IN DEFENSE OF EVIDENCE AND AGAINST THE EXCLUSIONARY RULE: A LIBERTARIAN APPROACH

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I. INTRODUCTION

If a liberal favors something, it is a safe bet you should oppose it.[1] A prime example is the so-called exclusionary rule, according to which evidence uncovered by police in violation of the Fourth Amendment's[2] prohibition against "unreasonable searches and seizures" is excluded from a defendant's criminal trial. Our thesis is that not all legal innovations are improvements, and that this applies, in spades, to the exclusionary rule.

For example, suppose Stan stabs his neighbor Victor to death. Arriving on the scene, a policeman breaks into Stan's home without a warrant, in violation of the Fourth Amendment.

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1. An identical rule applies to conservatives, at least from the perspective of libertarianism, from which we write. Unfortunately, an examination of their sins against our philosophy – war mongering, drug laws and prohibitions of other victimless crimes such as prostitution and pornography – would take us far too afield for present discussion. For more on libertarianism in general, see, MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (Humanities Press 1982); MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO (Hans-Hermann Hoppe ed., 2002); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (Kluwer Academic Publishers 1993); for the libertarian opposition to Bush's foreign adventurism, see antiwar.com, lewrockwell.com; for the libertarian perspective on victimless crimes, see WALTER BLOCK, DEFENDING THE UNDEFENDABLE, (Fox & Wilkes, 2nd ed. 1991).

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> 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.

U.S. CONST. amend. XIV

He finds the bloody weapon. At Stan's murder trial, the judge will not permit the prosecutor to introduce the knife as evidence, on the grounds that the knife is a "fruit of the poisoned tree,"[3] the result of an unconstitutional[4] search and seizure. Although he is in fact a murderer, Stan might well go free because the jury is not permitted to see the best evidence against him.

Section II is devoted to a historical account of the rise of the exclusionary rule. In section III we offer a libertarian perspective on this legal practice. The burden of section IV is to consider, and then reject, a supposedly libertarian objection to our thesis. We conclude in section V with an examination of the likelihood of eliminating the exclusionary rule.

II. ORIGIN OF A RULE

The law was not always this way. At common law, and continuing for one hundred years after the passage of the Fourth Amendment, evidence of the defendant's guilt was never excluded just because it was obtained illegally. The common law excluded evidence that was tainted by unreliability or suspect probative value—as with the hearsay rule—but probative evidence, regardless of its source, was admissible, since it tended to establish the truth, and, thus, help achieve justice.

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3. "In criminal law, the doctrine that evidence discovered due to information found through illegal search or other unconstitutional means (such as a forced confession) may not be introduced by a prosecutor. The theory is that the tree (original illegal evidence) is poisoned and thus taints what grows from it. For example, as part of a coerced admission made without giving a prime suspect the so-called 'Miranda warnings' (statement of rights, including the right to remain silent and what he/she says will be used against them), the suspect tells the police the location of stolen property. Since the admission cannot be introduced as evidence in trial, neither can the stolen property." *at* http://dictionary.law.com/definition2.asp?selected=795&bold=| | | | (last visited Dec. 15, 2003).

4. Most Americans have a peculiar, almost religious attachment to the U.S. Constitution. This is not something shared by the present authors. In the present paper, then, we put forth only arguendo our critique of the exclusionary rule on the basis of incompatibility with the niceties of the Constitution. For us, the exclusionary rule is improper per se, whether or not there is a document similar to the U.S. Constitution in legal force. For more on this see LYSANDER SPOONER, NO TREASON: THE CONSTITUTION OF NO AUTHORITY (1870); *see also* Letter from Lysander Spooner to Thomas F. Bayard, Congressman (May 22, 1882), *available at* http://lawcasella.com/spooner/LetterToBayard.htm .

In fact, the common law not only did not exclude illegally-obtained evidence, but it even allowed that evidence to *retroactively justify* what would otherwise be an illegal search and seizure. As stated in a 17th Century English legal treatise: "And where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him ...."[5] In other words, at common law evidence of the defendant's guilt provided a complete defense against charges that the search was a violation of the defendant's rights.

