourth Amendment rights.[135] After announcing its holding, the Court went on to say that the exclusionary rule is "an essential part of the right to privacy."[136] Beyond this, however, the Court did not specify where in the Constitution the exclusionary rule comes from.[137]

In *Linkletter v. Walker*,[138] the Court emphasized the exclusionary rule's purpose of deterring law enforcement from committing illegal searches and seizures.[139] Because the purpose of the rule is to deter law enforcement from violating the Fourth Amendment, the Court reasoned that applying the rule retroactively would not further this purpose.[140] The Court then concluded that violations of the exclusionary rule that occurred prior to *Mapp* would not be redressed.[141]

C. *The Modern Exclusionary Rule*

Once again, the Court changed its stance on the constitutional nature of the exclusionary rule in *United States v. Calandra*.[142] In that case, the

129. *Id.* at 655, 656; MCINNIS, *supra* note 8, at 185.
130. *Mapp*, 367 U.S. at 649.
131. *Id.* at 651.
132. *Id.* at 653.
133. *Id.* at 651.
134. *Id.* at 651–52 (citing Wolf v. Colorado, 338 U.S. 25, 30 (1949)).
135. *Id.* at 652.
136. *Id.* at 656.
137. MCINNIS, *supra* note 8, at 185.
138. 381 U.S. 618 (1965), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987).
139. *Id.* at 636–37.
140. *Id.* at 637.
141. *Id.* at 640.
142. 414 U.S. 338, 354 (1974).

Court further stressed that the purpose of the exclusionary rule is to deter law enforcement from violating the Fourth Amendment, not to redress the defendant's injury caused by the Fourth Amendment violation.[143] After clarifying this purpose, the Court stated that the 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."[144] This makes it clear that the exclusionary rule is not a constitutional doctrine, despite what the Court said in the past. Because the exclusionary rule is not constitutionally required, the Court has been able to create various exceptions to the rule.[145] The rationale for these exceptions is the purpose of the exclusionary rule: deterrence of Fourth Amendment violations by law enforcement.[146]

Like the exceptions to the exclusionary rule, the modern approach to applying the exclusionary rule arose from the deterrence rationale and the conclusion that the rule is not constitutionally required. The modern analysis was first alluded to in *Calandra*[147] and has been clarified by later cases.[148] These cases establish that courts should not apply the exclusionary rule unless the deterrent effect of its application outweighs the societal costs of applying it.[149]

1. *Hudson v. Michigan*

In *Hudson v. Michigan*,[150] the Court found that the deterrent effect of applying the exclusionary rule did not outweigh the societal cost of applying it.[151] In *Hudson*, law enforcement agents obtained a warrant to search a house for firearms and drugs.[152] The defendant challenged the search on the grounds that the police did not wait long enough after

143. *Id.* at 347.

144. *Id.* at 348.

145. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913 (1984) (adopting the good-faith exception); Nix v. Williams, 467 U.S. 431, 448 (1984) (adopting the inevitable discovery exception).

146. *Leon*, 468 U.S. at 916 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."); *Nix*, 467 U.S. at 444 ("If the prosecution can establish . . . that the information . . . inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.").

147. *See Calandra*, 414 U.S. at 348 (referencing a "balancing process" in the application of the exclusionary rule).

148. *See* Herring v. United States, 555 U.S. 135, 141 (2009); Hudson v. Michigan, 547 U.S. 586, 596 (2006).

149. *Herring*, 555 U.S. at 141; *Hudson*, 547 U.S. at 596.

150. 547 U.S. 586 (2006).

151. *Id.* at 599.

