

THE EXCLUSIONARY RULE

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If there is a litmus test to distinguish between so-called liberals and so-called conservatives in the United States, it is the exclusionary rule. More than one's views on abortion, more than one's views on law and economics, more than one's views on *Bush v. Gore*,¹ one's position on the exclusionary rule is viewed as a reliable indicator of the side on which one is situated.² To liberals, it is a pillar of privacy; it is essential to protect individuals from predations on the part of the police.³ To conservatives, it is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth.⁴

Of course, I am not talking about evidence whose veracity is made doubtful as a result of the means by which it was obtained, such as confessions extracted through physical or psychological torture. Rather, I am talking about evidence whose validity or "truthfulness" is unaffected or actually increased as a result of how it was gathered, yet where the method of obtaining the evidence ostensibly violates constitutional or other legal commands. Consider, for example, illegal wiretapping, warrantless searches, and stops that do not meet even the

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1. 531 U.S. 98 (2000).

2. See, e.g., Bradley C. Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 559 (1982) ("[T]he decade old debate over the rule's impact is essentially an ideological one—the values inherent in the rule are attractive to liberals and bothersome to conservatives."); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 75 (1992) (noting that "the exclusionary rule has caused intense debate between liberals and conservatives" and that the debate is driven more by ideological commitments than by empirical evidence about the rule's effects); cf. William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 975 (2001) (asserting that the exclusionary rule, with *Miranda* warnings and the death penalty, has served as an ideological marker separating conservatives from liberals).

3. See, e.g., Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 43-45 (1987).

4. See, e.g., Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 695-97 (1996).

requirements of *Terry v. Ohio*.⁵

The interesting paradox is this: liberals ought to hate the exclusionary rule because the exclusionary rule, in my experience, is most responsible for the deep decline in privacy rights in the United States. Indeed, the existence of the exclusionary rule has been the reason for more diminutions in privacy protection than anything else going on today. Why is this? Well, the dynamics of this process are very easy to understand.

What, for instance, qualifies as a reasonable search (the Constitution's reference point) is frequently a close question. On the one hand, the police must protect society by catching criminals and by using a variety of means to gather evidence. On the other hand, individual privacy interests may be infringed upon by those means. The judge who seeks to balance these conflicting values in determining whether a search is reasonable, however, finds that there is frequently an enormous thumb on the scale. If the judge holds the search to be unreasonable and therefore excludes the evidence, someone who is manifestly guilty of a very serious crime will be released.

Judges—politicians' claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities. Regardless of who appointed her, the judge facing a clearly guilty murderer or rapist who makes a Fourth Amendment or other constitutional claim will do her best to protect the fundamental right *and* still keep the defendant in jail. It is perfectly obvious: the judge will do so simply because she does not like the idea of dangerous criminals being released into society.

This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision. The hydraulic effect, as Chief Judge John M. Walker, Jr. has sometimes called it,⁶ or the slippery slope, means that courts keep expanding what is deemed a *reasonable* search or seizure.

You can look around and see how often this has happened. Exigent

5. 392 U.S. 1, 20-21 (1968).

6. Conversation between Chief Judge John M. Walker, Jr. and Judge Guido Calabresi, United States Court of Appeals for the Second Circuit.

circumstances, which used to be relatively uncommon, are now everywhere. What was enough to permit a *Terry* stop used to be quite limited.⁷ Today, however, almost anything a policeman says to justify a search is acceptable—and for good reason—because, case-by-case, the precedents have broadened the reasonable search doctrine.

On a side note, it is also my sense that this situation has led police to lie in order to prevent certain evidence from being excluded. Indeed, Chief Judge Walker has taught me that such perjury is not infrequent in this kind of case.⁸ One may ask, “Why can’t the courts stop this?” But again, the question of fact as to whether the police are lying, or whether the evidence was properly obtained, is often close. If it is a close question and a judge finds that the police did not tell the truth, then—given the exclusionary rule—a murderer or rapist will be released. As a result, when in doubt a judge will say, “Maybe they are telling the truth.” The hydraulic effect is at work here as well.

