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THE EXCLUSIONARY RULE: A DISPUTATION

Peter Lushing*

Four-thirty p.m.: the lawyer's decompression hour. Court has just adjourned. The belligerents and (dare we say it) a judge or two recuperate in saloons close by the courthouse; their families can wait. In one tavern, a rear booth is about to be occupied by Mark, earnest young county prosecutor. Mark is on the verge of that time when a criminal lawyer begins to doubt the sanity of the system and, perforce, his own integrity. He will be joined by Sam, a born defense counsel. Sam secretly worships America's criminal justice system for its holy commitment to procedural regularity. He has no other god.

Clutching beers, Mark and Sam plop down on the plush. They dispute the exclusionary rule, the law laid down by the Supreme Court that prohibits introduction at trial of evidence obtained in violation of the defendant's fourth amendment right to be free from unreasonable searches and seizures. The desirability of the exclusionary rule, like abortion and capital punishment, is one of the Great Issues of the Law. In these tangles the lawyer's fabled storehouse of persuasiveness is ineffectual, for our sentiments run deep, almost imbedded in our genes. Opinions will change, if at all, under the buffeting of experience, not the blandishments of reason and rhetoric.

THE EXCLUSIONARY RULE AS A TECHNICALITY

Mark

I've had it! Judge Hardy granted a motion to suppress half a kilo of heroin this morning and Big Bill Watson smirked his way out of the courtroom. Even a judge should know you can't try a heroin case without the heroin.

Sam

Come, come, counselor, you can't fault a judge for applying the law, can you?

Mark

Agreed, but what manner of law is this? Imagine, Wilson is going

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back to selling poison to kids just because, as Judge Cardozo put it, "the constable has blundered."\(^1\)

Sam

Cardozo's rejection of the exclusionary rule wouldn't have been quite as effective if he wrote against the criminal going free because "the constable has used a blunderbuss."

Mark

Hold on, are you suggesting that if we start convicting criminals instead of the police, the cops are going to shoot up the place?

Sam

Police wantonness (ahem!) is not just a pet paranoia of civil liberties types. Even before Earl Warren, the Supreme Court feared searches "without authority of law but solely on the authority of the police."\(^2\) The pre-Warren Court was not a bunch of hippies, you know—or even beatniks.

Mark

I'm not in favor of unleashing the police. I'm just against the exclusionary rule. The exclusionary rule is the ultimate technicality (ticks off on his fingers) it guts the proof at trial, it accomplishes nothing, and it helps only the guilty. Put that in your blunderbuss.

Sam

Why single out the exclusionary rule? There are dozens of rules that protect defendants.

Mark

Name one that isn't ultimately based on accuracy of the trial, and I include double jeopardy.

Sam

How about \textit{Rose v. Mitchell}?\(^3\) There the Court considered reversing a conviction after a fair trial just because the grand jury foreman was allegedly selected by racial discrimination.\(^4\)

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\(^3\) 443 U.S. 545 (1979).

\(^4\) The Court has just reaffirmed its holding in \textit{Rose}. Vasquez \textit{v.} Hillery, 106 S. Ct. 617 (1986). However, the Court now refuses to reverse a conviction after trial just because there was a violation of a Federal Rule of Criminal Procedure during the Grand Jury presentation of the case. United States \textit{v.} Mechanik, 106 S. Ct. 938 (1986). And it confines \textit{Rose} to equal
Antiracism is a fundamental policy.

So's prohibition of unreasonable searches and seizures.

Grand juries can easily comply with the Constitution.

Cops must obey the fourth amendment.

Racism in grand juries is minuscule compared to the number of illegal searches and seizures.

I rest my case.

But why exclude evidence a suspect is caught redhanded with just because the search was illegal? Where else on earth do they make such a farce out of trying to put criminals away?

Well, it's our law.

Nice try, but you can't put the burden of proof on me. He who wants a rule must carry his cause, and you want the exclusionary rule. You may not be used to the burden of proof but you've got it now, buddy.

I don't follow you. Even if there were no exclusionary rule, there would still be a rule, only it would let illegally seized evidence in. (Pause) I see you're not too impressed with that.

I'm not. That the exclusionary rule is on the books means nothing; in criminal law every day's a new day. Overruling or whittling a defend-
ant's rights down to a nubbin is a mere bagatelle, at least to this Supreme Court.

Sam

Suppose we put the burden of getting the next round on you, and when you come back I'll give you a little history lesson.

HISTORY OF THE EXCLUSIONARY RULE

Sam

First of all, I'm amazed that you treat a century-old doctrine like it was the latest pipedream of some judicial anarchist. Way back in 1886, in *Boyd v. United States*, the Supreme Court took it for granted that evidence obtained in violation of the fourth was inadmissible at trial.

Mark

That's what they get for taking things for granted.

Sam

It couldn't have been inadvertent, because in those days about the only right criminals had was for their name to be spelled correctly on their death warrant. And you mentioned other countries, not that that's relevant, but there's some kind of exclusionary rule in France, Scotland, Ireland, Australia, and Germany, at least. But who cares even if we're the only country with an exclusionary rule; how many countries have civilized criminal justice systems anyway?

