Week 9. More about exclusionary rule

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Doug Karo · 3 days ago

[Caution: I don't know much about the law and its practice so this could be way off base.] The videos argue that an exclusionary rule for the states is not grounded in the constitution and actually is not needed because of traditional civil suit and tort remedies for those innocent folks who have been subjected to police searches and seizures (at least, I think that is the argument). It seems to me that the identified remedy is largely theoretical for most folks. If you can accept that the civil justice system is as broken as the criminal justice system (huge barriers to using it, huge costs, huge delays, unequal administration, ...), then the remedy is empty for most people most of the time. And, I suppose, It may be the case that the popular feeling is that the innocent should be willing to have their privacy violated in order to aid police in doing their jobs. Perhaps what is suggested is a local standard of practice shaped by local feelings about police and what is acceptable for them to be doing. Thus in some parts of the country there could be one standard and in other parts of the country there could be another. Perhaps what is suggested is that there should be different levels of protection for the innocent: one for the wealthy and highly connected who would be able to fight back if the police were silly enough to invade their privacy and one for some of the more respectable rest of the folks and a very different one for those left out of the other two classes (who are expected to be the source of the problem anyway). (This would mirror the different level of protections for the guilty so we would be consistent.) I don't buy this sort of 'equality' and would have hoped the constitution would have some way to protect us against it.

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Michael Blanco · 3 days ago

I've been, in the main, critical of Professor Amar's view of the Exclusionary Rule, but his lecture today brought me somewhat closer. I think that I still don't buy it because his presumption is that the right is for the innocent, not for the guilty. I agree that convicted felons lose many of their constitutional rights, but the key word is "convicted," that is, after the fact. Before the fact, even if they are criminals, we don't know that yet. The Fourth Amendment tells the government how they get to find out whether people are criminals or not. In other words, the domain of the Amendment has to do with the process of gathering evidence. To allow considerations to impose from beyond that domain seems dangerous to me. Also, the best remedies are those that bring the situation closest to the original state before the infraction occurred. If you the government wrongly takes away my free speech rights, the best remedy is that

which restores it, or that which makes me legally most "whole." Presumptive, before the fact that the government has obtained evidence illegally against me, the best remedy is that which restores my rights. The best remedy for this is the Exclusionary Rule.

Having said all this, it's still tricky. No one wants guilty people to go free. The assumptions we make about the purpose of the Fourth Amendment, e.g., protecting the rights of "the people," which is the language of the Amendment v. the "innocent," which is not the language of the Amendment, how one deals with new but relevant information that is illegally obtained, make it a logical morass in my view. As Professor Amar says, the sentence, "This sentence is a lie," is incomprehensible. Language does not have the precision of mathematics. As someone mentioned today early, there is "play in the joints" of constitutional interpretation.

I think that if we could somehow build such a high wall against government infractions of the Fourth Amendment for the innocent, I might buy it. The main thing is that I'd want huge disincentives automatically in place should the government conduct an illegal search and seizure against someone innocent. Something to the effect that the person(s) who makes the decision to go in is automatically dismissed upon a finding that Fourth Amendment rights were infringed along with a huge fine immediately payable by the government. If the government appeals, they still have to pony up a healthy sum every day (say $300 per day, adjusted for the future based on today's dollars) beginning on the day of the initial judgment. If the government is ultimately successful in their appeal (you either give up the case or you lose or are denied cert at the United States Supreme Court), you don't get your fine, but you don't have to pay back the $300 per day. Plus, the person who made the decision is restored to the position with back pay or also receives equivalent pay for the time lost if he or she doesn't want the job back.

This is all a little crazy, but what has to happen to alleviate Doug's concerns is that the government isn't allowed to tie everything up in court for decades to, in effect, deny the remedy.

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Wendy Horgan · 3 days ago

Hi Doug,
I'm glad you are continuing this discussion.
You talk about a perception - or your perception - that the exclusionary rule falls hardest on the lower classes. It certainly would be nice to have data to back this up, but I think that even the perception that the exclusionary rule contributes to inequality in the criminal justice system is a real problem.

