

[Forums](#) / [Lecture Material](#)

[Help](#)

Week 9. More about exclusionary rule

✉ You are subscribed. [Unsubscribe](#)

🔔 UNRESOLVED

🏷 No tags yet. [+ Add Tag](#)

Sort replies by: [Oldest first](#) [Newest first](#) [Most popular](#)

[Doug Karo](#) · 19 hours 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.

👍 0 📉 · flag

[Michael Blanco](#) · 11 hours 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.

↑ 0 ↓ · flag

[+ Comment](#)

Wendy Horgan · 11 hours 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 is 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.

↑ 0 ↓ · flag

[+ Comment](#)

[Michael Blanco](#) · 9 hours 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.

↑ 0 ↓ · flag

[Wendy Horgan](#) · just now

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.

↑ 0 ↓ · flag

[+ Comment](#)

New post

To ensure a positive and productive discussion, please read our [forum posting policies](#) before posting.

| | | | | | | | | | | |
|-------------|----------|--|--|------|---------------------------|-----|------|--|--------------|---------|
| B | <i>I</i> | | | Link | <code><code></code> | Pic | Math | | Edit: Rich ▼ | Preview |
| <div></div> | | | | | | | | | | |

☐ Make this post anonymous to other students

☒ Subscribe to this thread at the same time

Add post