152. *Id.* at 588.

announcing their presence to enter the house.[153] This challenge was based on the common law knock-and-announce rule that requires law enforcement to give the occupants of a dwelling enough time to open the door themselves.[154] As the Court began its analysis, it noted that the exclusionary rule "generates 'substantial social costs,'" specifically noting that its application can result in guilty persons being set free.[155] The Court then laid out the requirements necessary in order to apply the exclusionary rule: (1) but-for causation,[156] (2) lack of attenuation,[157] and (3) the deterrent effect on law enforcement outweighing the societal cost of application.[158]

Beginning with causation, the Court stated that but-for causation is a necessary but not sufficient condition for application of the rule.[159] But-for causation means that the police would not have obtained the evidence but for the Fourth Amendment violation.[160] The Court concluded that the police's early entry into the house was not a but-for cause of obtaining the evidence, reasoning that since the police had a proper warrant, they would have obtained the evidence regardless.[161]

Further, the Court stated that even if there is direct but-for causation, the effects of the Fourth Amendment violation must not be attenuated.[162] Attenuation can occur in two circumstances: (1) when the causal connection is too remote, and (2) when the interests protected by the Fourth Amendment would not be served by application of the exclusionary rule.[163] The Court focused its analysis on the second circumstance.[164] If the protected interests would not be served, then there is attenuation and the exclusionary rule should not be applied.[165] The Court differentiated *Hudson*, in which a valid search warrant was obtained, from a case in which there was no warrant and the search was purely illegal, concluding that application of the exclusionary rule in the latter case would vindicate Fourth Amendment interests, while application in the former case would not.[166] The Court reasoned that the

153. *Id.*
154. *Id.* at 589.
155. *Id.* at 591 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).
156. *Id.* at 592.
157. *Id.*
158. *Id.* at 596.
159. *Id.* at 592.
160. *See id.*
161. *Id.*
162. *Id.* at 593.
163. *Id.*
164. *Id.* at 593–94.
165. *Id.* at 593.
166. *Id.*

interests protected by the knock-and-announce rule, which was violated in *Hudson*,[167] are different from those protected by the Fourth Amendment.[168] The knock-and-announce rule protects "human life and limb," property, and a specific type of privacy.[169] On the other hand, the Fourth Amendment protects an individual's "'persons, houses, papers, and effects' from the government's scrutiny" without a valid warrant.[170] Because the interests implicated in this case were not those protected by the Fourth Amendment, application of the exclusionary rule was not appropriate.[171]

The Court went on to explain what else is needed, beyond but-for causation and lack of attenuation, for proper application of the exclusionary rule—this is where the deterrence/societal cost balancing test comes into play.[172] In this case, the Court concluded that the cost to society would be great because, not only would application of the exclusionary rule allow a criminal to go free, but it would also lead to a spate of similar challenges.[173] The Court reasoned that application of the exclusionary rule in this case could create a "get-out-of-jail-free card" in subsequent cases.[174] Finally, applying the exclusionary rule to this case could result in police officers waiting too long to enter a house after announcing themselves, thus exposing the officers to more danger.[175]

Additionally, the Court concluded that any deterrent effect did not outweigh the societal cost.[176] The Court reasoned that ignoring the knock-and-announce rule really has no adverse effects, so deterring law enforcement from violating it achieves little.[177] There are also other methods of deterrence, such as a civil suit against the police for the violation.[178] The Court noted that the civil suit alternative has gained more strength since *Mapp* because Congress authorized attorney's fees for a prevailing plaintiff, and because more public-interest attorneys are

167. *Id.* at 590.

168. *Id.* at 593.

169. *Id.* at 594 ("[A]n unannounced entry may provoke violence in supposed self-defense by the surprised resident. . . . The knock-and-announce rule gives individuals 'the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.' . . . [T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance." (quoting Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997))).

170. *Id.* at 593 (citation omitted) (quoting U.S. CONST. amend. IV).

171. *Id.* at 594.

172. *Id.* at 594–96.

173. *Id.* at 595.

174. *Id.*

175. *Id.*

176. *Id.* at 599.

177. *Id.* at 596.