Under the exclusionary rule, however, evidence can be altogether excluded from criminal trials, no matter how probative that evidence may be, if it was the product of an illegal police search. The exclusionary rule, therefore, is fundamentally different from common law rules of evidence designed to preclude only what is dubious and unreliable. The knife could have Stan's fingerprints and Victor's blood all over it, but if police discovered the knife while conducting an illegal search, the exclusionary rule ensures that this evidence is never considered at Stan's murder trial.

Like so many bad things, the erosion of the traditional common law rule on the admissibility of illegally-obtained evidence began in the twentieth century. The Constitution was ratified in 1789, and the Bill of Rights, including the Fourth Amendment, was added two years later, in 1791. More than one hundred years afterwards, in 1904, the Supreme Court continued to apply the common law rule that evidence is admissible however obtained.[6] It was not until ten years later that the Supreme Court supplanted the long-standing common law tradition with the rule that evidence acquired in violation of the Fourth Amendment is inadmissible in criminal proceedings.[7]

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5. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 77 (Professional Books Ltd. 1973) (1721). For further discussion of how, at common law, probative evidence could retroactively justify a search and seizure by police, see Akhil Reed Amar, *Fourth Amendment First Principles,* 107 HARV. L. REV. 757, 767 n.30 (Feb. 1994).

6. Adams v. New York, 192 U.S. 585 (1904).

7. Weeks v. United States, 232 U.S. 383 (1914).

The Court reasoned that, without the exclusionary rule, the Fourth Amendment's "right of the people to be secure ... against unreasonable searches and seizures" is hollow. As the Court wrote:

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established [by] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[8]

Thus, in 1914, the Court found the exclusionary rule inherent in the Fourth Amendment, even though it was neither required by the common law nor by the Fourth Amendment for its first hundred years. For over a century the Court somehow failed to realize that the Fourth Amendment was "of no value," since the exclusionary rule had not yet been invented.

Given that the exclusionary rule was announced over a hundred years after the Fourth Amendment was ratified, it is no surprise that the rule is not at all rooted in the actual language of the Fourth Amendment. The Fourth Amendment prohibits unreasonable searches and seizures. It says nothing about the exclusion of evidence that results from such seizures. It says nothing about the appropriate remedy for violations of the Fourth Amendment. The Supreme Court itself recognized this a few years after *Weeks*, in *Olmstead v. United States*: "The striking outcome of the *Weeks* Case and those which followed it was the sweeping declaration that the Fourth Amendment, *although not referring to or limiting the use of evidence in courts*, really forbade its introduction, if obtained by government officers through a violation of the amendment."[9]

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8. *Id.*

9. Olmstead v. United States, 277 U.S. 438, 462 (1928) (emphasis added); *see also* United States v. Leon, 468 U.S. 897, 906 (1984) (noting that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure work[s] no new Fourth Amendment wrong. The wrong condemned by

Even after the Supreme Court in *Weeks* reversed the common law rule that illegal evidence is not inadmissible, the Court still did not apply the exclusionary rule to civil trials, in which evidence discovered by legal and illegal searches alike continued to be admissible.

Nor did the Court initially apply the rule to states. Originally, the exclusionary rule applied only in cases involving the federal government, because the Fourth Amendment restriction on unreasonable searches and seizures applied only to federal and not to state officers. The separate states were free to adopt their own rules of evidence.[10] Most of the states rejected the exclusionary rule and continued to allow both civil and criminal courts to consider all probative evidence. In fact, as Professor Akhil Reed Amar points out, many states had constitutional provisions similar or identical to the Fourth Amendment, yet not a single one of them interpreted that language as requiring that evidence uncovered in illegal searches be excluded.[11]

Moreover, even federal courts could admit illegally obtained evidence, so long as it was the result of a search by *state* police and not federal officials.[12] This practice was ended in 1960, however, when the Court ruled that evidence obtained by state officers during a search which would have violated the Fourth Amendment if conducted by federal officers, is inadmissible in a federal criminal trial, even when there was no participation by federal officers in the search and seizure.[13] This set the stage for *Mapp v. Ohio*[14] in 1961, which ruled that the Fourteenth

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the Amendment is 'fully accomplished' by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered. The rule thus operates as a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.) (internal citations omitted).