Mark

England, for one, which I didn't hear you mention.

Sam

There'll always be an England . . . quick! Name another!

Mark

Fiddlesticks. I'll concede America's system is best, but that don't make it perfect. Your century-old *Boyd* case was distinguished away to nothing in *Adams v. New York*, which reaffirmed the commonsensical common law refusal to look at where trial evidence comes from,

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5 116 U.S. 616, 638 (1886).
7 192 U.S. 585, 598 (1904).
unless, of course, there's a problem of credibility. You're not the only one who knows the oldtimers. Adams read Boyd as going off on Boyd's being forced to produce the evidence himself; that made Boyd a matter of fifth amendment compulsory self-incrimination, not fourth amendment search and seizure, and the fifth, unlike the fourth, talks about admissibility of evidence—being a compelled "witness." And Boyd's reading of the interrelationship of the fourth and fifth amendments is dead as a doornail. So there.

Sam

Whew! Your erudition truly astounds me, Mark, but if you climb down from your tree you'll see the forest, which is that only ten years after Adams the Supreme Court definitively and unanimously adopted the exclusionary rule in Weeks v. United States. How many other seventy-year-old rules favoring the individual over the government would you like to chuck?

Mark

I'll have to go home and think about that one; the oldies were goodies, and fewies. But I am not a slave to history; I decide issues on their merits. Weeks, by the way, was weasely; it read Adams as going off on the ground that Adams had raised the exclusion issue during trial, instead of pretrial. That brand of nit-picking makes a farce and a mockery out of stare decisis.

Sam

(Liltingly) "Every day's a new day."

Mark

Big deal, so in a moment of madness the Court adopted the exclusionary rule.

Sam

Seventy years ago.

Mark

For the federal courts. That was giving away ice in the wintertime; the federal courts weren't dealing with the kind of crime where search and seizure is going to be a big issue.

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9 232 U.S. 383 (1914).
10 Id. at 396.
Sam
Never heard of Prohibition, did you?

Mark
Never heard of it in 1914. The exclusionary rule is much easier on FBI agents leisurely investigating in their three-piece suits than it is on city cops dealing with murders and street crime, and that's why the states had mostly rejected the exclusionary rule.¹¹

Sam
There's your first major misconception and we're only on our second round. The exclusionary rule doesn't regulate the conduct of anybody, not even the FBI in their leisure suits. It's the fourth amendment that governs police work, and most or all the states had similar constitutional provisions. The adoption of the exclusionary rule added nada to that; the fourth and the state constitutions are self-executing. "Operation of law," get it? It's just that nobody gave a damn if search and seizure requirements were obeyed or not because next to nothing was done about violations.

Mark
You're proving my point: the exclusionary rule was still easier on the FBI, or whatever the federal police were called then, because they could usually obey the fourth and still make a case that would stand up in court. Don't think the Supreme Court didn't know that.

Sam
I'm going to hoist you on your own petard. Even though the states were not bound by Weeks, about half of them decided to adopt the exclusionary rule on their own, including that hotbed of radicalism, Vermont in 1901.¹² So that's the vote of the majority; for sure if we count the Supreme Court.

Mark
You count the Supreme Court's vote? The same Supreme Court which in Wolf v. Colorado¹³ voted not to require the states to follow the rule? I recall that Frankfurter wrote that other remedies for fourth amendment violations, like civil suits and prosecutions, would suffice.

Frankfurter's exact words were "if consistently enforced." That was a signal to his liberal buddies that he knew darn well remedies besides exclusion were practically worthless. Poor Frankfurter was straitjacketed by his federalism; he felt honor bound to let the States, capital "S," experiment with what was seemingly an empirical question: what is an effective deterrent for violations of the fourth amendment? He thought that "reasonable States," like diverse children in one big happy family, could disagree on the need for an exclusionary rule. Frankfurter's opinion landed on the ash heap of history.

Mark

Thank you, Karl Marx. You want to know why Wolf was carted to the dump? You think the Court flip-flopped because of some religious experience? I'll tell you why—it was because of change in court personnel, and that's no better than politics. Follow this: Douglas, who had dissented in Wolf, joined with new Justices Warren, Brennan, and Clark to make a majority with Black, in Mapp v. Ohio. You'd think that Black had changed his mind since joining Wolf, but his concurring opinion in Mapp says he isn't even sure there's an exclusionary rule stemming from the fourth, as opposed to the fifth amendment; he reached his uneasy result by considering the two amendments together. Ten years later Black announced there's no such fourth amendment exclusionary rule. Meanwhile, three other Justices dissented in Mapp and the ninth didn't reach the merits. Mapp was 5-4, and a fluke at that. It was like winning the game on a wild pitch.

Sam

I don't care what Black said ten years after he voted in Mapp; there are no do-overs, Sonny.