In the very good Texas Tech Law Review article that Joel posted, perception or more particularly, perception of the moral integrity of the Courts and government was an important argument in favor of a strong exclusionary rule. These Courts argued that there is a dangerous slippery slope once the Courts open the door to government's illegally obtained evidence. If you don't have an absolute rule, what can happen is what you suggest - that the Courts let in evidence because of the politics of law and order with less and less regard to protections of the 4th amendment applied equally to all classes of people.

I like the argument about moral integrity of the Court and government more than I like the argument about protection of the innocent. The moral integrity argument says that everyone - good and bad guys - deserve the protection of the 4th amendment. The protection of the innocent argument says that it's not fair that the innocent is subjected to illegal searches and seizures and of course it is assumed that no incriminating evidence is found. Many of our classmates are persuaded by this innocent argument - they are happy to have criminals subjected to illegal searches that will yield evidence that will put the criminal in jail, but they don't want themselves violated in that way. To my mind, the innocent argument raises the perception again that there is one set of rules for the wealthy and middle class and another set for the lower classes.

Opponents of the exclusionary rule like to point out that the rule could also operate to deny defendants seeking to prove their innocence the means to compel production of exculpatory evidence. Of course, I support exceptions to the 4th amendment in these cases. However, I don't believe this is a true stumbling block - I rather think this stumbling block could be gotten around if there was an interest in doing so.

As I read the Texas Tech Law Review, I understand that the current law is that the 4th amendment as a constitutional right has been severed from the exclusionary rule. As a consequence, while the 4th amendment in incorporated against the states, the exclusionary rule is NOT. The exclusionary rule has been reduced to a mere rule of evidence that federal and state courts are free to variously apply. So I think that what you suggested is true - that the exclusionary rule is now a "matter of local standard of practice".

I'm going on too long. This is such a hard issue - but thanks again for continuing with it.

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Michael Blanco · 3 days ago

I found an interesting article from the Cornell University Law School's Legal Information Institute that addresses some problems with Professor Amar's tort remedy at <http://www.law.cornell.edu/anncon/html/amdt4frag5_user.html>. Essentially, the article states that the government and government officers have numerous means at their disposal to avoid harsh penalties including claim of good faith, qualified immunity, and unsympathetic juries. One lawyer I know said he almost lost his shirt when he foolishly took on a "slam dunk" case on contingency against a police officer who had pummeled someone without justification. In this environment especially, I want the gold standard of the Exclusionary Rule absent guarantees that aren't going to be there anytime soon.

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Wendy Horgan · 2 days ago

Hi Michael,
I've got to run to my volunteer job, but I wanted to add some quick thoughts about some of the

issues you have raised.

You've discussed the "probable" nature of the 4th amendment - that no one knows beforehand if the search will prove the innocence or guilt of the person being searched. I feel this embraces the notion of "innocent until proven guilty" in the broadest and most egalitarian sense. That means you are innocent no matter what your criminal record, no matter what crummy neighborhood you live in, no matter who you hang out with, no matter what you look like (think hoodie), and so on and so on. Once you allow an exception for the exclusionary rule after-the-fact, after you have already judged either in the mind of the judge or by a guilty verdict, the defendant to be a criminal, then you have seriously undermined the "innocent until proven guilty" principle.

There's another argument raised that I like that gets around thinking of the exclusionary rule as a remedy rather than as intrinsic to the 4th amendment. This argument is made by Justice Traynor in "Cahan" where he argues that it had to be understood that if the 4th amendment were observed, some evidence that would prove a crime would never be found - meaning that the standard of "probable" will necessarily cause the Courts to deny some searches that might have uncovered evidence of a crime. So Traynor argues that the 4th amendment is "exclusionary" by its very nature and that the 4th amendment framers understood that it would act to protect criminals at the same time that it protected the innocent.

Prof. Amar might rejoin that history says otherwise - that the clear practice at the time was to let in all reliable evidence, no matter how obtained. Clearly, if you have an innocent party, like Wilkes, then the question of excluding evidence doesn't come up and the only remedy is in tort. But if you have a guilty party, it's hard to reconcile the contradiction between the "whole" meaning of the 4th amendment - as you have argued in your structural analysis - which amendment says you can't search illegally and then to say but if you do, there is virtually no consequence. Doesn't make sense.