178. *Id.* at 597–98.

willing to take on such cases.[179] The Court also reasoned that growing professionalism within police forces would have a deterrent effect.[180] Violations of the knock-and-announce rule, the Court reasoned, would be dealt with internally through disciplinary action.[181] Because of the minimal deterrent effect that the application of the exclusionary rule would have on knock-and-announce violations, the other means of deterrence for such violations, and the substantial societal cost of application, the Court concluded application of the exclusionary rule was not appropriate.[182]

2. *Herring v. United States*

In *Herring v. United States*,[183] the Court once again found that the deterrent effect of applying the exclusionary rule did not outweigh its societal cost.[184] In *Herring*, a police investigator asked a warrant clerk to search for any outstanding warrants for the defendant's arrest in the immediate jurisdiction and a nearby jurisdiction.[185] This search revealed an outstanding warrant in the nearby jurisdiction.[186] Based on this information, the investigator arrested the defendant and found drugs and a gun in the defendant's vehicle during a search incident to the arrest.[187] Unfortunately, it turned out that the warrant was no longer outstanding; it was mislabeled as active due to a clerical error.[188] Because of this, the defendant moved to suppress the evidence recovered during the vehicle search.[189]

Before diving into its analysis of the case, the Court reiterated its view on the exclusionary rule.[190] The Court stated that the exclusionary rule is judicially created and is not a constitutional requirement.[191] It emphasized that the purpose of the rule is to deter police misconduct.[192] Additionally, the Court stated that application of the exclusionary rule should be a "last resort, not our first impulse."[193] The Court emphasized the great weight

179. *Id.*
180. *Id.* at 598–99.
181. *Id.* at 599.
182. *Id.*
183. 555 U.S. 135 (2008).
184. *Id.* at 144.
185. *Id.* at 137.
186. *Id.*
187. *Id.*
188. *Id.* at 138.
189. *Id.*
190. *See id.* at 139–40.
191. *Id.*
192. *Id.*
193. *Id.* at 140 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

of the societal cost of letting guilty and potentially dangerous criminals go free.[194]

In reaching its conclusion, the Court stressed the importance of police culpability when applying the cost-benefit analysis of the exclusionary rule.[195] The more serious and deliberate the police misconduct, the more likely it is that the deterrent effect outweighs the societal cost of application.[196] Specifically, the Court stated, "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[197] The Court then concluded that the conduct in *Herring* was not serious enough to warrant application of the rule,[198] as it was merely an isolated incident of negligence, not systemic negligence or recklessness.[199]

3. *Utah v. Strieff*

The attenuation doctrine, which the Court mentioned in *Hudson v. Michigan*,[200] appeared again in *Utah v. Strieff*.[201] In *Strieff*, a police officer detained the defendant without reasonable suspicion, which rendered the detention illegal.[202] During the stop, the police officer discovered an outstanding warrant and arrested the defendant pursuant to that warrant.[203] Incident to this arrest, the officer searched the defendant and discovered drugs and drug paraphernalia.[204] The defendant attempted to suppress this evidence, arguing it was obtained due to an illegal stop.[205]

The Court began its analysis by outlining the attenuation doctrine: "Evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not

194. *Id.* at 141 ("[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998))).

195. *Id.* at 143.

196. *Id.* at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

197. *Id.*

198. *Id.*

199. *Id.* at 137, 147.

200. 547 U.S. 586, 593 (2006).

201. 136 S. Ct. 2056, 2059 (2016).

202. *Id.* at 2060.

203. *Id.*

204. *Id.*

205. *Id.*

be served by suppression of the evidence obtained.'"[206] The issue in *Strieff* was whether discovery of a valid pre-existing warrant attenuated the discovery of the evidence from the Fourth Amendment violation.[207] The Court identified three factors that should be considered when applying the attenuation doctrine: (1) "'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search"; (2) "the presence of intervening circumstances"; and (3) "the purpose and flagrancy of the official misconduct."[208] The third factor harkens back to the balancing test and police culpability that the Court stressed in *Herring*,[209] which may be why the Court in *Strieff* identified the third factor as the most important.[210]