10. *See* National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

11. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 764-769 (Feb. 1994).

12. Byars v. United States, 232 U.S. 28 (1927).

13. Elkins v. United States, 364 U.S. 206 (1960).

14. Mapp v. Ohio, 367 U.S. 643 (1961).

Amendment applied the restrictions of the Fourth Amendment to the states, via the odious doctrine[15] of "selective incorporation."

Thus, in 1961, the federal government, via its highest court, foisted the exclusionary rule upon state courts as well. For the past four decades, accused criminals across the United States have been able to avoid conviction by having the evidence of their crimes swept aside.

III. THE LIBERTARIAN APPROACH

The glaringly obvious problem with the exclusionary rule is that it protects the guilty. Accused murderers and thieves manage to escape punishment, not by demonstrating that the evidence is flawed or supports their innocence, but by having genuine evidence of their guilt deemed inadmissible because of the way it was gathered.[16] Past estimates from the Bureau of Justice Statistics and the National Institute of Justice suggest that the exclusionary rule is responsible for the release of as many as 55,000 accused criminals per year.[17] The actual number may be almost three times as high.[18] Because of the exclusionary rule, these criminals are free to continue victimizing innocents, and within just two years half of them have been re-arrested.[19]

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15. Stephan Kinsella, *Supreme Confusion, Or, A Libertarian Defense of Affirmative Action, at* http://www.lewrockwell.com/kinsella/kinsella11.html (July 4, 2003).

16. *See, e.g.* RALPH ADAM FINE, ESCAPE OF THE GUILTY 247 (New York: Doral, Mead & Co., 1986); *see also* ROBERT JAMES BIDINOTTO, CRIME AND CONSEQUENCES (Foundation for Economic Education, Inc. 1989) (discussing a 1987 column by James J. Kirkpatrick concerning the Supreme Court's reversal of a murder conviction because the search warrant issued to police was later ruled defective).

17. Edwin Meese III, *A Rule Excluding Justice*, NEW YORK TIMES, Apr. 15, 1983.

18. Edwin Meese III and Rhett DeHart estimate that 150,000 criminal cases per year are dropped or dismissed because of the exclusionary rule, 30,000 of them involving violence. Edwin Meese III & Rhett DeHart, *The Imperial Judiciary. . . And What Congress Can Do About It, available at* http://www.policyreview.org/jan97/meese.html (last visited on Dec. 16, 2003).

19. It must be pointed out, however, that not all 55,000 of the defendants who avoid conviction because of the exclusionary rule are "criminals" in the libertarian sense. Many of them are non-violent offenders guilty only of victimless crimes – such as drug offenses – who therefore do not deserve pun-

Libertarians should be horrified by this trend. Libertarianism is first and foremost concerned with recognizing, defending, and vindicating the rights of non-aggressors. Because each person is the rightful owner of his own body, he may justifiably repel any uninvited efforts to violate its physical integrity. Self-owners are permitted to defend themselves from aggressive initiations of force. Where defensive efforts fail, however, self-owners may vindicate their impaired rights by punishing their aggressors.[20] From the libertarian standpoint, therefore, it is an injustice when an aggressor goes unpunished for violating a victim's rights. The exclusionary rule allows just that: it excludes evidence of actual criminal guilt and enables guilty parties to avoid punishment.

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ishment because they have not violated anyone's rights. Nevertheless, in addition to protecting some non-violent defendants, the exclusionary rule is directly responsible for the acquittal of tens of thousands of violent criminals per year. *Id.* Suppose the police "illegally" get evidence that Jones is selling drugs. The exclusionary rule here would be helping to prevent the unjust punishment of someone guilty only of a victimless crime. We would make an exception for cases of this sort, and allow the exclusionary rule to operate. Not because we think it is valid, but only to avoid the injustice of incarcerating a person for a non-crime.

