1997

Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)

Akhil Reed Amar
Yale Law School

AGAINST EXCLUSION (EXCEPT TO PROTECT TRUTH OR PREVENT PRIVACY VIOLATIONS)

AKHIL REED AMAR*

The title of this Panel is a question: "What Belongs in a Criminal Trial?" Now if my mother, who is not a lawyer, asked me what belongs in a criminal trial, I would look her in the eye and say, "Mom, the truth." And if my brother, who is a lawyer, asked me what belongs in a criminal trial, I would say, "Vik, reliable evidence subject to true privacy privileges"—a more elaborate answer, but the same basic idea.

There should be two principles guiding the exclusion of evidence in a criminal trial.[1] First, if the introduction of X—where X is testimony or physical evidence, words or things—would itself tend to risk a distinctively inaccurate verdict in some very substantial way, then X should be excluded.[2] This is especially true when X creates an unacceptably high risk that an innocent defendant will be erroneously convicted, for our system is, quite properly, particularly concerned with erroneous convictions.[3] When prejudice truly outweighs probative value, there is an argument for exclusion: the evidence is just so unreliable or misleading that the decisionmaker simply cannot assess it fairly. This principle may not apply to a great many situations, but it has normative appeal.

The second principle is that true privacy privileges may constrain the search for truth. Now, in the Anglo-American

* Southmayd Professor of Law, Yale Law School. What follows is a lightly revised version of oral remarks delivered at the Fifteenth Annual National Student Symposium of the Federalist Society.

1. My remarks summarize themes developed in much greater detail in AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997). Instead of cluttering my summary presentation here with excessive footnotes, I have tried to steer the interested reader to the relevant passages of this book, which contains much more elaboration and documentation.

2. In many situations, properly instructed juries might be able to assess and properly discount partially unreliable evidence. *See* AMAR, *supra* note 1, at 131. *Cf. id.* at 203-04 n.21 (suggesting that properly crafted instructions may not always work).

3. *See, e.g., id.* at 90-92, 154-55, 191 n.124, 214 n.131.

tradition, we—rightly—believe that trials are public events,[4] and yet we also—rightly—believe that some matters are best kept altogether private. When these beliefs bump up against each other, one can make a good argument that certain things simply should not come into the public trial at all, and thus should remain private. These exclusions prevent private facts from ever becoming public. They do not *remedy* an out-of-court privacy violation, they *prevent* an in-court privacy violation. These exclusions exist in order to protect some valuable social relationships such as the spousal relationship, or the priest-penitent, lawyer-client, and doctor-patient relationships. These relationships implicate true privacy privileges.

Now, one might ask, what is a true privacy privilege? One test is that a true privacy privilege is one that applies to all witnesses, not merely defendants, and in all actions, not just criminal cases.[5] On this account, the Fifth Amendment[6] privilege against self-incrimination is not a true privacy privilege, because it can be overcome by immunity. Furthermore, it applies only in criminal, but not civil, cases. So, for instance, Oliver North has no Fifth Amendment privacy privilege. If we want his "private" story badly enough, we can force him to give it. All we have to do is grant him a certain kind of criminal immunity. The key question is, then, what kind of immunity do we have to give him? The question of immunity does not even arise in priest-penitent or doctor-patient or spousal or attorney-client relationships, because these implicate true privacy privileges: one has an absolute right to keep these conversations private, and so the privacy violation is the compelled statement itself. The test of universal applicability also explains why the Fourth Amendment exclusionary rule is not a true privacy privilege: if introduction of illegally found evidence were *itself* a privacy violation, exclusion would be required in all civil as well as criminal cases, and yet this has never been the law. A true privacy privilege is one where courtroom exclusion prevents the privacy violation—exposure in court—from ever occurring, rather than "remedying" an antecedent breach of privacy that

4. *See id.* at 117-19 (describing the concept of the public trial).

