

THE VIRTUES AND VICES OF THE EXCLUSIONARY RULE

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The standard attack on the exclusionary rule rests on an undeniable fact: the rule lets criminals walk away from the courthouse. The fact is true enough, but the standard attack is wrong. Seen purely as a remedy for a right whose scope is fixed, the exclusionary rule is enormously successful, and its public nature—the fact that we all can *see* the drug dealer who walks away—may well be part of its success. This is not to say that the rule has no downside. On the contrary, the rule may do serious damage to the criminal justice system. But the damage is not located where the critics say it is. Indeed, the rule's two biggest vices are mostly ignored in the vast literature on this subject.

Those vices both have to do with the exclusionary rule's ripple effects, and its tendency to change other aspects of the system for the worse. The first bears on the content of Fourth Amendment law, for that law is *not* fixed, and in this setting the remedy tends to shape the right. In part because of the exclusionary rule, we have an enormous body of law that regulates the police. Also in part because of the exclusionary rule, that law focuses heavily on what sorts of things police officers can see; it pays much less attention to the ways and settings in which police officers use force on suspects. This is a bad thing if, as is probably the case, police violence is a more serious problem than police snooping.

The second vice is broader and probably worse. The exclusionary rule skews criminal trials and criminal appeals by diverting scarce resources into a path separate from the question whether the defendant did the crime. This is more than the usual it-lets-the-bad-guys-go complaint. In a system in which the mass of criminal defense lawyers are paid very little, constitutional criminal procedure can change the *mix* of claims

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defendants make, but the *volume* of litigation is basically fixed by resource constraints. The exclusionary rule generates a lot of litigation—tens of thousands of contested suppression motions each year. That litigation is displacing something else, and the something else may well have more to do with guilt and innocence. That problem is much more serious than the occasional drug dealer whose Fourth Amendment claim is a ticket to get out of jail: the point is that the exclusionary rule skews the many cases in which drug dealers *lose*, not just the few that they win.

The bottom line is not clear. The literature on this subject (on both sides) tends to assume that this is an easy issue, that suppressing illegally seized evidence is either obviously good or obviously bad. In truth, it is neither. The exclusionary rule is, by a wide margin, the best legal tool available for regulating the police. But it distorts the rest of the criminal justice system. Perhaps this argues for keeping the rule, but within fairly narrow bounds—a direction in which the law has been moving for the past two decades. In any event, sensible law in this area must begin with some understanding of just why the problem is such a hard one to solve.

I. VIRTUES

Start with the assumption that Fourth Amendment law makes sense, that the sole question on the table is how that law should be enforced. Right away, one runs into a pair of practical problems that make the crafting of remedies unusually difficult. Typically, illegal conduct and *good* conduct are far removed from one another. Behavior is often arrayed along a spectrum, from awful to bad to questionable to good to wonderful, and the line defining illegality is drawn somewhere around bad. Where that is so, the details of the line and its enforcement may not matter much: if the law mistakenly deters some questionable conduct, so what? Police investigation is different. There, the gap between good behavior and illegal behavior can be vanishingly small. The police not only are *allowed* to search people's homes and cars and briefcases for evidence; doing so is often a good thing. And it can be a good thing even though the officer doing the searching is far from positive that the search will yield evidence—especially where the crime in question is very serious. Our society will have too little law enforcement if

the police always wait to search or arrest until they are certain that their suspicions are justified. It follows that a search based on (just barely) probable cause may be commendable even while a search that misses the probable cause line by a hair is unconstitutional.¹ Enforcing any legal line that slices so finely is likely to be hard.

The other problem has to do with the people whose behavior the law is regulating. Police are paid on salary, not by the arrest or search. This is a good thing: given the enormous scope of criminal liability in our system, we rely heavily on the police to exercise discretion *not* to search and arrest. This system of payment, coupled with this degree of discretion, is a recipe for overdeterrence. Officers gain little from the marginal legal search, so if they lose something substantial from the marginal illegal one, they may choose simply to search much less often and thereby reduce their exposure. Since searches and arrests are discretionary and the relevant decisions are hard to monitor, officers are free to react to legal regulation in precisely this way.