In general, the exclusionary rule ameliorates or reduces the application of all laws. In other words, the exclusionary rule is a way of making the justice system less efficient at convicting those accused of a crime. In the case of a *real* crime, one based upon violation of a just law, this is a bad result—there is no reason to reduce the chance of convicting an actual criminal. But in the case of activity that should not be criminal but is unjustly outlawed by statute, in that case the exclusionary rule—and anything else that hampers the justice system's efficacy--is a good thing.

However, there is a further complication. Suppose a "Drug Czar" gets caught with narcotics. In cases such as these, again, the exclusionary rule should *not* operate: people of this sort *deserve* to be imprisoned when they violate drug laws because they are responsible for enforcing those same enactments against others. In other words, the exclusionary rule is only legitimate when it would protect *non-aggressors* against punishment for violating laws against non-aggressive behavior. However, in the case of the government officials responsible for passing or enforcing unjust laws they cannot be considered non-aggressors. Therefore, they therefore deserve no protection against the very laws they have improperly helped to foist on the people.

20. For an elaborate discussion of how his own aggressive acts effectively "estop" the aggressor from objecting to punishment, see N. Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, 12 JOURNAL OF LIBERTARIAN STUDIES 51, 59-62 (Spring 1996), *available at* http://www.mises.org/journals/jls/12_1/12_1_3.pdf (last visited Dec 16, 2003).

The libertarian approach to the exclusionary rule is simple: does admitting illegally-obtained evidence violate individual rights? Is the exclusion necessary to prevent rights violations? When the police search the person or property of a man=suspected of committing an act of aggression (crime), he is either guilty or not. If he is guilty—if he is an aggressor—then *his* rights are not violated. After all, an (actual) aggressor's rights are not violated when he is *punished*, so why would they be violated if the police rummage through his property[21] without the proper legal permission? Part of his punishment is that he cannot complain about the enforcement efforts that caught him. Thus, the common-law rule that evidence can retroactively justify an illegal search is eminently libertarian. For libertarians, our concern is for the *victim*. We *want* criminals to get the short end of the stick. When it comes to actually guilty people, then, the exclusionary rule provides a remedy they do not deserve.

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21. Is there *nothing* the police can do that would justify allowing the perpetrator of a crime to go scot-free? We do not go that far. We allow that in certain cases, it would be possible to utilize something akin, but not exactly the same as, the exclusionary rule. Suppose a relatively minor crime: the theft of a bicycle. Posit, further, that in capturing the thief, the police entirely ruin his car or house, both, more serious offenses. Then the men in blue would owe the bicycle thief a large debt, while the former would only owe a small one to his own victim (the justified owner of the bicycle). When the large debt was repaid, the small time crook would have enough "change" left over that could be used to compensate the rightful bicycle owner. (We discuss penalties for the police who violate proper procedure below. But even here, note, we are not precisely using the exclusionary rule to exculpate the bicycle thief. He must still compensate his own victim, despite the wrong doing of the police. We are merely maintaining that the penalty the police owe to *him* would be larger than what he, in turn, owes the proper bicycle owner, and, thus, in effect, this petty criminal would not have to fork over anything of his own; indeed, he would have money left over after being compensated by the police. For the libertarian view that proper punishment for crime includes compensating the victim, see ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS, (Randy Barnett and John Hagel eds., Harper Business, 1978); Bruce L. Benson, *Restitution as an Objective of the Criminal Justice System*, THE JOURNAL OF THE JAMES MADISON INSTITUTE, 17 (Winter 2001); Robert Bidinotto, *Crimes and Moral Retribution, in* CRIMINAL JUSTICE? THE LEGAL SYSTEM VS INDIVIDUAL RESPONSIBILITY 194 (Robert Bidinotto, ed., Foundation for Economic Education, 1994); Williamson M. Evers, VICTIM'S RIGHTS, RESTITUTION AND RETRIBUTION 25 (Independent Institute, 1996); N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607 (Jan. 1997).

