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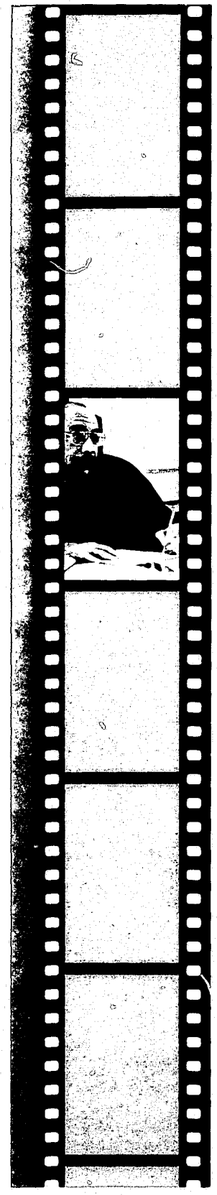

CRIME FILE

Exclusionary Rule

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Your discussion will be assisted by your knowing how the exclusionary rule evolved, and why some think it is an important means for preventing unreasonable searches and seizures while others regard it as an unfair way of denying evidence.

What Is the Exclusionary Rule?

The exclusionary rule is among the most controversial and the most passionately debated rules of law governing our criminal justice system. It is not hard to understand why this is so. The exclusionary rule is the primary means by which the Constitution's prohibition of unreasonable searches and seizures is currently enforced: thus it is seen by some as the primary protection of personal privacy and security against police arbitrariness and brutality. It is also the basis for judges' decisions to exclude reliable incriminating evidence from the trials of persons accused of crime, and it is thus considered by others to be little more than a misguided loophole through which criminals are allowed to escape justice.

In its most general sense, the exclusionary rule is a rule of evidence prohibiting a judge from admitting evidence in a criminal trial if law enforcement officers acquired that evidence in a manner that violates the defendant's constitutional rights. While there are certain exceptions to that rule, they are few in number and limited in scope.

One kind of enforcement violation that invokes the exclusionary rule is police action that is contrary to the fifth amendment's requirement that "no person...shall be compelled in any criminal case to be a witness against himself," the so-called right against self-incrimination. Forced confessions and other kinds of compelled testimony are routinely forbidden from being introduced as evidence when their origins are exposed. Whether a particular action constitutes compulsion is often a matter of some controversy. However, the rule that a defendant's compelled testimony may not be used as evidence in his trial is a clear command of the Constitution. Thus, it is not the *fifth* amendment's exclusionary rule that generates so much controversy. For that, we must look to the language of the *fourth* amendment to the Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purpose of this amendment is to ensure that the United States does not become a nation where, in the words of Patrick Henry, "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason" by force of government authority. Unlike the fifth amendment, which in its very words refers to the process whereby evidence is introduced in court, the fourth amendment is silent on the question of the use of evidence in court. It addresses itself only to the process whereby one's person and one's possessions may be subjected to inspection and seizure by public authorities.

The exclusion of evidence from a defendant's trial when that evidence has been obtained in violation of the defendant's fourth amendment rights is the manner in which those rights are currently enforced. It is exclusion in these circumstances that has generated a great deal of public debate and that concerns this episode of Crime File.

This program brought to you by the National Institute of Justice. James K. Stewart, Director. The series produced by WETACOM through a grant to the Police Foundation.

History of the Rule

In considering the constitutional status of the exclusionary rule and its relation to the fourth amendment, it is useful to know when and how the rule came about. The exclusionary rule is the creation of the Supreme Court of the United States. It was unknown to the English law our ancestors brought with them to America and unknown to the generation that adopted the fourth amendment as part of the Constitution. Until 1914, the rule in American courts was the same as it still is in British courts: namely, the illegality of a search and seizure was irrelevant to the question of whether its fruits were admissible as evidence in a criminal trial.

In 1886, in *Boyd v. United States*, the Supreme Court held that to seize personal papers violated the fourth amendment and that to use them as evidence violated the fifth amendment. But that was a somewhat eccentric case that most scholars believe should have been decided on fifth amendment grounds alone. In 1914, however, the Supreme Court decided *Weeks v. United States*. In that case, the Court held for the first time that a violation of the fourth amendment by itself could justify the exclusion of evidence.

How were fourth amendment rights enforced before 1914? Courts relied upon common law, which regarded unlawful police behavior violating a person's privacy and property as a form of trespass against that individual. To remedy such an injury, the victim simply petitioned for a return of the property and sued the offending officer for monetary damages.

Following the decision in *Weeks*, the reach of the exclusionary rule was gradually extended. For instance, in *Weeks*, the Supreme Court acknowledged a right to have illegally seized evidence excluded only if the evidence was something the defendant legally owned and had asked to have returned prior to trial. After *Weeks*, the Court removed the requirement that the defendant own the evidence in question. As a result, contraband, such as stolen goods and illegal intoxicants, was just as eligible for exclusion as personal property.