Mark

Even if Black's Mapp opinion landed on the crack between the fourth and fifth amendments? Ho, ho!

Sam

The dissenters in Mapp didn't criticize the merits of the exclusionary rule; they just denied it could be constitutionally imposed on the states. So many Supreme Court and state judges being in favor of the

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14 Id. at 31.
16 Id. at 661-62 (concurring).
exclusionary rule proves that the rule at the least is a reasonable position.

Mark
That's what they said about slavery. Our Constitution—or wherever the exclusionary rule comes from—can be reinterpreted and rethought from time to time, and the scuttling of the exclusionary rule is an idea whose time has come. Three current Justices are against the rule.\textsuperscript{18} Even as we speak, two cases creating an exception to the rule for evidence seized illegally in good faith are hardly dry.\textsuperscript{19}

Sam
"Seized illegally in good faith." I like that, it's a catchy tune.

Mark
The Supreme Court thought so; there was dancing in the aisles. Now that the good faith exception has tolled, do you have anything to say before the Court sentences the exclusionary rule to death?

Sam
Two things: one, for my last meal I'd like another beer and two, what's your remedy for fourth amendment violations?

ALTERNATIVE REMEDIES FOR FOURTH AMENDMENT VIOLATIONS

Mark
Like Frankfurter would say if he were here drinking with us, what's wrong with convicting Big Bill on the evidence against him, and prosecuting the cop for the illegal search?

Sam
Prosecuting the cop? Do you moonlight at one of those comedy clubs? Look, you're a DA. How do you relish turning away from your daily menu of murders, rapes, armed robberies (and, of course, "big" drug busts), and stopping everything to try a cop who put his hand in a heroin dealer's pocket without permission? I don't think the jury would leave the box to deliberate.


Mark
Then let Big Bill sue the cop.

Sam
Oh yeah, Wilson would make a sympathetic plaintiff, that’s for sure.

Mark
Who cares if lawsuits are futile for the likes of him? Only a saint could be upset if we don’t pay off a criminal for the search that put him in the cooler.²⁰ Innocent victims of illegal searches must find it worthwhile to sue—there are 25,000 suits a year for police misconduct.²¹

Sam
How many of those suits are for beatings, and how many are just for search and seizure?

Mark
How should I know? I’ve got still another remedy: administrative discipline, also cited by Frankfurter. Bust the cop down to a beat on Staten Island.

Sam
Police departments are gonna give some high priority to disciplining their own—especially when the complaint comes in from an arrestee. Police brass attitude toward civilian complaints makes the Bar Disciplinary Committee look like Attila the Hun, and you know what those guys call stealing a client’s money: “comingling of funds.” I personally don’t see the exclusionary rule as a remedy for anything, so its replacement with a civil or criminal alternative is beside the point. I think deterrence as a reason for the exclusionary rule can be justified, though; keep your powder dry while I go buy the next round.

²⁰ Professor Stephen A. Saltzburg may be just such a saint. See S. Saltzburg, American Criminal Procedure 364 (2d ed. 1984) (actual damage to victim of illegal search includes the increased probability of conviction).
THE EXCLUSIONARY RULE AS A DETERRENT TO POLICE MISCONDUCT

Sam

(Taking a big swallow) Boy, we deserve this, don’t we? The dregs we have to deal with in court.

Mark

To say nothing of the defendants.

Sam

Right!

Mark

I say the exclusionary rule keeps out relevant, credible evidence, and deterrence or not that’s enough reason not to have the rule. Or do I have to justify the admission of relevant evidence to you?

Sam

Other things go on in the world besides finding facts at a trial. Trials are hemmed in by external considerations, like confidentiality in relationships—that’s why some witnesses are privileged not to testify.

Mark

So—does suppression of evidence deter the police? It seems to this humble thinker that the cop whose evidence is suppressed was not deterred.

Sam

And neither are murderers, but it’s not exactly time to repeal the penalty for murder. Obviously the deterrence resulting from suppression is for this cop and other cops’ future conduct.

Mark

So where’s the deterrence?

Sam

If the illegal evidence can’t be used to convict, the cops have that much less reason for doing the illegal search. An incentive to act in violation of the fourth amendment has been neutralized.

Mark

But suppression of the evidence is no reason not to do the search alto-
gether. You’re a cop on foot patrol, right? You see a known drug dealer walking quickly in a high addiction neighborhood and he’s got a bulge in his pocket. Do you have probable cause to arrest or search?

Sam

Of course not.

Mark

Do you have reasonable grounds to make a Terry stop?\(^22\)

Sam

Not on your life.

Mark

Do you figure that a “toss” would be illegal and any resulting drugs suppressed?

Sam

Sure do.

Mark

Maybe you do but good cops don’t operate on that contemplative level. A good cop is a lean beast of prey. His mindset is to look for trouble, and pounce when he sees it. Your suppression computer will only work for cops who should be behind a desk. Suppose the cop takes a quick reading, though, and concludes the evidence would be suppressed. What does he do next?

Sam

Nothing.