5. *See id.* at 65-66, 69-70 (critiquing a privacy rationale for the Self-Incrimination Clause).

6. U.S. CONST. amend. V ("... [N]or shall [any person] be compelled in any criminal case to be a witness against himself....").

has already occurred, out of court.[7]

Let me now try to elaborate on my general vision of what *does* belong in a criminal trial by going through the Fourth,[8] Fifth, and Sixth[9] Amendments. Remember, the subtitle of our Panel is "The Role of Exclusionary Rules"—a *plural* word—and exclusionary rules derive not just from the Fourth but also from the Fifth and Sixth Amendments. These Amendments have been misunderstood in their purpose and effect.

Let us start with the Fourth. The Fourth Amendment generally does not require, does not call for, does not even invite, the exclusion of evidence as a remedy for an unconstitutional search or seizure. Nowhere does the text say such a thing. Indeed, the text never distinguishes between civil and criminal cases, yet exclusionary rule doctrine always has. When we do exclude, we exclude in criminal cases but never, as a general matter, in civil cases. So, the text obviously does not support the current exclusionary rule.

What about history? The history emphatically rejects any idea of exclusion.[10] The English common law cases underlying the Fourth Amendment never recognized exclusion. England still does not recognize exclusion. Canada, until the 1980s, resisted the temptation. None of the Founders ever linked the Fourth Amendment to exclusion. In the first century after Independence, no federal court ever recognized exclusion. No state court—and remember, virtually every State's constitution had a counterpart to the Fourth Amendment—ever excluded evidence in this first century.

When the most thoughtful judges of the era were presented with the case for exclusion—and it came up rarely, because it was so outlandish—they dismissed it out of hand. Joseph Story, who was no slouch as a scholar, confronted the argument for exclusion, and said that he had never heard of a case in the Anglo-American world excluding evidence on the ground that it

---

7. *See* AMAR, *supra* note 1, at 137-38 (further discussing privacy privileges).

8. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....").

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial... and to have the Assistance of Counsel for his defence.").

10. *See generally id.* at 20-25, 191 n.132 (discussing historical attitudes toward the exclusionary rule, both in the U.S. and abroad).

was illegally obtained.[11] The Massachusetts Supreme Judicial Court reached the same conclusion a generation later, in a case presided over by its great Chief Justice Lemuel Shaw.[12]

So much for text. So much for history. How about structure? The structure of our Constitution generally, and of our criminal procedure provisions in particular, corresponds to my principles. The structure of the Constitution basically advocates truthseeking procedures constrained by privacy privileges, and so Fourth Amendment exclusion derives no support from a proper understanding of the Fourth, Fifth, and Sixth Amendments.

One obvious question is, then, where did this exclusion doctrine come from? It did not develop, as is taught in law schools, as a deterrence-based remedy for an antecedent Fourth Amendment violation. Rather, in about twenty United States Supreme Court cases—landmark cases beginning with *Boyd* in 1886[13] and continuing to the 1960s—judicial proponents of exclusion put forth an argument combining the Fourth Amendment and the Fifth Amendment privilege against self-incrimination.[14] This combination swayed the Court. It drives Justice Hugo Black's fifth vote in *Mapp*[15] and appears no less than six times, if one reads carefully, in Justice Clark's majority opinion in *Mapp*.[16] It goes as follows.

Consider a diary. (Most of these early cases involved personal papers.) When the government illegally grabs your most

11. United States v. La Jeune Eugenie, 26 F. Cas. 832, 843-44 (C.C.D. Mass. 1822) (No. 15,551) (stating that "the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend, upon the lawfulness or unlawfulness of the mode, by which it is obtained").

12. Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337-38 (1841) ("When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question.") The opinion was actually written by Justice Wilde, *see id.* at 333, but Chief Justice Shaw then overruled the defendant's motion to arrest the judgment. *See id.* at 343.