Of course, the standard liberal response to this argument is to question how the police can be controlled in the absence of a robust exclusionary rule. “Without the rule,” they say, “how can there be anything to stop the police from invading privacy?” These scholars often point to history in arguing that the lack of an exclusionary rule would result in little or no protection for privacy rights.⁹ They contend that though perhaps the rule does not work very well, it is better than anything else.¹⁰ And, of course, there is a lot to be said for this position because—aside from the exclusionary rule—most, if not all, of the suggestions for controlling the police in this area simply do

7. See, e.g., Gregory Howard Williams, *The Supreme Court And Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567, 575-83 (1991) (discussing cases that have eroded the careful balance set out in *Terry v. Ohio*, 392 U.S. 1 (1968), by recognizing as legitimate stops those made based on factors such as time of night and level of crime in the area, and by allowing the use of profiles to trigger stops).

8. See, e.g., Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 234-37 (1998); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040-41 (1996).

9. See, e.g., Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL’Y 711, 744 (2000) (“[H]istory shows that where courts do not employ the exclusionary rule, the problem of police lawlessness only gets worse.”). See generally Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1380-89 (1983) (explaining the development of the exclusionary rule and arguing that it is necessary, and thus constitutionally required, to remedy Fourth Amendment violations).

10. See Stewart, *supra* note 9, at 1386-89 (comparing the exclusionary rule to alternative remedies); cf. Kamisar, *supra* note 3, at 29-30 (suggesting that proposed modifications to the exclusionary rule would greatly limit its effectiveness).

not work.

Ironically, one of the favorite counter-arguments of conservatives is that the police should be taught; that is, they should be told to behave better. I would have thought that conservatives would be more interested in incentives as essential to any effective solution for the exclusionary rule problem. Currently, absent the exclusionary rule, there are almost no incentives for the police to be good actors, and in the absence of such incentives, teaching and preaching are not going to have much of an effect. Another standard suggestion often made by conservatives is to punish the police officers individually. Though such punishment, if it were imposed, might well prompt the police to refrain from unreasonable searches, there is a fundamental incentive problem with this solution as well. Who is going to tell us that the police did something wrong if there is no incentive for a defendant to report what happened? Why should a criminal accuse the police of engaging in misconduct, and thereby incur the possible wrath of the police, unless he has something to gain from it?

More sophisticated people such as Akhil Amar have suggested that tort suits may resolve this problem.¹¹ It is true that, nominally, the tort regime does include the right incentives for the detained criminal to make known police misconduct. The criminal receives the tort verdict, and the misbehaving cop can thereafter be punished.

There are, however, two major problems with using tort law in this manner. The bigger problem is that it does not take into account how juries actually work in tort cases. The reason that tort suits—that great American pastime—work the way they do in most civil cases is because juries identify with the plaintiff. They see the plaintiff as someone like themselves and consequently decide in favor of the plaintiff.

Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way. Of course, the mechanism works a little bit better when the illegal search was of innocent people. Even there, however, the jurors tend not to identify with the people searched. All too often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at

11. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 31-45 (1997).

hand. Hence, they view the plaintiffs as different from themselves. The result is that plaintiffs bringing tort actions against the police often fail to get jury verdicts.¹²

Even in the most serious cases, where people have been badly beaten up by the police, it is, in my experience, very unlikely that a jury will render a plaintiff's verdict. When juries do give a verdict, the damage award is likely to be very small, for juries do not want to reward criminals. Because damages are hard to quantify in such cases, it is almost always necessary to guess at them. As a result, any jury disinclination to give significant awards is extremely difficult for courts to control.

Now, Professor Amar has come up with all sorts of complicated multiplier approaches to counter this, and it is possible that tort suits with multipliers may work a little bit where the search was of innocent people.¹³ But for the bulk of the people—the guilty criminals, with regard to whom evidence has been found, albeit illegally—tort suits just do not work.

So, in the words of that celebrated “scholar” Lenin, “What is to be done?”¹⁴ Well, I have my own half-baked solution to the exclusionary rule problem. One of the things I have noticed as a judge is that even when people have been sentenced to thirty or forty years in jail, they fight desperately to get two points down on the sentencing guidelines. Now at first, I wondered why the difference between a jail term of thirty-five years and one of forty years mattered so much to somebody. After further thought, I realized that many of the people who are sent to jail are sexually active people in their early twenties. The difference between getting out at my age and getting out at Judge Walker's age may be very significant indeed.¹⁵ As a result, the possibility of moving a few points down on the sentencing guidelines may act as a strong incentive for criminal defendants to argue that evidence was improperly obtained.

12. See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 61-62 (1994) (noting the failure of tort suits to prevent Fourth Amendment violations).