Overdeterrence is a serious concern here because in this area, close-to-the-line conduct is often very good conduct. And overdeterrence is a danger because the police have no strong incentive to undertake the marginal (legal) search or arrest. The result is that the usual legal tools—damages, fines, criminal punishment—are likely to cause more harm than good if they are widely used. If an officer faces serious loss whenever he makes a bad arrest, he will make fewer bad arrests, but also many fewer good ones. The same is true, only more so, if the law threatens the officer with jail for constitutional violations. The social costs of this overdeterrence are surely high: they can be measured by murders and rapes and drug deals that would not have happened if their perpetrators had been put away.

1. The problem is really attributable to the nature of the relevant Fourth Amendment standards. A rule enforcing optimal police behavior would *require* some searches with only a slight chance of finding evidence—imagine a case where the suspected crime is truly horrible or the suspect poses a serious risk of future harm, and where the cost of the search to innocents is relatively low. Such a rule would *forbid* searches in some cases where the officer had something akin to proof beyond a reasonable doubt before the search took place—for example, where the crime in question is trivial and the ancillary costs of searching are high. “Probable cause” and “reasonable suspicion,” the dominant standards in Fourth Amendment law, do not capture this huge variability. Those standards aim to fix some rough probabilistic justification and apply it across the board, leaving things vague enough to allow courts to fuzz the standard in one direction or the other as appropriate. That still leaves many cases in which the officer should definitely search if he can do so legally, but where legality is a close question.

The temptation is to solve this problem by making the government, rather than the individual police officer, bear the immediate costs of legal liability. Unfortunately, that move solves nothing. Most police work for local governments, and most local governments operate under serious budget constraints. The effect of governmental damages liability for police misconduct mimics the effect of making individual officers pay damages: the locality has an incentive to reduce its liability by reducing the level of policing. And police work is redistributive. Because crime tends to be concentrated in poor neighborhoods, the people who get the biggest benefits from police work do not pay the biggest tax bills. So the government cannot respond to a rise in the cost of police services (which is what broader damages liability means) by charging the beneficiaries of those services more. Just as a government faced with large damages liability for running a municipal pool, which serves poor residents but is paid for by rich ones, may simply close the pool, a government faced with large damages liability for the police may simply reduce the police presence in areas likeliest to give rise to lawsuits. This is overdeterrence writ large.

In a system faced with these problems, suppressing evidence looks like a godsend. Suppression is restitutionary: the officer loses the very thing he gained from the illegal search, and no more. That largely takes care of overdeterrence. And because the rule does not seriously overdeter, courts need not reserve it for the worst constitutional violations. Instead, the exclusionary rule can be applied across the board to the mass of illegal searches and seizures, without fear that doing so will lead officers to stop searching altogether. This gives courts the chance to define just where the constitutional line falls, to develop a working body of law in this area that tells police what they should and should not do. These virtues—the ability to deter without overdetering, coupled with the ability to define the law—are very substantial indeed.

One final happy feature of this much-maligned constitutional remedy is the one its critics always focus on: we can actually see the criminal walking out the courthouse door. Of course, *any* system that regulates evidence gathering lets some armed robbers and drug dealers get away with their crimes. That is automatically true whenever the law limits what the police can look at, indeed whenever the law in any way raises the cost of

gathering evidence. The difference between the exclusionary rule and, say, a damages remedy for Fourth Amendment violations (again, taking the content of Fourth Amendment law as a given) is not that the exclusionary rule prevents some robbers from being caught—a damages remedy does that too—but that the exclusionary rule shines a spotlight on a few of the robbers and drug dealers who go free. The criminals who get away because the police didn't bother to get a warrant are not invisible. We see them, at least sometimes.