13. *See* Boyd v. United States, 116 U.S. 616, 630, 633-36 (1886) (holding that compulsory production of private papers for use against their owner is prohibited both by the Fourth Amendment privilege against unreasonable search and seizure and by the Fifth Amendment privilege against self-incrimination). The case is discussed in AMAR, *supra* note 1, at 22-25.

14. These cases are listed in AMAR, *supra* note 1, at 250 n.28.

15. *See* Mapp v. Ohio, 367 U.S. 643, 661-66 (1961) (Black, J., concurring) (incorporating the exclusionary rules against the States).

16. *See id.* at 646-47, 646 n.5, 655-57 (opinion of the Court). For a list of the six passages, see AMAR, *supra* note 1, at 251 n.33.

personal papers and your diaries, and then seeks to introduce all this stuff in a criminal proceeding, the introduction of that diary is *itself* a *new* Fifth Amendment-like constitutional violation (the argument goes). In effect, you are being made an involuntary witness against yourself when your personal papers testify against you. That was the theory, anyway.

So, exclusion was not designed to remedy an antecedent violation, but to prevent a new one from occurring *in the courtroom itself*, a violation rooted in Fifth Amendment self-incrimination concerns. This explains: (1) where the exclusionary rule came from; (2) why it has always applied in criminal cases but never in civil cases[17] (because the Fifth Amendment applies only in criminal cases); (3) why illegally-obtained evidence could always be used against any defendant other than the searchee[18] (because your papers, as an extension of your person, your voice, your testimony, could not be made to testify against you—but, just as you could be forced to testify against someone else, so could your papers); and finally, (4) why the courts have always treated illegal seizures of persons differently from illegal searches and seizures of objects (because the Fifth Amendment self-incrimination idea did not apply to the body of the defendant and we never exclude the body of the defendant from the trial).[19]

Now, this doctrine of Fourth-Fifth fusion, which is the only principled—if incorrect—constitutional basis for exclusion, has

17. *See generally* United States v. Janis, 428 U.S. 433, 447 (1976) ("In the complex and turbulent history of the [exclusionary] rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state.").

18. *See* Agnello v. United States, 269 U.S. 20, 35 (1925) (refusing to grant a new trial to co-defendants of a person against whom an unlawful search had been made, even though their convictions depended in part on the unlawfully-found evidence, because the constitutional rights of the co-defendants had not been violated); Alderman v. United States, 394 U.S. 165, 171-76 (1969) (restricting exclusionary rule standing to those whose rights were violated by the search itself).

19. *See, e.g.*, Holt v. United States, 218 U.S. 245, 252-53 (1910) (holding that requiring a defendant to put on a shirt, in order to prove that it fit him, was not prohibited by the Fifth Amendment, because "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material"); Schmerber v. California, 384 U.S. 757, 760-72 (1966) (holding that the Constitution does not prohibit the use of involuntarily-given blood samples from a criminal defendant). These cases are discussed in AMAR, *supra* note 1, at 23, 62-63. If the government kidnapped you utterly illegally, a court would never "exclude" your body and hold that the government had to dismiss the charges, let you go, close its eyes, count to 20, and then try to catch you again. *See id.* at 108, 236-37 n.84 (citing and discussing cases).

been plainly repudiated by the recent Supreme Court. The Court repudiated it in both the *Fisher* and *Leon* cases,[20] leaving us only with three more modern arguments for exclusion.

First, some claim that the exclusionary rule preserves judicial integrity. This argument is hard to take seriously, because the rule does not apply to civil cases. Furthermore, other countries with judicial systems characterized by integrity do not exclude evidence. In fact, integrity is also threatened when we exclude true evidence, and thereby deprive the trial and the world of relevant facts.