After identifying these factors, the Court began its analysis.[211] Under the first factor alone, the drugs and drug paraphernalia in *Strieff* would likely have been suppressed because the discovery of the evidence closely followed the unconstitutional search.[212] Previous cases found that the first factor favors attenuation only when "'substantial time' elapses between an unlawful act and when the evidence is obtained,"[213] and in this case, the officer's illegal act and the search occurred within minutes of each other.[214] The second factor weighed in favor of finding attenuation under the Court's analysis.[215] Since the warrant was valid, predated the illegal stop, and the officer had an obligation to arrest the defendant upon discovering the warrant, the Court reasoned the search was indisputably lawful after the arrest pursuant to the warrant.[216] Finally, the Court concluded that the third factor weighed in the State's favor.[217] The Court reasoned that the officer's illegal stop was at most negligent and therefore did not rise to the level of purposeful or flagrant.[218] Additionally, after this negligent (albeit illegal) stop, the officer's actions were lawful.[219] The Court also noted that this was apparently an isolated incident and not

206. *Id.* at 2061 (quoting Hudson v. Michigan, 547 U.S. 586, 593 (2006)).
207. *Id.*
208. *Id.* at 2062 (quoting Brown v. Illinois, 422 U.S. 590, 603–04 (1975)).
209. Herring v. United States, 555 U.S. 135, 143 (2008).
210. *Strieff*, 136 S. Ct. at 2062.
211. *Id.*
212. *Id.*
213. *Id.* (quoting Kaupp v. Texas, 538 U.S. 626, 633 (2003)).
214. *Id.*
215. *Id.*
216. *Id.* at 2062–63.
217. *Id.* at 2063.
218. *Id.* The Court rejected the defendant's counterargument that the officer stopped the defendant for the purpose of finding evidence of wrongdoing, accepting that the officer stopped the defendant for information on what was happening inside a drug house. *Id.* at 2064.
219. *Id.* at 2063.

systemic police misconduct.[220] Based on this analysis, the Court held that applying the exclusionary rule would be improper.[221]

In her dissent, Justice Sotomayor expressed concern about the precedent set by the majority.[222] Justice Sotomayor wrote, "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."[223] She went on to say, "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 warrant."[224]

Justice Kagan's dissent attacked the majority's conclusion based on the Court's previous emphasis on deterring police misconduct through application of the exclusionary rule.[225] Justice Kagan believed the majority's result would incentivize police misconduct.[226] Like Justice Sotomayor, Justice Kagan imagined that the *Strieff* opinion would increase the occurrence of stops despite a lack of reasonable suspicion.[227] Whether or not the dissenting opinions are correct, considering the current composition of the Supreme Court bench,[228] it does not seem like this 5-3 opinion will change in the near future, and this is the current state of the exclusionary rule.

220. *Id.*
221. *Id.*
222. *Id.* at 2064 (Sotomayor, J., dissenting).
223. *Id.*
224. *Id.*
225. *Id.* at 2071 (Kagan, J., dissenting).
226. *Id.* at 2074.
227. *Id.*
228. On April 7, 2017, the Senate confirmed President Trump's conservative Supreme Court nominee, Neil M. Gorsuch. 163 CONG. REC. S2442–43 (daily ed. Apr. 7, 2017). Justice Gorsuch replaced the late Justice Antonin Scalia, and legal scholars believe that Gorsuch will follow in Scalia's conservative footsteps. Alex Swoyer, *Neil Gorsuch an Ideal Antonin Scalia Replacement, Conservative Legal Scholars Say*, WASH. TIMES (Jan. 31, 2017), https://www.washingtontimes.com/news/2017/jan/31/neil-gorsuch-ideal-scalia-replacement-conservative/ [https://perma.cc/V6BZ-YS43]. Additionally, as of the writing of this Note, another President Trump nominee, Brett Kavanaugh, is awaiting a Senate confirmation vote. Erin Kelly, *Brett Kavanaugh: Senate Judiciary Panel Will This Month*, USA TODAY (Sept. 10, 2018, 6:39 P.M.), https://www.usatoday.com/story/news/politics/2018/09/10/brett-kavanaugh-senate-judiciary-panel-vote-month/1260756002/ [https://perma.cc/R9C6-XMV7]. Kavanaugh is known for his many conservative opinions. *See* 164 CONG. REC. S6014–15 (daily ed. Sept. 4, 2018) (statement of Sen. Schumer). If Kavanaugh is confirmed, the majority of the Court will be conservative, so opinions like *Strieff* will likely be around for a long time.