If the police illegally search the property of an innocent person, however, his rights *are* violated. However, the exclusionary rule does *not* provide a remedy for them. In most cases, innocent victims of illegal searches are simply never prosecuted because the search turns up no evidence against them. Even if the innocent defendant is prosecuted and the illegally-obtained evidence is introduced in court, presumably, since the person is innocent, it would not prove his guilt anyway. What the innocent victim of an illegal search needs is to be able to sue the state[22] for damages for trespass and false imprisonment, not to exclude non-existent evidence. Guilty defendants should have no right to sue for damages,[23] however—it is their fault the police had to go looking for evidence, not that of the police's.

So: the exclusionary rule gives rights to the guilty they do not deserve and does nothing for innocent victims of illegal searches. How can it be consistent with, let alone mandated by libertarianism?

Another argument is that illegal evidence must be excluded in order to give incentive to police not to engage in illegal searches in the first place. But this is also flawed. As noted above, there is nothing wrong with "illegal" searches—of guilty

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22. This is only a first approximation. Under one view of the libertarian law code, it would be improper even for innocent victims of illegal search to be able to sue the government, since this organization is funded by compulsory tax receipts; were it successfully sued, it would merely turn around and seize from other innocents, through taxation, funds with which to pay the plaintiff. Instead, innocent victims of illegal search should be able to sue the offending police officers personally. However, in another interpretation of libertarian law, the state is merely an armed band of thieves with a world-class public relations department that has convinced all and sundry of the error of this perspective. It, however, being correct, and the government occupying the position of a puffed up Mafioso organization, it would be entirely suitable to relieve it of its ill-gotten gains. If it subsequently turns around and raises taxes, so much the worse for it. No one would countenance the idea that the Mafia should not be fined, on the ground that it might then step up its depredations. For an account in support of this view, see Walter Block, Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government (2003) (unpublished manuscript, on file with authors).

23. In making this statement we assume that the harm they create is less than the punishment that would be justified on the basis of the original crime.

people.[24] The problem is unreasonable or warrantless searches of *innocent* individuals. So we do not want to dissuade illegal searches in general—rather, the goal should be to minimize illegal searches, but only of innocent suspects. However, if anything, the exclusionary rule tends to disproportionately deter searches of actually guilty people, since it is only here that police, and society as a whole, pay any penalty. Instead of excluding evidence, which helps the guilty and does nothing for the innocent, why not allow *innocent* victims of unreasonable police conduct to sue?[25] This would tend to deter illegal searches of those not likely to be guilty. Such a system would give police an incentive to be very careful if the person is innocent or not very likely guilty, more so than in cases where guilt is very likely. Doing away with the exclusionary rule would thus shift the brunt of "illegal" searches from innocent people to criminals—where it most emphatically belongs.

In any event, suggesting that the exclusionary rule is *necessary* or required by libertarian or even constitutional principles, based on such utilitarian reasoning, is unpersuasive. If we want to make police violations of individual rights "less likely," surely there are much more effective ways of accomplishing this than refusing to look at evidence that a crime was committed. Allowing (innocent) victims of illegal searches to sue for damages, as noted above, makes sense. Other measures could be proposed as well. For example, laws could be restricted to those prohibiting aggression. If the peaceful possession of narcotics were legal, for example, then the problems related to obtaining evidence of narcotics use evaporates. The state's role could be gradually reduced, replaced with private services,[26] including private justice[27].

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24. We continue to assume that the harm the police create is less than the punishment that would be justified on the basis of the original crime. Without this assumption, the criminal could be punished to a greater extent than he deserves.

25. We would also allow victims of illicit police activity the right to sue, providing only, that the harm perpetrated upon them was so egregious as to constitute excessive punishment.

26. *See* Patrick Tinsley, *With Liberty and Justice for All: A Case for Private Police*,14 JOURNAL OF LIBERTARIAN STUDIES 95 (Winter 1998-99), available at http://www.mises.org/journals/jls/14_1/14_1_5.pdf (1999).