Mark

He just goes on his merry way? Now you sound like a virgin writing a sex manual. I’m talking about life, not logic, Son. If you’re a good cop you’ve got loads of incentives even apart from making a case for trial. By stopping this guy and fishing the drugs out of his pocket you’ve stopped crime, for one thing. There’s that much less heroin in commerce.\(^23\) And just putting the criminal through arrest and lock-up harrasses him and helps contain crime.

\(^{22}\) Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk).

\(^{23}\) “I’ll take anything . . . . If I get 10 decks of heroin off the streets, that’s $100 out of the dealer’s pocket and that much stuff that doesn’t go into somebody’s arm,” said a policeman,
Sam
You've barely interrupted him. And you sit in court for hours knowing you're gonna go home empty-handed. So where's the incentive now?

Mark
Well, a cop gets brownie points down at the stationhouse even for an illegal arrest; it's the courts that take the weight for tossing the case out the window. You miss the bottom line: the cop gains nothing letting the drug dealer go on his merry way. Or by letting an investigation go dead in the water when a little illegality would crack a case open. So why not do an illegal search, if nothing else will work?

Sam
You can't expect to have gain in every situation.

Mark
Right, but why will a cop choose absolutely no gain over the chance of some gain? And I haven't even touched on the cop who'll lie to me and the judge and beat the suppression motion that way.

Sam
Or the murderer who'll perjure his way to an acquittal.

Mark
Forget the murderer; cops become past masters at testifying and judges love to believe them—even judges who don't believe them believe them. If you want to deter cops you've got to threaten them. You've got to have civil liability or administrative discipline.

Sam
Maybe you do need some downside risk. But the cop wants to get people put away. Take away his raison d'être—the courtroom utility of the seized evidence.

Mark
I think you motivate people with fear of punishment, and suppression of evidence is no punishment because if the cop had acted legally

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24 "But what happens in the courts is somebody else's business—we teach that in the academy—and if cops allowed themselves to be frustrated, they'd be doing nothing in the streets," said a policeman in reference to repeatedly arrested drug offenders. Id. at B4, col. 5.
there'd be no evidence to begin with. He's just losing something in court he wouldn't otherwise have had, and stands a chance of gaining something like praise at headquarters or maybe a judge who cares even less about the fourth amendment than he does, and you know they're not in short supply.

Sam
Having to pay damages for the search or getting a demerit (heavens!) in his personnel folder is just too unlikely to be much of a deterrent. You'll change the cop when you remove his principal reason for making the illegal search. What do you think would cut down international terrorism more; assuming that terrorists were rational, increasing the chances of punishment, or making it certain that their demands will never be met?

Mark
Cops don't plan their actions like hijackers, I told you. You don't understand the existential rush of police work.

Sam
If you don't set the table they won't sit down to eat. That's why you've got to take away the carrot, not just brandish the stick, which in this case is more like a twig. Your examples are fastmoving street encounters or stymied investigations. What if it's a question of raiding a house and getting the goods on somebody, and the cop has time to get a search warrant. He'll go get the warrant rather than go in without one and blow the case.

Mark
Proving what?

Sam
That the exclusionary rule is deterring police from searching without a warrant.

Mark
So far all you've proven is that the exclusionary rule makes him apply for a warrant. What if the warrant is denied? What then?

Sam
He's not going to go on a raid without a warrant!
Mark
Why not? What has he got to lose at this point? Especially if he’s worked hard on the case, he’s not going to walk away from criminality just because some magistrate doesn’t appreciate good police work.

Sam
Any cop who raids a house after a search warrant was denied is certainly risking a lawsuit.

Mark
Aha! So he’s not deterred by the exclusionary rule, he’s deterred by fear of a lawsuit—one of your so-called “worthless” remedies.

Sam
(Exasperated) Well, what about all the cops who apply for a search warrant out of respect for the law?

Mark
Then it’s not the exclusionary rule that’s deterring them either—it’s the warrant clause of the fourth amendment.

Sam
(Bows head in mock homage) My compliments to the chef.

Mark
And if I might kick you when you’re down, I for one don’t remember that prior to Mapp the states without their own exclusionary rule were worse places in terms of police misconduct.

Sam
That’s not something you’d “remember.”

Mark
What do the statistics say about the rule’s deterrent effect?

Sam
For once statistics don’t lie: they don’t say anything. Some studies show police applying for warrants for the first time after Mapp. E.g., Canon, The exclusionary rule: have critics proven that it doesn’t deter police?, 62 Judicature 398, 400-01 (1979).
lice. You’re the prosecutor—what’s your experience?

Mark
To me the exclusionary rule is an absurdity once you get beyond deterring kicking doors in at 3:00 a.m. for the fun of it. The cops I talk to don’t see any rhyme or reason in the rulings in their cases: to them there’s no consistency in the law. Who outside of a professor can possibly keep up with the law of search and seizure? The United States Code Annotated has over 2,000 pages of fine print on the fourth amendment.