The exclusionary rule's critics think this fact undermines our faith in the criminal justice system. To some degree they are probably right, though there are plenty of other reasons for the public's lack of faith in the system. But the critics ignore the other side of the coin. Whatever its costs, the visibility of the criminal who walks away has an important benefit: it makes *courts* see the consequences of the constitutional rules they create for the police. This is no small matter. To a degree unsurpassed around the world, the United States has given judges (more precisely, judges have given themselves) the job of writing and enforcing the rules that cover day-to-day criminal law enforcement—not just outer boundaries defining outrageous behavior, but ordinary rules for ordinary searches and seizures. These judges are often unelected and almost always less politically accountable than officials in the other branches of government, and they have no particular expertise in the system they regulate. Even if this institutional arrangement is necessary, it creates the potential for bad lawmaking. The exclusionary rule is a useful check on that potential, a way of limiting counter-majoritarian excess. Judges who write rules that prevent the capture of the occasional rapist are forced to see an occasional rapist walk away as a result of those rules. And the rest of us can see it, too. That may serve to rein in overly aggressive judicial lawmakers.²

2. Of course, courts should see the other side of the coin as well; judges need to understand the impact upon the innocent victim of illegal police conduct. In a system that allows for some (but not too much) damages liability, meaning a system like ours, they do. The worst sort of police conduct visited on the most sympathetic victims is likely to lead to civil suit. Where the police conduct is more marginal, civil suit is likely to be barred by qualified immunity, presumably in order to avoid overdeterrence. Meanwhile, in the mass of search and seizure disputes, courts see the consequences of the law they create for the central business of the police: catching and punishing criminals. These cases are not distributed perfectly—we may have too many or too few cases in one or the other category, and the damages cases are concentrated too heavily in federal court,

There is more that might be said in the exclusionary rule's favor, but it would seem like piling on. In conventional terms, the rule sounds like a roaring success. And in some respects it is. I speak to police audiences from time to time, and experienced officers are the first to say that the quality of police training and the degree to which police obey the law have risen dramatically over the past three decades or so. The exclusionary rule is not the only reason for that phenomenon, but it deserves at least some of the credit, for the rule made it possible to undertake serious, detailed regulation of police investigation without running the risk of *eliminating* police investigation. And it did so in a way that tended to keep courts from going overboard, by regularly confronting them with the costs of their decisions. In the terms on which this debate is usually carried out, the pro-exclusionary rule side is unequivocally right.

II. VICES

But the terms of the usual debate are wrong, for reasons that become clear when one broadens the field of vision. Most discussions of this issue see the exclusionary rule as an independent variable in the criminal justice system: remove it, and everything else stays the same. This vision cannot be right, for the system is not static. Were we to stop suppressing illegally seized evidence, a lot of other things would change too, at least over time. Some of those changes would be bad, but some would be good, for as things now stand, the exclusionary rule drives some important features of the system in destructive ways.

A. The Substance of Search and Seizure Law

Consider the content of Fourth Amendment law. In theory, one could have many different rules for police investigation of crime, and one could have a menu of possible remedies for violations of those rules. Selecting the best combination would mean answering two independent questions. What limits should we place on police officers? How can we best enforce those limits? In form, the second question is subservient to the first. In practice, the roles may be reversed.

while the bulk of suppression hearings takes place in state court systems. Still, one might plausibly see the exclusionary rule as a useful mechanism for maintaining the salience of ordinary criminal law enforcement when deciding cases that govern such law enforcement.

Courts make law in the context of cases, and the choice of remedy determines the cases courts see. In a damages system, the cases must present some plausible claim for monetary relief. The victim of police misconduct must have suffered the kind of harm that juries and judges are likely to value—the case must be “worth” something—or it will not be brought. Damages systems thus tend to highlight two kinds of police misconduct cases: illegal arrests and police brutality. If one surveys the reported § 1983³ cases brought against police officers and police departments—admittedly a non-random sample, but still a revealing one—these are exactly the cases one sees. And there is a kind of damages case one does *not* see: the lawsuit challenging the search of a suspect’s automobile or briefcase or jacket pocket. Such suits are almost never filed, both because the targets of the searches may be unattractive to juries (though that much is true of victims of police shootings, and *they* sue), and because neither judges nor juries would award any significant sum of money to compensate for the fairly trivial harm of having the trunk of one’s car opened. Save for house searches, and not often even there, Fourth Amendment damages claims tend not to involve *searches* at all. They involve seizures of suspects, and they tend to challenge the violent way in which those seizures were carried out. That means a damages system would probably focus, as current Fourth Amendment damages litigation does focus, on police violence and illegal detention.