Or the jury could be informed of its right to judge the law[28] as well as the defendant. The federal government could be restricted to those powers expressly enumerated in the original Constitution.

Then, there is a whole series of more direct punishments that could be aimed at achieving the same goal. For example, if a policeman engages in an improper search, he could be docked an hour's pay (or whatever time it took him to undertake such illicit activities). This slap on the wrist might have the beneficial effect of making him more careful in the future, without, tragically, unleashing a murderer or rapist upon the populace.[29] It is a mistake to believe that cops should be "above the law." If they engage in trespass against innocents (or wildly disproportionately harmful searches even against the guilty) they should be penalized to the full extent of the law for such violations of it.

Any such measures would deter or reduce, to some degree, bad laws, and consequently the problems of searches for evidence of violations of those laws. But intentionally ignoring genuine evidence of actual guilt? This is contrary to libertarianism, since it protects, instead of punishes, criminal aggressors. Clearly, the exclusionary rule is merely one possible remedy to illegal searches and seizures, and not even a very good one.

IV. LIBERTARIAN EXCLUDERS

Nevertheless, the exclusionary rule has recently received emphatic approval from otherwise libertarians such as Timothy

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27. *See* THE MYTH OF NATIONAL DEFENSE: ESSAYS ON THE THEORY AND HISTORY OF SECURITY PRODUCTION (Hans-Hermann Hoppe ed., The Ludwig von Mises Institute 2003).

28. *See* AMERICAN JURY INSTITUTE/FIJA, JUROR'S HANDBOOK: A CITIZEN'S GUIDE TO JURY DUTY, *available at* http://www.fija.org/juror%27s_guide.htm (last visited Dec. 16, 2003).

29. We must concede, however, that there is one benefit of the present system: it gives rise to a whole host of dramatic novels, movies, cops and robbers shows on television, etc. It would be an exaggeration to maintain that such fare consists of *nothing but* criminals being let off on such technicalities; but it cannot be denied that an inordinate amount of what passes for drama nowadays features such miscarriage of justice. Under proposals we are making for a revamping of the law in this regard, all such benefits to movies and plays, etc., would unfortunately vanish.

Lynch of the Cato Institute. In his article "In Defense of the Exclusionary Rule," Lynch presents an argument in favor of the exclusion that he thinks "take[s] the Constitution's text, structure, and history seriously."[30] It is apparent even to Lynch, however, that the text of the Constitution does not mandate the exclusionary rule. In fact, the text of the Constitution does not even mention it, as Lynch acknowledges.[31] And this author further concedes that the exclusionary rule is "inconsistent with the common law," including more than a hundred years' worth of American court decisions.[32] This means that his argument does not fit comfortably with a good deal of constitutional "history," either. Indeed, as Professor Amar notes, "Supporters of the exclusionary rule cannot point to a single major statement from the Founding – or even the antebellum or Reconstruction eras – supporting Fourth Amendment exclusion of evidence in a criminal trial. Indeed, the idea of exclusion was so implausible that it seems almost never to have been urged by criminal defendants, despite the large incentive that they had to do so, in the vast number of criminal cases litigated in the century after Independence."[33]

If common law, constitutional history, the original understanding of the Fourth Amendment, and even libertarian principles do not argue for the exclusionary rule, what can Lynch find in its favor? Well, it is the "structure" of the Constitution that mandates this result. The key concept in Lynch's structural defense of the exclusionary rule is the "separation of powers principle." The basic idea is familiar from any introductory civics class: the Constitution divides the powers of the federal government among the three branches. As Lynch puts it, "each branch is expected to remain within its sphere and to respect the powers that the Constitution has assigned to the other branches."[34] To ensure this outcome, the Constitution sets up "checks and balances,"

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30. Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 Harv. J.L. & Pub. Pol'y 711, 711-51 (Summer 2000).

31. *See id.* at 745.

32. *See id.* at 746.