Sam
Come on, most of that stuff is the same thing over and over. Judges love to drone on about the well-settled. It makes them feel secure. Police have to know just a few basic rules to keep within the fourth amendment most of the time.

Mark
Are you kidding me, or what? Suppose a cop wants to search a car—not a bizarre situation, right? First the Supreme Court says he can take it down to the station house after an arrest and search it there without getting a warrant. Then the Court says he can’t search a package in a car stinking of marijuana without a warrant—even though the search is now done at the scene. The very same day they say you can search a jacket inside the car without a warrant. That case reverses New York’s highest court, which apparently doesn’t know the law either. Less than a year later they overrule themselves and now say you can search a package in the car without a warrant at the scene. And you’re sitting there telling me a policeman just has to know a few simple rules, and he’ll be deterred. Do you know what the law of car searches is?

Sam
What is this, “Friends on Trial”? There’ll always be a gray area where nobody is sure what the courts will do. That’s true of the fourth amendment, and that’s true all over the law. We don’t abolish

26 E.g., Schlesinger, The exclusionary rule: have proponents proven that it is a deterrent to police?, 62 Judicature 404 (1979).
Property or the Uniform Commercial Code just because innocents are hurt in a certain number of cases because they couldn’t predict what the courts would do.

Mark

I never knew Property and Commercial Transactions were meant to deter people.

Sam

No, but a prime aspect of those areas is supposed to be reliability. We’re talking about Money, Chucko. Any difficulty of application of the fourth amendment is a problem with the substance of the amendment, not with the exclusionary rule.

Mark

Unless one is justifying the exclusionary rule on deterrence grounds. Have you forgotten what your position is, or did you just stop listening to yourself? I have the distinct impression the law of search and seizure is evolving toward greater and greater complexity; these judges have to do something to keep the job from getting boring. They’re in their little fiefdoms making distinctions all day. I can’t blame them—it’s human nature to want to exercise your brain muscle. But they’re making search and seizure into a game of Trivial Pursuit.

Sam

I think upon sober reflection you’ll agree that most situations fall within a rather hard core of fourth amendment doctrine . . .

Mark

. . . which the cop will know . . .

Sam

. . . when he sees it. And let’s see if you know what two beers look like when you see it.

SUPPRESSION OF EVIDENCE AS A DISPROPORTIONATE RESULT

Mark

Let’s take your hardcore cases. Now suppose the cop should’ve been deterred by a clearly foreseeable motion to suppress—but this cop is a naughty boy: he’s oblivious. Why give a huge windfall to the defendant? Why not treat him like the criminal he is, excuuum uuuuse me, ac-
cused of being, and handle the cop's violation of the law separately? To coin a phrase, the exclusionary rule mixes apples and oranges.

Sam

Hey, that's pretty good, I've got to remember that one.

Mark

Don't worry, tomorrow you won't remember a thing. Now just balancing the trivial discomfort to the defendant from the illegal search against letting him go free from a child murder or whatnot shows how irrational this exclusionary rule is. Was the fourth amendment invented to protect the interests of criminals?

Sam

There you go again. Your complaint is with the substance of the fourth amendment, not the exclusionary rule. As I said about two beers ago, police labor under the amendment, or are supposed to, whether there's an exclusionary rule or not. That much was decided when the amendment was ratified. I'm sure you weren't at the Constitutional Convention.

Mark

I don't go to meetings.

Sam

(Shouting and pounding) The amendment, not the exclusionary rule, governs cops' conduct.

Mark

Don't holler or you'll get us both excluded from this joint. The fourth amendment had nothing to do with cops and robbers. It was passed to curtail writs of assistance used by customs officials to harass businessmen.\(^32\)

Sam

If it was to limit Customs, it had to be intended to limit grosser government invasions as well. And stop sidetracking me, I'm not a juror. Now your child murderer would not have been caught in the first place had the cops obeyed the fourth amendment. And why do we keep talking about killers going free? You know as well as I do the

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courts know how to make fine distinctions in those cases. Show a judge a murderer and you’ll get his brain pumping iron.

Mark

Oh, great. The judge preserves the exclusionary rule by winking at the cop’s violation of the fourth. How hypocritical can you get? I always had this feeling about you liberals...

Sam

Shaddup! Look, you live in the suburbs, and you don’t think your house can be crashed by half a dozen Dirty Harrys in the middle of the night, magnums drawn, you and your wife rousted from bed and spread-eagled against the wall, your kids frightened half to death and maybe traumatized for life, all because of some hunch down at headquarters. You don’t picture yourself stopped on the street and made to ID and account for yourself just because you look funny to some cop with a little time on his hands, your body patted down and your pockets emptied. You can’t even imagine being yanked out of work and hauled down to the stationhouse for interrogation “on suspicion,” or having your car pulled over because a trooper doesn’t think you really can afford a Buick. You don’t see the fourth amendment as necessary to protect you so you don’t give a damn if the cops are deterred from violating it or not. You think you’re immune. But what about so many others, like plenty of people in the cities? Take away whatever residue of security from the cops they still have and you’ve left them with no psychological defenses for daily life. Shouldn’t they be protected from terror and humiliation? It’s not just criminals the cops go around molesting. Of course the fourth amendment isn’t there to protect criminal interests—it’s there for all the good burghers, even if they can only afford to eat at Burger King. That’s why your balancing act of freedom for the criminal against invasion of his privacy is a sideshow—there isn’t supposed to be proportionality here or even any remedy whatsoever for the defendant. It is a windfall, which we gratefully bestow on the scum of the earth because of the fierceness of our commitment to the security of us all, just as we’d rather let many guilty men go free than convict a single innocent.

