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Exclusionary Rule: Reasonable Remarks on Unreasonable Search and Seizure

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Pro Se

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Reasonable Remarks on Unreasonable Search and Seizure

By Yale Kamisar

Can we live with the so-called exclusionary rule, which bars the use of illegally gained evidence in criminal trials? Can the Fourth Amendment live without it?

A growing number of lawyers and judges, including Chief Justice Warren Burger, have called for abandonment of the rule, usually on the ground that it has not prevented illegal searches and seizures and on the ground that the rule has contributed significantly to the increase in crime.

No one has convincingly demonstrated a causal link between the high rate of crime in America and the exclusionary rule, and I do not believe that any persuasive evidence of such a relationship exists.

In the 1950-59 decade, the decade immediately before the U.S. Supreme Court imposed the exclusionary rule on the states as a matter of federal constitutional law, crime increased much faster in many states that admitted illegally seized evidence than in the District of Columbia, whose law enforcement officers had long been subject to the exclusionary rule.

The Michigan experience is illuminating. The Michigan Constitution contained a so-called anti-exclusionary rule provision that permitted the use in evidence of dangerous weapons seized outside the dwelling house—regardless of how they were seized. Until this proviso was struck down in 1970, the great majority of state judges treated it as valid.

Thus, as a practical matter, until 1970 the police of Michigan were free to search for and seize firearms of all types on the street without "probable cause" or any cause at all.

But from 1961 to 1970, the number of unregistered handguns increased dramatically, firearm robberies doubled, and homicides committed with firearms increased fourfold. (In recent years, both the Michigan homicide rate and robbery rate have fallen substantially.)

Critics of the exclusionary rule sometimes sound as if it is the main loophole in the administration of justice. But in reality it is only a minor escape route in a system that filters out many more offenders through the discretion of police, prosecutors, and the courts than it tries, convicts, and sentences.

In my judgment it would be a grave mistake to abandon the exclusionary rule. The Fourth Amendment of the U.S. Constitution says: "The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated." There are similar provisions in every state constitution. We say it, but do we mean it?

The Fourth Amendment's guarantee does not explicitly say what the consequences of violation should be. In 1914 the Supreme Court set forth the exclusionary rule in *Weeks v. United States* in an effort to see that the Fourth Amendment provision would not be ignored. The exclusionary rule, however, was applied only to federal prosecutions. It excluded evidence obtained by federal officers in violation of the Fourth Amendment.

It was not until 1961, in *Mapp v. Ohio*, that the court imposed the rule on state courts. It had become convinced that no meaningful alternative had emerged in the more than 20 states that still admitted illegally seized evidence.

The *Mapp* decision is generally regarded as the beginning of the Warren Court's "revolution" in American criminal procedure. Understandably, therefore, it, and even the 1914 *Weeks* doctrine itself, have become principal targets of the "counter-revolution" in American criminal procedure that has set in since the late 1960s.

The attack on the exclusionary rule has been led by Chief Justice Burger. At first, he tempered his sharp criticism of the rule by pointing out that he would not welcome its demise until there could be developed some alternative (such as an administrative remedy against the government itself to afford compensation and restitution for victims of Fourth Amendment violations).

More recently, however, the chief justice has expressed a readiness to scrap the rule without waiting for alternatives to emerge. For him (and perhaps for a majority of the present court), the rule results in "the release of countless guilty criminals" and has become unbearable.

Judging from their increasingly gloomy and bitter dissents, the two

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Illustration by Dean Matthews

"holdovers" from the old Warren Court majority, Justices William Brennan and Thurgood Marshall, fear (and many Supreme Court watchers are predicting) that a majority of the present court will soon abandon the rule altogether, or at least drastically revise it to provide for exclusion only where the police have acted not only unlawfully, but also in "bad faith" or "flagrantly" or "recklessly."

The exclusionary rule has not had as great an impact on the police as some had hoped (and others had feared).

For one thing, the rule has no direct impact on substantial police activities directed to ends other than the formal prosecution and conviction of offenders; for example, harassment, physical abuse, and unnecessary destruction of property. This is a good reason to supplement the rule, not to abandon it.

The rule demonstrates to law enforcement officers and to the general public that the courts are committed to the principles of the Fourth Amendment so that when the police themselves break the law neither they nor any other government agency will be allowed to use the benefits that flow from the violation. Otherwise, it would be difficult for the average citizen—and the average policeman—to believe that the government really meant to forbid the conduct in the first place.

The government's protestations of disapproval of police illegality cannot be taken seriously, observed Justice Oliver Wendell Holmes in his famous dissent in the 1928 *Olmstead* case, "if it knowingly accepts and pays and announces that in the future it will pay for the fruits" of this illegality.

"No distinction," he insisted, "can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such inequities to succeed."

I doubt that I ever fully appreciated the force of Holmes's views until about 15 years ago, when an incident occurred in Minnesota, where I was then teaching. Because Minnesota had admitted illegally seized evidence until 1961, the Supreme Court's decision that year caused much grumbling in police ranks.

At a panel discussion in which I participated, the point was made—and perhaps this is the most basic point of all—that if the police feared that evidence they were gathering in the customary manner would now be excluded, they must have been violating the guarantee against search and seizure all along. This evoked illuminating responses from the two law enforcement officials on the panel.

The Minneapolis city attorney denied that the police had been violating the law all along; his explanation was that "the courts of our state were telling the police all along that the exclusionary rule didn't apply in Minnesota."

This peculiar way of viewing illegal police conduct was echoed by a St. Paul detective on the same panel. "No officer lied upon the witness stand," he explained. "If you were asked how you got your evidence, you told the truth. You had broken down a door or pried open a window. Oftentimes we picked locks. . . . The judiciary okayed it; they knew what the facts were."

There is no reason to think that the Minnesota experience is unique. The heads of the New York City and Los Angeles police departments, for example, also reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written.

Are the police not likely to react to the scrapping of the rule as if the guarantees had just been deleted? Are they not likely to feel that once again "the judiciary is okaying it?"

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