D. *The Exclusionary Rule Applied to Evidence Obtained by Illegally Searching the Mail*

The previously discussed precedent suggests that courts should no longer feel compelled to conclude that mail sent using criminal aliases is not subject to Fourth Amendment protection. Since the exclusionary rule is not a constitutional requirement,[229] evidence illegally obtained from one of these packages does not automatically lead to a dangerous drug dealer being set free. Under *Herring*, if law enforcement conduct is not "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," then application of the exclusionary rule is unnecessary and improper.[230] Whether police conduct rises to the level of culpability necessary to trigger the application of the exclusionary rule should be determined on a case-by-case basis, but certain circumstances would likely fall below this level. For example, if USPIS agents mistakenly believed that a search warrant was valid because a clerical error indicated validity where there was none, a court likely would not apply the exclusionary rule. Like in *Herring*, a court would find this conduct was merely negligent, which would not rise to the requisite level of police culpability.

Consider, as an example, a situation in which a trained drug-detection dog identifies a potentially suspicious package through a sniff. Under *Strieff*, an officer's mistake in believing there is reasonable suspicion to seize a package for the dog sniff, as in *Walker*,[231] may not rise to the level of culpability required to exclude any evidence the officer found after he obtained a search warrant. The dog sniff created probable cause for the warrant, so the warrant is valid on its face. Even though the initial seizure may be unconstitutional due to the lack of reasonable suspicion, like the initial detention of the defendant in *Strieff*, the search would be based on a valid warrant, like the search in *Strieff*. Also like *Strieff*, the officer in this hypothetical was merely negligent because he mistakenly believed there was reasonable suspicion to seize the package.

In *Strieff*, the warrant was already outstanding, unlike in the above hypothetical, but the Court noted that the third factor—police culpability—is the most important.[232] Therefore, this difference may be of no consequence to the analysis. The officer mistakenly believed he had reasonable suspicion in this hypothetical, so his conduct only rose to the

229. United States v. Calandra, 414 U.S. 338, 348 (1974).

230. Herring v. United States, 555 U.S. 135, 144 (2008).

231. United States v. Walker, 20 F. Supp. 2d 971, 972 (S.D.W. Va. 1998). The *Walker* court did not decide whether there was reasonable suspicion. However, these were the facts that led the court to ultimately conclude that the defendant had no Fourth Amendment rights in the package because the package was addressed to his criminal alias. *Id.* at 974.

232. *Strieff*, 136 S. Ct. at 2062.

level of negligence, which should not be enough to apply the exclusionary rule. In fact, if the *Strieff* analysis fails because obtaining a valid warrant after the constitutional violation is not enough to find attenuation,[233] this hypothetical can be resolved in the government's favor by applying the doctrine from *Herring*.

It is also likely of no consequence that the first factor identified in *Strieff*—temporal proximity—weighs in favor of applying the exclusionary rule. Since the illegal seizure happened shortly before getting the dog to find probable cause for the warrant, a court looking at temporal proximity alone would apply the exclusionary rule. In *Strieff*, however, the Court noted that the temporal proximity was also too close, but that did not matter because the other factors weighed in favor of not applying the exclusionary rule.[234] Therefore, in this hypothetical, it should not matter that the temporal proximity factor does not weigh in the government's favor. If *Walker* had been decided after *Strieff*, or even *Herring*, the court in *Walker* could have applied *Strieff* or *Herring* to deny the motion to suppress the drugs instead of concluding that the defendant had no Fourth Amendment rights.