What cases does the exclusionary rule bring to the fore? The answer is obvious: those in which the officer found something incriminating. Police beatings or shootings are rarely challenged in suppression motions. No one was looking for evidence in the Rodney King incident, and where there is no evidence to suppress, the exclusionary rule does not come into play. On the other hand, police decisions to look at things—to open the trunk of suspects’ cars, to feel the inside of their jackets, to root around in their duffel bags—are challenged routinely.

This case selection has huge consequences for Fourth Amendment law. Damages cases and suppression hearings do not share equal billing in Fourth Amendment litigation: there are many times more of the latter than of the former. Qualified

3. See 42 U.S.C. § 1983 (1994).

immunity and restrictions on municipal liability mean, as a practical matter, that even in those few damages suits that exist it is hard for courts to make law; they are invariably stuck with applying established doctrine to contested facts. So for purposes of defining Fourth Amendment law, exclusionary rule litigation *is* Fourth Amendment litigation. And in exclusionary rule cases, judicial attention naturally focuses on the propriety of finding things: on what the police can look for, and where, and when, and on what they have to know before they look. The result is a bias toward rules limiting evidence gathering as opposed to the other sorts of things police might do that one would want to regulate, such as striking people or shooting at them. We see that bias in the system today. There is an enormous body of case law on the details of searches of glove compartments or paper bags found on the back seats of cars, or on when the police can use trained dogs to sniff out drugs. Meanwhile, the case law on deadly force is thin: one could easily read all the reported decisions over a weekend; the number of cases is vastly less than the number of cases discussing, say, the search of closed containers in automobiles—a trivial issue by comparison. More telling still, the cases on non-deadly force are practically nonexistent.

This focus on privacy rather than police coercion and violence is usually taken for granted, but there is nothing at all inevitable about it, and it is probably a bad thing. The language of the Fourth Amendment bars “unreasonable” searches.⁴ Nothing in that language requires that reasonableness turn on what the officer saw and what he knew when he saw it, rather than the level of force he used in carrying out his job. And in a world in which we take other sorts of government snooping quite for granted (think about tax forms), there is something a little odd about the strength of the protection given to the privacy interest in paper bags and jacket pockets. That interest cannot be stronger than the interest in regulating police violence—an interest that the exclusionary rule tends to suppress.

The exclusionary rule is not the sole source of this bias. The bias has strong historical roots, going back centuries before the

4. 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 . . .”).

exclusionary rule existed. Fourth Amendment law arose out of eighteenth-century seditious libel cases and *Lochner*-era regulatory disputes.⁵ Those disputes were nominally about evidence gathering, but they had more to do with the substance of what the government was regulating than with techniques of criminal investigation. Eighteenth-century limits on paper searches made it harder to prosecute political or religious dissidents. Nineteenth-century limits on the subpoena power (the main subject of Fourth Amendment law in the *Lochner* era) made it harder for the federal government to regulate business. Today, these controversies are anachronisms. No one is trying to criminalize sedition, and the regulatory state is alive and well, with no particular interference from the Fourth Amendment. But the idea that the Fourth Amendment is about protecting privacy survives.

The fact that the Fourth Amendment is enforced in suppression hearings is at least part of the reason why. The exclusionary remedy works most naturally if the substantive right focuses on what the police may see and hear; it thus perpetuates privacy's reign in the law of search and seizure. One might imagine doing things differently; evidence could be suppressed when the police behaved too coercively at the scene of the defendant's arrest. The system does a little of that. But that approach requires judges to fight the remedy's natural tendency, which is to look primarily to evidence gathering rather than coercion. So the exclusionary rule tends to maintain the legal status quo, in which searches of glove compartments are a big deal and police violence is not. As a system for regulating police misconduct, this is backward. The exclusionary rule is partly responsible.