The most radical extension of the exclusionary rule took place in 1961 in *Mapp v. Ohio*, one of the cases discussed in the program. In that case, the Supreme Court broke with 180 years of constitutional tradition and applied the exclusionary rule not only to *Federal* courts, as it had done in 1914 in *Weeks*, but also to *State* courts. It did so by concluding that the 14th amendment to the Constitution, which guarantees due process of law to persons accused of crime in a State court, requires State courts to adopt the same remedy for unconstitutional searches and seizures as the Court had required of Federal courts in *Weeks*—namely, the exclusionary rule.

Justifications for the Rule

There are three basic arguments in favor of the exclusionary rule: (1) the rule protects a constitutional "right to privacy"; (2) the rule upholds the integrity of the judiciary by precluding judicial acquiescence in denial of an individual's fourth amendment rights; (3) the rule deters police misconduct by forbidding the use of improperly acquired evidence. All of these arguments have been adopted at one time or another by the Supreme Court.

1. ***Protection of privacy and dignity***. In *Mapp v. Ohio*, the Court maintained that the exclusionary rule is an "essential part of the right to privacy"—a right the Court found to be inherent in the technical language of the 4th, 5th, and 14th amendments. In this view, the Constitution requires the exclusionary rule as a remedy for the unlawful invasion of the defendant's privacy and dignity secured by the fourth amendment. The rule is also constitutionally required in order to prevent any additional invasion of privacy and dignity due to the use of unconstitutionally seized evidence in a criminal proceeding against the victim of an illegal search. To adherents of this view, in the words of one of the program's discussants, "an attack on the exclusionary rule is an attack on the fourth amendment itself."

2. ***Requirement of judicial integrity***. A second justification for the exclusionary rule is that it is needed to maintain the integrity of the judicial branch of government. Unlike the justification outlined above, this argument is not grounded on an alleged fourth amendment foundation. Rather, it rests on a concern for the moral integrity of the administration of justice. In relation to cases concerning illegal searches and seizures, this position originated in a dissenting opinion by Supreme Court Justice Brandeis in 1928. Brandeis argued that the exclusion of illegally seized evidence "preserve(s) the judicial process from contamination." If courts allowed people to be convicted on the basis of such evidence, those courts would become accomplices to the searching officer's misconduct, thus "ratifying" an illegal act. In effect, courts would then be teaching disobedience to the law while ignoring the purpose of the fourth amendment.

3. ***Deterrence of fourth amendment violations***. Since the mid-1960's, the Supreme Court has consistently relied upon one justification for the exclusionary rule—its value in preventing illegal searches and seizures. Interestingly, the Court asserted this rationale for the rule at the expense of the right-to-privacy argument. In *Linkletter v. Walker* in 1965, the Court denied that the exclusionary rule had anything to do with vindicating the privacy of the victim of an illegal search. The Court stated that "the ruptured privacy of the victims' homes and effects cannot be restored" by means of the exclusionary rule. "Reparation comes too late." In keeping with its abandonment of the right-to-privacy argument, the Court since *Linkletter* has repeatedly affirmed that the exclusionary rule is not a personal constitutional right of the accused. The Court now views the rule as a judicial invention to deter police officers from violating the fourth amendment by, in the words of the Court, "removing the incentive to disregard it."

Criticisms of the Rule

Criticisms of the exclusionary rule commonly take three forms: (1) the rule is not an effective deterrent of unlawful searches and seizures; (2) the rule is morally bankrupt and corrupts the administration of justice; and (3) the rule does not rest on the Constitution and is therefore beyond the constitutional authority of the courts to invent.

1. ***A questionable deterrent***. Not surprisingly, the Supreme Court's adoption of the deterrence rationale for the exclusionary rule has led a number of social scientists to study the rule's effectiveness in accomplishing its stated objective. On the whole, the news has not been good for the rule's supporters. Six of the seven major empirical studies of the rule's effectiveness have concluded that the rule has little or no value in deterring police misconduct. The seventh study reaches no definite conclusion. The Supreme Court itself has confessed that it has "acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system" (*United States v. Janis*). Many observers of law enforcement have noted, however, that arrests rather than convictions are the primary measure of success in police work. According to its critics, then, the exclusionary rule is well tailored to affect the life of the judge, the prosecutor, and the criminal defendant, but it has no teeth when it comes to disciplining the police.