Mark

(Claps slowly, sarcastically) “God bless us all,” said Tiny Tim. Quit psychologizing me, will you? That’s out of court. Look, I want poor

people to be protected from the cops as much as you, their unelected spokesman, do; in fact, I also want them protected from the vermin they live with, something I’m not sure of in your case. I’d rather hear from the poor and the minorities how they feel about a strong police presence than from people like you, in your infinite wisdom and generosity to impose that wisdom.

Sam

Again, you’re talking about the fourth amendment, not the exclusionary rule.

Mark

Don’t interrupt. The outrageousness of your argument came to the surface when you said that the child murderer “would not have been caught in the first place had the cops obeyed the fourth amendment.” We wouldn’t be here now had our parents gone to sleep earlier. But they didn’t, and we are, and we can’t act as if we’re not. Isn’t it a touch absurd to act as if a killer has not been caught just because they find the body in his basement without a warrant? You know what they call people who act as if reality isn’t real? “Insane.”

Sam

Isn’t it equitable for a court to restore the status quo ante for a violation of law?  

Mark

Listen Crazy Eddie, equity says give the murderer back the body?  

Who in the world can believe this guy’s entitled to equity? Pardon me, but isn’t there a slight question of unclean hands? And while you’re up “washing” your hands, I believe the next round is on you.

THE COURT AS LAWBREAKER

Sam

Like any rule, the fourth amendment doesn’t stand in isolation from the rest of the law. Just as property law can’t contradict criminal law and give the thief title to stolen property, the fourth amendment can’t


be contradicted by any evidence law which would allow the police to use the fruits of an illegal search.

Mark
Forget the thief's rights. Why should a court lose its power to receive evidence because of what somebody else did? Look at the court's rights, not the cop's. The court violates no law in admitting the evidence—unless you beg the question.

Sam
How can the law say to a cop "don't make this search" and then turn around and let him make a case in court by doing it—especially since the whole purpose of the search was to get evidence to present in court? Is that logical? As Monrad Paulsen said, when the police break the law and the courts reach eagerly for the benefits, the man in the street gets the idea that government is staffed by a bunch of hypocrites.36

Mark
Or liberals. Paulsen was preaching to the converted.

Sam
Like Brandeis was when he wrote that the government "teaches the whole people by its example"?37 Like the Court was when it said "[n]othing can destroy a government more quickly than its failure to observe its own laws"?38

Mark
All that fire and brimstone is for the people who live far removed from cops and robbers. The man in the street—who isn't even there anymore because he's afraid of being mugged by some guy who just got his motion to suppress granted—he wants action from the criminal justice system, not teaching.

Sam
He wants Judge Hitler or Judge Stalin presiding.

Mark
That’s not what I’m saying. Paulsen and Brandeis are wrong to think that in fact the average man sees admission of illegally seized evidence as immoral or hypocritical. The only hypocrisy he sees is when the court tosses a perfectly good case out the window. Forget the blarney about government hypocrisy and go out and meet the folks. The criminal justice system is for them—not the other way around. We had people before we had government, you know.

Sam
Wasn’t that when we lived in caves? The system can’t be governed by what the unsophisticated think.

Mark
I sense a reversal of position, counselor, as well as a slur on Democracy, sir! You must be on the ropes.

Sam
Well . . . the exclusionary rule can and should be explained to the general public.

Mark
Oh boy! If you’re so hot on teaching the Common Man why we free proven murderers, why not have someone come out on the news every night and tally that day’s dismissals due to the exclusionary rule? Then we’d see the government “teaching” the people, all righty! The defenders of the exclusionary rule ought to take up a collection to publicize the rule in action. A well-informed public won’t just abolish the exclusionary rule, they’ll take the fourth amendment with it.

Sam
Now you’re getting vicious.

Mark
It hurts, doesn’t it!

Sam
(A touch whiney) I’m sorry. The rule enforces the Constitution, and we don’t have a choice in the matter. I’ll concede right here and now

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39 Monrad Paulsen was perfectly aware of this argument. See Paulsen, supra note 36, at 256.
that you can whip up public frenzy for repeal of the Bill of Rights, and even for lynch law.

Mark

(With mock solicitude) Oh, Sam. Please just show me where the Bill of Rights provides for an exclusionary rule.

Sam

It doesn’t have to in so many words. For every law you don’t need another law that says you have to obey the first law. Since when do you need an explicit provision that says you have to obey the fourth amendment?