*B. The Exclusionary Rule in a Selective System*⁶

Now broaden the field of vision still further, and consider the way criminal defense lawyers choose which claims or arguments, legal or factual, to raise on behalf of their clients. Defense lawyers are constrained in the way that lawyers are almost always constrained—the client will pay for only so much. Here, of

5. I have developed the points raised in this paragraph elsewhere. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393 (1995).

6. The discussion in this section is taken from a larger work in progress titled *The Uneasy Relationship Between Criminal Procedure and Criminal Justice* (forthcoming 1997).

course, it is usually the state that pays, not the client. (By most current estimates, about eighty percent of criminal defendants receive court-appointed, and hence state-paid, counsel.) And the state's pay scale powerfully constrains litigation. It follows that the exclusionary rule does not simply give defendants a weapon to add to their arsenal. Rather, it trades one weapon for others, substituting litigation over searches and seizures for litigation over something else.

All this turns on how, and how much, counsel are paid. Appointed counsel generally fall into two categories, public defenders and separately appointed lawyers. The first category is paid a salary; the second is both appointed and paid case-by-case. Because of severe budget constraints, public defenders' offices allocate a very large number of criminal cases across a fairly small number of lawyers. The numbers can be staggering. One recent study found a jurisdiction in which some public defenders had represented over a thousand misdemeanor defendants in the past year, and another jurisdiction in which one lawyer had represented over four hundred felony defendants in an eight-month span.⁷ Those numbers are extreme, but the story they tell is generally true. In public defenders' offices, seriously overburdened lawyers are the norm.

Defense lawyers paid case-by-case face the same sort of pressure in another form. The state typically pays an hourly fee up to a cap. Hourly fees are sometimes low, though not always—amounts in the neighborhood of fifty dollars per hour are reasonably common in States that set these fees by statute. But the real pressure comes from the caps, which are typically one thousand dollars or less. Thus, it is common for defense counsel to face something like the following pay scale: forty or fifty dollars an hour for the first twenty hours, and zero thereafter.⁸

Both kinds of appointed counsel are forced to be ruthlessly selective. They cannot afford to contest more than a small minority of cases, and with respect to cases that do go to trial, they cannot afford to make all plausible claims or arguments.

7. See RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 8 (1993).

8. For a good overview of state compensation of separately appointed defense counsel, along with suggestions for comprehensive reform, see Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73 (1993).

Lawyers always act as a rationing device for claims and arguments—a filter to separate the steps worth taking from those not worth taking. But in the mass of criminal cases, the rationing is unusually severe. The effect is a little like a major battle's impact on a nearby military hospital: as the casualties pile up, it takes an ever more serious injury to get a doctor's attention.

Enter the exclusionary rule. One of the rule's great virtues is its efficiency. Claims are inexpensive to raise, and the facts on which they rest usually do not involve much independent digging by defense counsel. Adjudicating them requires neither detailed papers nor a complicated jury proceeding, but typically a fairly brief hearing with a couple of witnesses before a judge. And the benefits of a successful claim are sometimes enormous—it can mean dismissal of all charges. Even where that is not the case (as it often is not), suppressing some evidence can lead to a charge reduction and a more favorable plea bargain. Which leads to one final point about the cost of invoking the exclusionary rule—one can file and litigate suppression motions without going to trial. From the defendant's point of view, suppression motions tend to be quite cost-effective, which is no doubt why they are raised so often.

But while they may be *cost-effective*, they are not *costless*. In a world in which most defense counsel must severely ration the claims they make, those thousands of suppression motions presumably displace something else. The most obvious "something else" is factual argument, argument about the merits of the criminal charge. That kind of argument is more likely to require non-trivial investigation by defense counsel than exclusionary rule claims. It is also costlier to pursue. If the government fights the suppression motion, the upshot is a brief suppression hearing; if the government fights a self-defense argument, the upshot is a jury trial. And the exclusionary rule claim is about as likely, *ex ante*, to succeed.