In the law review article, the Courts have made a big deal about the "broken egg" argument - meaning once there has been an illegal search, you can't put that broken egg back together again. Therefore, the issue is the limited one of after-the-fact remedy - the tort remedy that I'll read about more in the Cornell article you mention, or the remedy of **future** deterrence of police misconduct. Lots of wiggle room in the consideration of future deterrence because you can see how it would be easy for the Court to say that this particular instance of police misconduct is not likely to reoccur for whatever reason so that "future" deterrence is not applicable and illegally obtained evidence should come in.

Gotta go.

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Michael Blanco · 2 days ago

In addition to what you say above, I think we sometimes forget the tenor surrounding the "constitutional conversation" in Philadelphia and the state ratifying conventions. Of course, the

impulses in this conversation are too complex to fully capture, but one of the major one, which we can still see throughout the Federalist Papers, the Constitution, and conversations surrounding it, is a basic fear of governmental power. They fought a war over governmental tyranny, and the Articles, though unworkable, represent their basic attitude toward government, which was only expanded in the Constitution grudgingly. Those that didn't advocate for the Bill of Rights did so not because they didn't believe in the basic propositions there but because they thought they were unnecessary due to the structure of the Constitution. Criminality is always a threat, but in their minds, "governmental criminality" was the greater threat. Given this background, I think our default for constitutional interpretation should always be to put the burden of proof on the government, not the people.

That said, I think the "slog" is always towards increasing governmental power. It's not surprising that even in the immediate decades after 1789 we see an increase in governmental power beyond what we find in the written Constitution. The text of the Constitution implies with its two-year funding cycle (that does not apply to the navy, for example), and many of the documents from the framers demonstrate, fears over a standing army and the hope that defense could be primarily accomplished through state militias with the creation of a standing army only in time of greatest need. The 1st United States Congress only passed legislation for the United States Military during the last day of the session after being urged, twice, by George Washington. America has had a permanent standing army since then. Numerous other examples could be proffered, including judicial review, expansion of Commerce Clause powers, and so on. I am not saying that all of the this "slog" is bad, but because of it, I think we tend to forget how distrustful the framers and enactors were of government, and I think they leave their fingerprints of that distrust on the Fourth Amendment.

All of this to say that I think the Exclusionary Rule is a legitimate way to look at the Fourth Amendment from the "implied" standpoint that Professor Amar speaks about. And, I'm not surprised that very few of the states ever adopted it prior to *Mapp* and its successor opinions. Government seldom voluntarily gives up power. I'm thankful the Warren Court saw the clear implications of the Fourth Amendment and gave us the Exclusionary Rule.

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Wendy Horgan · 2 days ago

I really like what you've written here. I think that much of what we've learnt so far in the course supports your argument that fear of government power was an important part of the "constitutional conversation".

And, when you write that the default position should be to put the burden of proof on the government, not the people, that idea seems so self-evident, now that you've said it, that I have to wonder whether the Courts haven't said this before.

The only point that I'd quibble with is your statement that the current, very limited exclusionary rule, illustrates the general trend toward increased government power. (I am still somewhat guessing when I write about the Roberts Court.) I think you are right that the Roberts rule

gives far more power or deference to law enforcement than did the version of the rule under Mapp. But I tend to think of increased government power in federal terms. What's happened between the Warren and Roberts Courts is that enforcement of the rule has shifted from the federal courts applying a constitutional standard to states courts and local law enforcement applying a local, non-constitutional standard. I think of the Warren Court as exercising expansive government power but ironically in a way that checked the government power of other branches of the federal and state governments.

But I certainly agree with your point that it feels like more government power when there are fewer restraints on illegal searches.

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Michael Blanco · 2 days ago

I didn't mean to communicate at all that I think the Exclusionary Rule is part of the general trend towards increased government power. Whatever I said to imply that I certainly take back. I think the Exclusionary Rule mitigates expanding government power. I agree that the Warren Court was the use of one branch of the government to, in this case, limit another branch (executive power). The Warren Court certainly expanded some aspects of government, such as busing in *Brown II*, but this action was, obviously, in response to government's denial of equal protection for almost a century.