Mark

Why do you assume excluding the evidence is “obeying” the fourth amendment? There’s tons of law that isn’t enforced by specific performance or restoration of the status quo. Who says the fourth amendment provides any more than a damage remedy?

Sam

You’re looking at the fourth amendment in a vacuum. It’s taken for granted by the Supreme Court that we exclude statements obtained in violation of sixth amendment right to counsel, and even perfectly credible confessions obtained in violation of due process. What do you say to that?

Mark

You can’t use the sixth amendment right to counsel analogy. Just last year the Supreme Court adopted the inevitable discovery exception to the exclusionary rule in a case involving statements obtained in violation of the right to counsel. That puts sixth amendment exclusion on the same theoretical basis as fourth amendment exclusion, so you can’t use one to bolster the other—that’s a bootstrap argument.

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43 The inevitable discovery exception admits into evidence that which was illegally seized or discovered as a result of an illegal seizure, if the item would ultimately or inevitably have been discovered even if no violation of any constitutional provision had taken place. See Nix v. Williams, 467 U.S. 431 (1984).
44 Id.
Wrong. The inevitable discovery exception was applied by the Court not to the statements themselves, but to the physical evidence obtained as a result of the statement (a body, by the way!). The Court’s deterrence analysis was applied to exclusion of fruits of statements, not to exclusion of statements themselves. So exclusion of statements under the sixth amendment is still an independent reason for excluding evidence directly seized in violation of the fourth amendment. What about credible confessions obtained in violation of due process?

Hell, I don’t think they should be excluded either!

Now you’re against due process. So who’s on the ropes?

I didn’t say that; I just said I don’t believe in exclusion as the remedy for every violation of due process.

Well, the law can’t be “cops can’t make warrantless searches or violate due process but if they do the courts will act as if it doesn’t matter.” Where are your principles?

I think I left them in my other pants. Where’s the proof the rest of us are any better off under your principles?

Is that the point of principle?

It is to me; why have principles that make us worse off?


46 See the exquisite discussion of the analogy between fourth amendment exclusion of evidence and the refusal to admit credible confessions obtained through violation of due process in Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 337-45 (1974). The entire article is tremendously rewarding.
If we are worse off—which I don’t believe for a second—it’s because of the fourth amendment, not the exclusionary rule. It’s just immoral for the courts to punish law breakers while the courts themselves receive stolen property, as it were. As Holmes said, “it is a less evil that some criminals should escape than that the Government should play an ignoble part.”

On the soapbox, again! Who says a court’s acceptance of illegally seized evidence is ignoble? Courts will take wiretaps and buggings of a man’s conversations with his family and friends on his phone or in his bedroom. They’ll accept statements elicited by informers, stoolies, plants, and provocateurs of every shade and description. They’ll take testimony of known perjurers and plea-bargainers looking to save their rears. They’ll even convict a man for selling heroin the feds gave him to set him up. So what is so corrosive to the courts’ moral fiber about evidence obtained in violation of the fourth amendment?

Your examples are distasteful, not illegal. Illegality is something special; even a prosecutor should be able to appreciate the uniqueness of illegality. And what of the ancient maxim about not profiting by one’s own wrong?

Back to the Chancellor’s foot. In court the prosecutor is only incidentally profiting from the evidence; it’s society that gets the direct benefit of the conviction. A trial isn’t a game the prosecutor “wins.” Whether the defendant committed the crime is an objective fact, separate and apart from the fortunes of the opposing attorneys or the cops. This is your whole fallacy, right here: you don’t see the trial as determining anything, but as just an even contest that somebody wins and somebody loses. Tennis anyone?

How about next Saturday?

I say the law always allows what is necessary to prevent greater evils.

The FBI could search buildings for an atom bomb if they thought a terrorist had one, even without probable cause.

Sam
Where in the fourth amendment does it say that?

Mark
Great! Now you’ll have us all blown to bits on principle. *(Singing)* Who’ll obey the fourth when we’re far away?

Sam
O.K., let the FBI violate the fourth to save the world—they just won’t be able to use the evidence to prosecute.\(^49\)

Mark
Why not?

Sam
Because the search was illegal.

Mark
Then you are endorsing illegality—ha!

Sam
I’m not endorsing it—I’m insisting on a remedy.

Mark
Boy, is this doubletalk.

Sam
Are you saying the law should be “let’s pretend no cop should make an illegal search, but if he does we’ll say ‘Oh, well, time to choose the lesser of evils’”? How can the courts, the ultimate motivation for the cops’ illegal searches, take a stand favoring obedience to the fourth if they’re going to let in the fruits of its violation? Where would judicial integrity be?

Mark
You can’t eat judicial integrity either. If the exclusionary rule is a matter of judicial integrity, why don’t the courts enforce it on their own instead of requiring a motion to suppress by a defendant whose rights were violated, why doesn’t the rule apply in the grand jury, why isn’t all evidence discovered as a “but for” result of an illegal search suppressed, and how in blazes do you account for the harmless error rule in search and seizure cases?