Second, there is the non-profit principle—the idea that government should not profit from its own wrong. This is incorrect as a constitutional rule, both factually and normatively. Factually, it simply is not true that the government is always actually and clearly better off because, and only because, it violated the Fourth Amendment. In many cases, even though the Constitution was violated, the violation was not the but-for cause of the government's later possession of the evidence. Often, it could have gotten the evidence utterly lawfully. Suppose, for example, that law-enforcement officers had probable cause but did not obtain a warrant before conducting a search for a bloody knife. If they found the knife, under current exclusionary rules, judges would still suppress it as the fruit of an illegal search. This result is disturbing because the police (by hypothesis) easily could have gotten a warrant. Frank Easterbrook has written thoughtfully on just this problem in a Seventh Circuit opinion.[21] So, the standard of inevitable discovery discussed by Carol Steiker[22] actually is not overbroad, but rather is radically underinclusive. After all, there are many situations with a seventy-percent likelihood that the government would have found the evidence. But unless that likelihood is ninety-nine percent, judges tend to say that the government can never use that evidence. The criminal, therefore, is the one affirmatively better off, because once the government initially

20. *See* Fisher v. United States, 425 U.S. 391, 407-08 (1976) (repudiating *Boyd*); United States v. Leon, 468 U.S. 897, 905-06 (1984) (same).

21. *See* United States v. Brown, 64 F.3d 1083, 1084-86 (7th Cir. 1995) (permitting use of evidence discovered, though not seized, in a warrantless search of a defendant's home, because the police had believed the apartment did not belong to the defendant and had conducted the search for safety reasons).

22. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 20 HARV. J.L. & PUB. POL'Y 435 (1997).

acquires something illegally, it rarely can be used against the defendant. In short, there is a huge causation gap.

But there is also a normative problem, because the government always has been able, in some sense, to profit from its wrongs. It does not have to give stolen goods back to a thief. It does not have to give drugs back to a drug dealer or contraband back to a smuggler. This is basically because the thief is not entitled, morally or legally speaking, to the stolen goods, nor is the drug dealer to the drugs, nor the smuggler to the contraband. Similarly, they are not entitled to the evidence of their crimes. The law is entitled to every person's evidence; so, normatively, the government should be able to use the evidence just as it is able to keep the stolen goods.

Finally, there is the third modern argument for the exclusionary rule—deterrence. Here I disagree with Bill Stuntz.[23] Every scheme of deterrence will prevent some inappropriate searches and seizures. But not every deterrence scheme is sensible. The Founders knew about deterrence and talked about it a great deal. They never talked about exclusion, though. Instead, they talked about punitive damages and civil tort suits. Those schemes of deterrence have huge advantages over the exclusionary rule. They focus on the scope of the violation, which occurs when the search and seizure takes place, rather than when it happens to come up with otherwise admissible evidence.[24] If the police bop me on the nose, their action is not really related to whether or not they find evidence. Bopping me on the nose is, however, an independent constitutional wrong.

Tort law and deterrence remedies can focus on that independent wrong. We could enforce punitive damages. If there is too little or too much deterrence, we could raise the punitive damages or lower them as needed. Such remedies would also change the distribution of the benefits of deterrence. Right now, the benefits of deterrence go to the guilty more than the innocent. If the police know you are innocent and just want to hassle you because of your race, your sex, your politics, and the search—predictably—finds no evidence, the exclusionary

23. *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997).

24. For more analysis on this point, see AMAR, *supra* note 1, at 156-58.

rule is no deterrent whatsoever. It is no help for you at all. In Stanley Surrey's phrase, the distribution of benefits under the exclusionary rule is "upside down," helping the guilty, not the innocent.[25] This is why many countries around the world do not have our exclusionary scheme. The Founders did not intend to enact our scheme, and, with all due respect, they understood deterrence better than Bill Stuntz does. I should say that Bill Stuntz has written very thoughtfully about all of this. I just disagree with his judgment about what is the most functionally desirable system. But even if I am wrong about that, there remain these small matters of text, history, and structure to contend with.