Thus, when making a choice between filing a motion to suppress the results of the warrantless search of the defendant's home and investigating a possible but tenuous self-defense claim, defense counsel have some reason to opt for the former over the latter. This would not be so in a world in which defense counsel had vastly more resources to work with. But that is not our world. Where resource constraints are severe, defendants

tend to get some claims at the cost of others.

These tradeoffs between the exclusionary rule and other sorts of claims do not merely change the mix of claims a particular defendant raises. They probably also change which defendants aggressively contest the charges against them—meaning that they change the distribution of defense victories. Appointed defense counsel usually represent many criminal clients. Legal ethics doctrine treats these relationships as hermetically sealed; decisions made in one case are not supposed to affect decisions made in others. But resource constraints make that impossible. Whatever ethical rules may say, lawyers must, to some degree, trade off claims and arguments *across* clients. A decision to take case X to trial makes trial marginally less likely in case Y, simply because counsel cannot afford to try too many cases; rationing applies to the whole of counsel's caseload, not to any one case. The same thing is true with suppression motions and self-defense claims. More of the former probably means fewer of the latter, again because there is only so much time and it must be spread across so many cases. By vastly raising the number of Fourth Amendment claims litigated—by making Fourth Amendment claims so *attractive*—the exclusionary rule probably reduces the number of valid self-defense claims raised or potential alibi witnesses interviewed. That is a serious cost. It suggests that the exclusionary rule not only frees the occasional guilty defendant; it may contribute to jailing the occasional innocent one.

The problem extends to appellate courts as well. Judges too must ration their time and attention, and more time devoted to some kinds of claims tends, at the margin, to mean less time devoted to something else. Again, the trade may be between careful attention to constitutional claims that are only tangentially related to an individual defendant's guilt and equally careful attention to factual arguments that go directly to who did the crime. The consequences are apparent on any scan of reported criminal cases. Forty years ago, if one randomly read state appellate decisions, one would have found two sorts of arguments cropping up again and again in criminal cases, and getting serious discussion in the opinions: claims that the jury instructions did not correctly define the crime, and claims that the proof of one or another element or defense was insufficient. Today, appellate opinions in criminal cases contain much less

discussion of these sorts of claims, and much more discussion of search and seizure, police interrogation, jury selection, and the rest of the panoply of constitutional criminal procedure rights. Like the exclusionary rule, those rights have brought real and important gains. But there has been a price, and some of it may have been paid by innocents sent to prison because the system didn't look closely enough at the facts of their cases.

III. CONCLUSION

There is a common thread to the exclusionary rule's virtues and vices. The rule works in part because it is tied to criminal prosecutions. That feature makes Fourth Amendment claims easy to raise, which in turn ensures that lots of claims *are* raised, which in turn allows courts to serve as reasonably good watchdogs for certain kinds of police misbehavior. Using criminal litigation to regulate the police thus has enormous administrative and remedial advantages. The point goes well beyond search and seizure law—police interrogation is much more easily monitored through *Miranda* claims than through damages actions. Indeed, it goes well beyond the police. It is much easier to regulate misbehavior in jury selection by reversing convictions than by encouraging lawsuits by potential jurors; that is why our law uses criminal litigation to protect not only defendants but jurors as well.⁹ Throughout the law of criminal procedure, this dynamic has produced large bodies of law designed mostly to regulate the process as a whole, law that is not strongly correlated to the correctness of particular outcomes.

But using criminal litigation for purposes other than figuring out whether this defendant did this crime can be costly. Given the way the system allocates resources, all this regulatory law displaces something else. Defense lawyers and prosecutors and appellate judges alike pay much more attention to search and seizure issues (and police interrogation, and jury selection, and a lot else) than they used to. Unfortunately, they may be paying less attention to the thing that ought to matter most in any criminal justice system: whom we are sending to prison, and for what.

9. *See, e.g.*, *Georgia v. McCollum*, 505 U.S. 42 (1992) (barring race-based peremptory challenges by defense counsel); *Powers v. Ohio*, 499 U.S. 400 (1991) (barring race-based peremptory challenges even where defendant's race is different from race of those struck from the panel).