Sam
(Mournfully) It’s true, the Supreme Court now sees the rule strictly in cost/benefit terms of deterrence and doesn’t invest it with moral dimension. Dilution of the principles of Weeks and Mapp is chic now. But the substratum—the rock the rule is carved out of—is the morality of obedience to law, no matter what a later Supreme Court bench says, or even what the yuppies say.

Mark
Fine, now we’re turning criminals loose on grounds nobody can even agree on.

Sam
Your fallacy is your total incomprehension of anything you can’t see with your eyes or pick up in your paws. I’m going to pick up the last round now, and then we’ll talk about the nightmare we’d have if you got your way.

IF THE EXCLUSIONARY RULE WERE ABOLISHED

Sam
A while ago you called me “insane” for not deferring to reality. You want to talk reality? O.K., this is it. Right here and now, tell me what happens if we abolish the exclusionary rule? Tell me, what will the cops and everybody else think if the courts discard the exclusionary rule? Or if Congress repeals it, which I assume can’t be done, or if

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there is a constitutional amendment? Turning around after all these years and admitting illegally seized evidence will be interpreted by the cops only one way: the fourth amendment is dead and buried. A cop won’t hesitate before doing an illegal search—as far as he’s concerned, the courts will be in his corner, or at least looking the other way.

Mark
You’re saying repeal of the exclusionary rule would make the cops go ape.

Sam
Why not? They would have been told to “go for it.” Who would stop them? The press? The media can only sustain an interest in the first amendment; they’d never campaign for obedience to the fourth. And there’d be no political pressure from the people and communities that would suffer the most; they’re powerless by definition. The only governmental institution that speaks with moral authority in this country, the judiciary, would have been muzzled. At the first sign the courts don’t have a categorical commitment to the proposition that cops must obey the law it’ll be open season on the lower class, the minorities, the deviants, the radicals, the “usual suspects,” and anybody else the cops feel like pushing around. Without an exclusionary rule the courts won’t be monitoring police conduct—it will be as if the fourth amendment has been cut loose and drifted off into outer space. The exclusionary rule isn’t a mere remedy for violation of the fourth amendment—it is the fourth amendment, the heart and soul of a living, breathing, belching, sweating fourth amendment, one which is alive and actually prohibiting unreasonable invasion of our security. Without the exclusionary rule the fourth amendment would be a slogan, like “land of the free.” And believe me, the law that protects us from wanton police is the primary law. The exclusionary rule says that, loud and clear, by rearing up against police illegality at the precise point where the cop stands to gain from it; that’s the place for the fourth amendment to operate—when the seized evidence is offered at trial—not in some dinky tort forum. People always think that if somebody does something wrong and the authorities know about it but impose no penalty, then the act is not illegal in the first place. People identify illegality with a realistic chance of paying a penalty. When the New York Times reported Weeks it didn’t say there’s a new remedy for fourth amendment violations—it said the case “revolutionized” prosecutions because it restricted the conditions under
which evidence could be seized. If the Times, with the Weeks opinion in front of its nose, confused exclusion with rules limiting search and seizure, what the heck do you think the cops and the general public are going to think if exclusion is abandoned? They’ll think the fourth has been repealed, and they won’t be half wrong.

Mark
If I could just get a word in edgewise, the Times wasn’t confused; the exclusionary rule did restrict the conditions under which evidence could be seized—evidence for court. The fourth amendment all along had restricted the conditions for seizure of items aside from their use as evidence.

Sam
Look, you’re running out of ideas. Remember last month we were walking on South Street and we saw a cop go up and frisk that guy who was just standing on the corner?

Mark
Whoa! That guy’s case hasn’t even come up yet. Nobody’s decided that cop violated the fourth amendment.

Sam
(Rising to his feet) That’s just the point. Without an exclusionary rule, nobody is going to say whether the cop violated the fourth amendment or not—which is precisely why we need an exclusionary rule!

Mark
(Also rising) I’m sorry, I’m just not persuaded. We’re not going to turn into a police state if they do away with the exclusionary rule. There are just too many checks and balances in this country for that to happen. On the contrary, a big part of freedom is feeling you can walk down the street without some bandit knocking you on the head, and we’ll all feel a lot freer knowing that the cops can do their job stopping criminals without being penned in by hairsplitting regulations. In fact, once the courts stop dismissing cases on technicalities the whole system is going to regain integrity, and win the admiration of all. So repealing the exclusionary rule is going to liberate everybody but the crooks.

56 N.Y. Times, Feb. 25, 1914, at 1, col. 6 (headline: May Not Seize Papers).
Sam

(As the two head for the door) As I've been saying all afternoon, your problem is with the fourth amendment, not the exclusionary rule. If you want to get rid of the fourth amendment, do it the proper way, through constitutional amendment; don’t hide behind abolition of the exclusionary rule.

Mark

(Draping his arm around Sam’s shoulders) I’ll see you in court Saturday.