And, certainly, Roberts et al. are a "law and order" wing of the current Court. Scalia has been sniping at the Exclusionary Rule for years.

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 Louis Moya · 2 days ago

Or, one lawyer I know-- who almost lost his shirt when he foolishly took on a "slam dunk" case on contingency against a police officer who had pummeled someone without justification-- said he was critical of Professor Amar's view of the Exclusionary Rule.

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Anonymous · a day ago

Hi Michael,
My mistake - You were quite clear that you view the exclusionary rule as a check on government power and that fear of government power animated much of what is written in the constitution. You are also quite clear in your examples of how we've moved away from early mistrust of government power - for example we now support a standing army (and much more).
I get confused because there is a strange irony between the label "less activist" (applied to the

Roberts Court) which may be regarded as meaning less intrusion of government power and the consequence, particularly for criminal defendants, which is fewer rights. So if the government works as a super hero defender of civil rights - as it did during the era of civil rights and the Warren Court - then more government power means more civil rights. Or - as in the Roberts Court - you can simply expand government power in some areas at the expense of civil rights - e.g. law enforcement - while limiting government power in other areas that might act to defend civil rights - e.g. cutting back the scope of the Voting Rights Act.
Hard to keep it all straight - but thanks for your input.

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Michael Blanco · a day ago

No doubt this concept of "activism" has been twisted and turned in so many directions it's hard to keep straight. Conservatives scream about the "activism" of reading privacy into the Constitution ala *Griswold* but then want parental rights protected even though neither can be textually found in the Constitution. In my view, privacy is closer from a textual perspective than parental rights (I personally like the Douglas' "emanations of the penumbra" of *Griswold*), but I think both privacy and parental rights are "implicit in the concept of ordered liberty." Unfortunately, the entire conversation has become completely politicized, which means those who don't even bother to approach the topic seriously become instant experts on the Constitution by listening to a blurb by a political commentator who hasn't bothered to really learn anything either.

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Eric Hagemann · an hour ago

I've been thinking about this rule, and isn't there a simpler, justification for the exclusionary rule. You both seem to have some good thoughts on the matter, so I wanted your feedback:

If we allow evidence gathered illegally into a court, then the rules surrounding the legality of police collection of evidence have no teeth. If the police are prohibited from knocking down a door to search a house without a warrant, but if when they do so, the court allows admission of evidence gathered in that way, then laws prohibiting it means nothings. So, in order for the rules to matter, the exclusionary rules is necessary for the system to work as a whole.

Thus doesn't the enforcement of Amend 4 protection *require* the exclusionary rule in order to work on a daily basis.

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Michael Blanco · 13 minutes ago

I was trying to get to this point in some of my comments above, but I think you have done a

better job bringing the dilemma into sharper focus with your comment above. The exclusionary rule is about rules for gathering evidence, just like chain of custody and so on. If the defense can prove a break in the chain of custody, certainly at least for evidence that can be tainted, it's game over. You can't convict someone when any kind of meaningful possibility exists that the evidence could be tainted. The exclusionary rule works the same way in my view in terms of it's all got to be evidence that's obtained according to the rules. Of course, one can argue that evidence obtained in an illegal Fourth Amendment search isn't tainted from the standpoint of "spoiled" in, say, the way DNA evidence can. However, in my view, it's still tainted from the standpoint of it doesn't conform to the established standards of evidence gathering and therefore it can't be used. And in this case, were talking about the only constitutionally-enshrined method of evidence gathering, not something that was arrived at by statute or jurisprudentially. Professor Amar has appealed to a fortiori arguments a number of times in the course, and I also think it applies here. What applies to the lesser applies even more to the greater, and the greater is the Fourth Amendment. And while it's true that the Fourth Amendment doesn't specify the exclusionary rule, the procedures and logic of "the lesser" do call for it: we throw out evidence when not gathered correctly, and this point especially applies to Fourth Amendment evidence gathering.

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