13. And this is important, because the proposal that I make below would not work directly in cases of searches of innocent people. By creating incentives against illegal searches generally, however, it would also tend to deter illegal searches of the innocent. Nevertheless, the existence of a sophisticated tort remedy that focuses primarily on those cases that involve innocent victims would help to plug a possible hole in my proposal.

14. V. I. LENIN, WHAT IS TO BE DONE? BURNING QUESTIONS OF OUR MOVEMENT (Joe Feinberg & George Hanna, trans., Int'l Publishers Co., Inc. 1969) (1902).

15. I was born in October of 1932 while Judge Walker was born in December of 1940.

Let us consider a system where questions about the propriety of evidence could be raised after the trial's conclusion and the defendant's conviction. At that point, there would be no incentive for the prosecutor to charge more *ex ante*. At the same time, the convicted defendant would have a real incentive to argue that evidence was improperly introduced. Under such a system, there would be a hearing at which the court would determine whether the evidence was obtained wrongfully through negligence, gross negligence, or wanton and willful behavior. On that basis, a judge would come down two, three, or four points on the sentencing guidelines. (I am not interested in the calibration of the numbers themselves at this point. That is something to be worked out later, namely, by figuring out what "price" suffices to provide the right incentives.)

If this system were instituted, I think defendants would readily report any improper collection of evidence. While judges may be tempted to place a thumb on the scale in the context of criminal punishment, just as they are tempted to do in the context of admitting evidence and testimony at trial, the effect is counteracted by the fact that many judges find even the sentences at the lower end of the existing sentencing scale to be more than adequate. Because the sentencing guidelines are so severe, judges are not unduly worried about whether a criminal goes to jail for thirty-five years as opposed to forty. As a result, I do not think that the thumb on the scale would operate anywhere near as strongly in the sentencing area as it does when the issue is the suppression of evidence.

Similarly, when the guidelines provide for short sentences and my approach might result in a defendant avoiding jail altogether, the crimes at issue tend to be white-collar ones that nobody worries much about. Indeed, the fact that the guidelines provide very low sentences for such crimes means that the defendants are not thought of as being all that dangerous.

Though such a system gives defendants an incentive to inform courts about police misconduct, it still provides little deterrence for potential bad actors in law enforcement. But this can be readily cured. One could imagine a system that punished individual policemen when it was discovered that the cops had acted with negligence, with gross negligence, or willfully and wantonly. If the search or seizure was simply negligent, the punishment might be very slight. If the police behavior was grossly negligent, the punishment might be greater. If

there was an intentional wrong, the penalty might be much more severe.

Again here, I am not interested in the calibration. But I do believe that by pairing an automatic police punishment with a sentencing procedure that provides an incentive for criminals to disclose police misconduct, we would have a system that would be far more effective in controlling the police than anything we have now, or would have even with a mechanism based on tort suits combined with multipliers. This is especially so because my suggested approach addresses a major incentive problem with the use of tort damages, which, as Peter Schuck pointed out in his book on suits against the government, are usually paid by a totally different part of the government than that for which the “wrongdoer” works.¹⁶

Similarly, this approach addresses a major problem with the use of the exclusionary rule: excluding evidence fails to affect the “cowboy” cop very much. The cowboy has gathered the evidence, arrested the criminals, and received all the publicity: “I’ve caught the perps. I did my job, and then these crazy judges let the person out.” That the criminal was let off does not greatly deter the cowboy, who will be affected only by a punishment that is directed specifically at him.

There are, of course, several problems with my suggestion, including issues involving capital cases. I think there are ways of solving these problems, but I will leave them for future discussion.

As it is, I present this half-baked idea playing the role of an academic, rather than that of a judge. Judges cannot afford half-baked ideas. Only academics can engage in such flights of fancy—a great blessing for judges and academics alike. But I do think that a potential solution may lie in a system like the one I have described, where privacy is protected without the absurdity of the current exclusionary rule.

Moreover, if we had an approach like the one I have proposed, both liberals and conservatives would be put to the test of whether they really mean what they say. Are liberals truly interested in privacy? Or is their defense of the exclusionary rule based on things that have very little to do with what they say is at stake? Are conservatives in fact interested in getting at the truth? Or are they hiding behind that argument in order to support broad invasions of privacy that they

16. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 106 (1983).

think are justified? Wouldn't it be interesting if both sides focused on what they really believe to be at play? It would certainly make the argument a much more honest one, and it would also get rid of a particularly irritating whipping boy—the whipping boy that judges are just here to let criminals out on technicalities.