Now let us turn to the Fifth Amendment. This Amendment is a rule requiring exclusion, but only of words, of testimony, of witnessing. The Amendment applies in criminal, and only criminal, cases. It can be overcome by immunity. And it does not apply to objects. (*Schmerber*[26] tells us that we can force people to give up a sample of their own blood, even if it might hang them.)

What is the reason for the Fifth Amendment rule of exclusion, then? The reason is reliability. One basic concern is that when words are coerced from suspects—especially in a pre-*Gideon*[27] world—the suspects might not have the advice of a lawyer. If suspects were forced to take the stand, clever prosecutors could make them look guilty even if they are not. The cruelty is in forcing the innocent to take the stand, twisting their own words against them, making them look guilty, and thus making them effectively hang themselves. If that is the account, it is easy to understand why the privilege applies to criminal, rather than civil, cases. After all, we are far more concerned about erroneous convictions in criminal contexts. Moreover, it is clear why immunity overcomes the privilege, because immunity insures that your words will never be introduced against you in a criminal trial. Finally, it explains why the Self-Incrimination Clause does not apply to objects, because physical evidence such as blood is far more reliable

25. *See generally* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973).

26. *See* Schmerber v. California, 384 U.S. 757 (1966).

27. *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (instituting the right to state-paid counsel for indigent defendants in all criminal felony trials, federal and state).

than words.

Using this analysis, we can actually compel Oliver North to testify before Congress—that is not a criminal case—and so long as his words are never introduced in a criminal case in which he is a defendant, no Fifth Amendment violation will ever have occurred. Simply put, he will never have been made a witness against himself in a criminal trial. Similarly, outside the trial of a criminal defendant, we can actually force the defendant to disclose where the body is buried or where the bloody knife is hidden, and the defendant must tell us, under penalty of perjury. The lawyer is there to provide advice, just as in civil discovery, and the actual words will never be introduced at trial. So long as only the fruit of this discovery is introduced—the body and the bloody knife, with defendant's fingerprints all over them—there will never be any Fifth Amendment violation.

The Fourth Amendment is about things—houses, papers, effects, stuff—but it is not about exclusion. The Fifth Amendment is about exclusion in criminal cases—but only about excluding words, because they can be unreliable.

I am not going to be able to go into Sixth Amendment doctrine in detail here, but there are rules of exclusion there too, based both on the attorney-client privilege and the speedy trial ideal. As I have explained elsewhere,[28] Sixth Amendment exclusion doctrine is defensible only to the extent it prevents unreliable adjudication or preserves legitimate privacy.

The current rules, which exclude much too much reliable physical evidence on Fourth Amendment, Fifth Amendment, and Sixth Amendment speedy trial grounds—are upside down in two ways. And here I do agree with Bill Stuntz's biggest point:[29] these rules do have the unfortunate effect of letting guilty people go free, but more significantly, they also often make innocent people affirmatively worse off.

The exclusionary rule often leads judges to constrict what counts as a Fourth Amendment violation, and that hurts innocent people. Similarly, because we have such overbroad principles of exclusion under the Fifth Amendment Self-Incrimination Clause, innocent defendants actually suffer because they cannot compel the production of witnesses in their

28. *See* AMAR, *supra* note 1, at 96-116, 136-38.

29. *See* Stuntz, *supra* note 23, at 454.

favor. Even if I as an innocent defendant actually know who did it, I cannot currently put that person on the stand if that person takes the Fifth. Under a proper reading of the Fifth Amendment, that would change.[30]

When truth is excluded from trials, there will be two types of systemic errors: wrongful, erroneous convictions *and* erroneous acquittals. The rules hurt innocent defendants while helping the guilty ones. And I have a hard time explaining to my mother or my brother why that makes sense.

30. *See* AMAR, *supra* note 1, at 49-51, 71-73, 134-36 (explaining how narrower Fifth Amendment immunity would lead to broader rights of defendants to compel other witnesses to testify against themselves).