2. ***A miscarriage of justice***. Many critics of the exclusionary rule find it unjust that reliable incriminating evidence cannot be used in a trial simply because of the manner in which it was obtained. Justice Benjamin Cardozo once expressed astonishment that "the criminal is to go free because the constable has blundered." The argument made by critics of the rule to back up Cardozo's sentiment is this: Rules of criminal procedure are meant to provide for conviction and punishment of the guilty while protecting the innocent. If two offenses have been committed—one by the defendant and one by the police officer—then both should be punished. The exclusionary rule departs from the truth-finding process of a trial by suppressing proof of guilt, and it does nothing to punish the police officer who broke the law. Thus criminals often walk free while the ends of justice go unserved.

3. ***An abuse of judicial authority***. A third criticism of the exclusionary rule goes beyond a critique of its existence to a critique of its creator—the Supreme Court. According to this view, the role of the courts is to interpret the law, not to make it. If the courts have authority to apply an exclusionary rule, it must be because the Constitution requires them to do so, or because a legislature has created such a rule. The exclusionary rule, say its constitutional critics, is based neither in the Constitution nor in legislation but only in judicial fiat. First, the fourth amendment is silent about how it should be enforced. Second, the ideal of judicial integrity is not well served by a rule that suppresses incriminating evidence: it is in any case an ideal not firmly rooted in any constitutional provision. Third, deterrence of unlawful police behavior is the domain of legislative and executive action, not of the judiciary acting as a legislature.

Recent Developments

Among the criticisms of the exclusionary rule as an across-the-board response to all types of fourth amendment violations is that it sweeps too widely. Chief Justice Burger has pointed to "the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition." Honest mistakes that are made by police officers and that constitute no great injustice to an individual are met with the same penalty as purposeful and flagrant violations of fourth amendment rights—the exclusion of evidence. In 1984, in the cases of *United States v. Leon* and *Massachusetts v. Sheppard*, the Supreme Court created a "good faith" exception to the exclusionary rule. The Court ruled in these cases that evidence obtained by officers acting with a search warrant issued by a judicial officer should not be excluded if a judge later finds that the warrant was invalid, provided its invalidity was not obvious to the police officers.

Since most fourth amendment violations do not involve defective warrants, the immediate effect of this ruling on the exclusionary rule is minor. Nevertheless, many Court observers expect further modifications of the exclusionary rule as other good-faith circumstances are brought before the courts.

No review of the contemporary status of the exclusionary rule would be complete without reference to the several legislative bills under consideration in congressional committees. Some bills would broaden the good-faith exception adopted by the Supreme Court in 1984. Others would abolish the exclusionary rule altogether. The rule would be replaced by the right of a victim of an unconstitutional search and seizure to sue the government for damages, and by a mechanism for disciplining law enforcement officers who violate fourth amendment rights. Both of these types of bills rest on the assumption that the exclusionary rule is not a constitutional requirement and can therefore be changed through legislation. Congress refused to adopt any of these changes in 1984, and any change of heart since then has yet to be demonstrated.

The fate of the exclusionary rule over the long run is difficult to predict. It has endured for 70 turbulent years. Do the *Leon* and *Sheppard* decisions portend further modifications and exceptions to the rule by our highest Court? To two of the dissenters in those cases, "it now appears that the Court's victory over the fourth amendment is complete." Undoubtedly, to several of the Justices in the majority, the decisions were a blow struck for criminal justice and against a rule that Chief Justice Burger has called "conceptually sterile and practically ineffective."

The exclusionary rule is a simple rule of evidence that masks complex issues regarding the Constitution, morality, security, and the ends of the criminal justice system. The resolution of the exclusionary rule debate will require answers to the larger questions briefly outlined in this commentary.

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Discussion Questions

1. With regard to the exclusionary rule's effectiveness at deterring police misconduct, on whom should the burden of proof lie—the rule's proponents or its critics? Expressed another way, if the evidence on deterrence is inconclusive, should the rule be retained or abolished?

2. Is the integrity of the judicial process enhanced or diminished by the existence of the exclusionary rule?

3. If the exclusionary rule is not required by the Constitution, do courts have authority to create and enforce it? Do legislatures have authority to limit or abolish it?

4. What alternatives to the exclusionary rule, if any, might be suggested as more effective deterrents to unlawful police activities?

5. Is the exclusionary rule just, unjust, or a mixture of both? Apart from the constitutional question, does a person have a *moral* right not to be convicted on the basis of illegally obtained evidence?

This study guide and the videotape, ***Exclusionary Rule***, is one of 22 in the CRIME FILE series. For information on how to obtain programs on other criminal justice issues in the series, contact CRIME FILE, National Institute of Justice/NCJRS, Box 6000, Rockville, MD 20850 or call 800–851–3420 (301–251–5500 from Metropolitan Washington, D.C., and Maryland).

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