

FREEDOM VERSUS SOCIETAL COST: IN DEFENSE OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

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We must recognize that freedom from unwarranted police intrusions into individual privacy is a freedom worth the societal cost of allowing the guilty to sometimes go unpunished due to the exclusion of otherwise reliable evidence. See *Adone v. State*, 408 So. 2d 567, 577 (Fla. 1981) (Sundberg, J., concurring and dissenting).

In 1961, in *Mapp v. Ohio*, 367 U. S. 643 (1961), the Supreme Court extended to state criminal proceedings the Fourth Amendment exclusionary rule, which had been made applicable to federal criminal proceedings in *Weeks v. United States*, 232 U. S. 383 (1914). Under this rule, evidence obtained by a search and seizure in violation of the Fourth Amendment is inadmissible in a criminal trial.

Ever since Chief Justice Burger's notorious dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388, 411-24 (1971), the Fourth Amendment exclusionary rule has fallen under increasing attack from the forces of law and order. At present, numerous bills are pending in Congress which purport to restrict the rule, and recently the Senate approved and sent to the House of Representatives a bill that would allow the use of evidence seized in violation of the Fourth Amendment, provided the officer who acted unconstitutionally had reasonably believed at the time of the search or seizure that his conduct conformed with the Fourth Amendment.

Last Term it appeared the Burger Court might overrule the Fourth Amendment exclusionary rule. However, in *Illinois v. Gates*, 462 U. S. 213 (1983), the Court instead overruled *Aguilar v. Texas*, 378 U. S. 104 (1964), and *Spinelli v. United States*, 393 U. S. 410 (1969), thereby relaxing probable cause requirements and making it easier for police to secure search warrants. It seems almost certain that the Court will overrule *Mapp* and *Weeks* and hold that evidence obtained in violation of the Fourth Amendment is admissible if the policeman acted in the reasonable good faith belief that his actions were legal. See Fitzhugh, *The New Exclusionary Rule Cases*, 70 A. B. A. J. 58 (1984).

This therefore seems to be an appropriate occasion to set forth the reasons why the Fourth Amendment exclusionary rule should be retained intact.

First, the attacks on the Fourth Amendment exclusionary rule in particular cases generally are assertions that there was no unreasonable search and seizure. Inevitably, opponents of the rule will point to a give case or fact situation and argue that the police were acting reasonably or otherwise properly and that, therefore, the evidence seized should be admissible. Although they claim to be attacking the exclusionary rule, they are in fact arguing that the search and seizure did not violate the Fourth Amendment. The exclusionary rule does not tell us what is or is not an illegal search and seizure; it only tells us what to do with the evidence once it has been determined that it was obtained illegally. All arguments against the rule, therefore, directed to

the reasonableness of police activity in a given case, are actually attacks on the view that the Fourth Amendment was violated. Thus, it is wholly unconvincing to attack the exclusionary rule on the grounds that the police acted properly. If they acted properly, then there was no Fourth Amendment violation and the exclusionary rule does not come into play. In debating opponents of the exclusionary rule, therefore, the first question to ask in connection with a particular case is this: Did or did not the police violate the Fourth Amendment? If the police did, then why should the evidence be admissible? If the police did not violate the Fourth Amendment, then there is no need to invoke the rule, since it excludes only illegally obtained evidence.

Second, assuming it is conceded that police did violate the Fourth Amendment in a given case, all arguments in favor of admitting the evidence (whether because the police acted in reasonable and good faith, or because of other reasons) rest on the unacceptable assumption that, if the evidence is excluded, societal "costs" will result. In the first place, all such "costs" arguments assume that evidence obtained in violation of the Fourth Amendment is necessary for the criminal justice system to function. But the Fourth Amendment itself outlaws unreasonable searches and seizures; therefore, it is ludicrous to assert that, absent Fourth Amendment violations, the criminal justice system will fail. The very existence of the Fourth Amendment blocks all arguments that violations of the Amendment are essential to the functioning of the system. The "efficient" and "effective" operation of criminal justice cannot, therefore, depend on Fourth Amendment violations (and the evidence obtained thereby) as an integral part of the system.

In the second place, why is it burdensome to require that all evidence be obtained in compliance with the Fourth Amendment? Why is it expecting too much of the police to require that they comply with the Fourth Amendment as interpreted by the courts? If Fourth Amendment standards are too strict, they should be relaxed; if they are not, they should be retained or strengthened. It is the Fourth Amendment, however, and not the exclusionary rule, that sets the standards for police behavior.

Third, arguments against the exclusionary rule boil down, ultimately, to the position that the evidence may have been obtained illegally but nonetheless should be admissible because it represents the truth and is reliable. The view that all relevant evidence that is trustworthy and reliable ought to be admissible, even though obtained unconstitutionally, is repugnant to America. "Non refert quomodo veritas habeatur, dummodo habeatur" ("It matters not how the truth was obtained, so long as it has been obtained") was the motto of the Spanish Inquisition and its principal defense of the use of torture to obtain evidence of guilt. Is the Spanish Inquisition to be the model for America's "war" on crime? Are we in America also to adopt the view that the end justifies the means? Are we to abandon our concern for procedural regularity?

Finally, if evidence obtained in violation of the Fourth Amendment is to be admitted, what about the continued vitality of other constitutional exclusionary rules? If reliable evidence of guilt obtained in violation of the Fourth Amendment is to be rendered admissible, why not equally admit reliable evidence obtained in violation of the Fifth Amendment Self-Incrimination Clause, the Sixth Amendment Right to Counsel Clause, and the Fourteenth Amendment Due Process Clause? Attacks on the Fourth Amendment exclusionary rule are also attacks on these other exclusionary rules. The same arguments that militate in favor of abolishing the Fourth

Amendment exclusionary rule also extend to all other rules that operate to shut out illegally obtained truth. Thus, if the Fourth Amendment exclusionary rule falls, so eventually will the other exclusionary rules; and a system that allows the use of all such evidence would be intolerably oppressive.

It is no wonder that retired Justice Potter Stewart recently wrote: "Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the Fourth Amendment itself." See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and Seizure Cases*, 83 Col. L. Rev. 1365, 1392 (1983).

If George Orwell knew that the Burger Court was on the brink of allowing substantive use of illegally seized evidence, he would smile ironically. He knew long ago what the future portended.