CONCLUSION

The modern exclusionary rule cases underscore the importance of police culpability in applying the deterrence/societal cost balancing test.[235] In all these cases though, the Court also repeatedly stresses the great societal cost of applying the exclusionary rule.[236] These modern

233. In *Strieff*, the Court did stress the fact that the warrant was already outstanding, so courts may be unwilling to extend *Strieff* beyond the specific facts in that case. *Id.* at 2062–63. Additionally, extending *Strieff* to a warrant obtained after the constitutional violation would erode the fruit of the poisonous tree doctrine more than *Strieff* did. Courts apply this doctrine to suppress evidence obtained as a result of law enforcement's Fourth Amendment violation when the obtainment of that evidence is not sufficiently attenuated from the violation. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963). In *United States v. Place*, the Court applied the fruit of the poisonous tree doctrine to suppress evidence found in a suitcase after the government illegally seized it, then got a dog that alerted to it in order to obtain a warrant to search it. 462 U.S. 696, 699, 710 (1983) (suppressing the evidence found based on the warrant obtained through the dog sniff because the seizure of the luggage was unreasonable). Of course, that case was decided long before *Strieff*, and the illegal seizure was the result of purposeful police conduct, so the facts in *Place* are very different from the hypothetical in the level of police culpability. *See id.* (explaining that the agents seized the luggage after the defendant refused to give consent for the search and took the bags to the Kennedy airport for the dog sniff without informing the defendant where they were taking it, which resulted in a seizure of 90 minutes before the warrant was obtained).

234. *Strieff*, 136 S. Ct. at 2062–63.

235. *See, e.g.*, *id.* at 2062; *Herring*, 555 U.S. at 143.

236. *Strieff*, 136 S. Ct. at 2061 ("[T]he significant costs of this rule have led us to deem it 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.'" (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006))); *Herring*, 555 U.S. at 141 ("[T]he rule's costly

cases have slowly chipped away at the exclusionary rule's power.

It has not yet happened, but the next step in this jurisprudence would be to conclude that the exclusionary rule should not apply in certain cases, based not on lack of police culpability but instead on the seriousness of the offense charged. This would allow courts to apply the exclusionary rule in, for example, a case where the defendant sends marijuana to his home in Georgia while visiting Colorado, because the societal harm is insubstantial. The same court could then deem application of the exclusionary rule inappropriate in a case where a dark web drug dealer sends dangerous illicit substances throughout the country, leading to the deaths of some of his customers. In each of these cases, the police could be equally culpable in searching these packages by not following proper Fourth Amendment procedure, but the outcomes would be different based on the respective societal harm.

The dissenting Justices in *Strieff* would no doubt reel at this. It favors law enforcement and perhaps incentivizes police misconduct, just as the dissenting Justices thought the decision in *Strieff* would.[237] They might argue that this type of exclusionary rule analysis is just as dangerous as destroying all Fourth Amendment rights in packages addressed to criminal aliases. What would stop USPIS from opening every package and keeping only those packages that contain particularly dangerous drugs or those that contain drugs in especially large amounts? Based on a single package alone it would be impossible to differentiate between a serious dark web drug dealer and someone who sends drugs through the mail to himself in an isolated incident. From law enforcement's perspective, it does not seem like the risk would outweigh the reward. Each wrong guess about the seriousness of the illegal activity would open up law enforcement to tort liability, resulting in great costs to the agency or personally to the agent who committed the violation.[238] No, contrary

toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998))); *Hudson*, 547 U.S. at 591 ("The exclusionary rule generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large." (citation omitted) (quoting United States v. Leon, 468 U.S. 897, 907 (1984))).

237. *Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting); *id.* at 2074 (Kagan, J., dissenting).

238. By bringing a *Bivens* claim, the defendant could recover damages, including punitive damages, from the federal agent personally. Carlson v. Green, 446 U.S. 14, 21, 22 (1980) (noting that a *Bivens* claim has a deterrent effect on police misconduct). If a state police department had a policy of violating Fourth Amendment rights in this way, § 1983 would apply, allowing a cause of action for the violation. *See* 42 U.S.C. § 1983 (2012); Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Both *Bivens* and § 1983 allow a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights."); Wyatt v. Cole, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). Additionally, the Court noted civil suits for constitutional violations have more

to what the *Strieff* dissenting justices might argue, shifting the exclusionary rule analysis is not as dangerous as destroying Fourth Amendment rights completely.

teeth than they did in the past, so they more effectively serve their deterrent purpose now. *See Hudson*, 547 U.S. at 597–98.