33. Amar, *supra* note 8, at 786

34. Lynch, *supra* note 30, at 718.

mechanisms by which each independent branch of government may protect its unique powers against encroachment from the other two. Lynch maintains that the exclusionary rule is another such protective mechanism: in fact, he proclaims, it is "the only" effective means the judiciary has of preserving its right to issue warrants, as guaranteed by the Fourth Amendment.

The way Lynch sees it, the Fourth Amendment allows only the judiciary to issue warrants, and if the executive branch fails to respect this authority – for example, if the police conduct a warrantless search – then the only effective remedy at the court's disposal is to exclude the evidence uncovered in that search. But even Lynch does not believe the fundamental purpose of the exclusionary rule is to protect citizens' Fourth Amendment rights. He admits, for instance, that the exclusionary rule provides no remedy for the innocent victims of illegal search – the ones who are never prosecuted because the search either turns up no evidence against them, or completely exonerates them.

Instead, Lynch argues that the fundamental purpose of the exclusionary rule is not to protect citizens but rather the judiciary. If the executive branch attempts to erode the judiciary's Fourth Amendment power to issue warrants, this commentator believes the appropriate judicial response is to exclude whatever evidence their unlawful searches produce. Lynch concludes that the exclusionary rule is justified because it helps to preserve the constitutional separation of powers.

But surely there is something wrong here. To begin with, Lynch goes too far when he calls the exclusionary rule "the only" effective judicial response to illegal searches by the executive branch. This claim overlooks the fact that for most of this country's history the exclusionary rule did not exist, and it is only since about 1961 that it applied to the states as well. Lynch would have us believe that until the Supreme Court created the exclusionary rule, there was simply no institutional brake on illegal searches—and that the only available and effective remedy was and is to exclude illegally obtained evidence. But as noted above, the exclusionary rule is poorly designed to really deter police harassment of innocent victims. Furthermore, no matter how "effective" the exclusionary rule is, it comes at a steep price: tens of thousands of violent criminals go free.

Not only is the exclusionary rule contrary to libertarian principles, it is contrary to constitutional principles as well. Lynch is simply mistaken in finding the exclusionary rule sanc-

tioned by the Fourth Amendment. Nothing in the text of the Fourth Amendment gives even the slightest support for the practice of ignoring evidence of criminal guilt. As even the Supreme Court admits,[35] the exclusionary rule is not a creature of the Constitution but of the judiciary itself.[36] If the exclusionary rule really were embedded in the Constitution, it would be difficult to understand why it took over a hundred years to discover this, and why it applies only to criminal trials and not to civil trials as well.

Lynch's separation of powers argument is unpersuasive because it is not clear from the Fourth Amendment that the judiciary has the exclusive power to issue warrants in the first place. All it says is that "no Warrants shall issue, but upon probable cause...."

But even assuming, for the sake of argument, that only the judiciary is constitutionally empowered to issue warrants, still this in no way justifies, much less *requires*, the practice of excluding evidence obtained without one. After all, the Supreme Court recognizes that in many instances the Constitution does not require police to obtain a search warrant at all. Exigent circumstances, for instance, allow police to makes searches without warrants.[37] But if the constabulary can legally search a suspect without obtaining a search warrant, the judiciary cannot be constitutionally required to exclude the evidence of those searches in an attempt to preserve its supposed monopoly on warrant issuing.[38]

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35. United States v. Leon, 468 U.S. 897 (1984).

36. *Id.*

37. For a complete list of the circumstances under which search warrants are constitutionally unnecessary, see Amar, *supra* note 8, at 764-769.

38. Another problem with Lynch's reliance on structural features of the Constitution to argue that the exclusionary rule is necessary to preserve separation of powers, is that the Constitution, in Article III, Section 2, explicitly empowers Congress to regulate or restrict the appellate jurisdiction of the Supreme Court in all cases except those "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." U.S. CONST. art III, § 1. In other words, Congress has clear constitutional power to restrict the jurisdiction of the Court, and even to abolish all lower federal courts. *Id.* It is within Congress' power to prevent federal courts (including the Supreme Court) from hearing Fourth Amendment cases. This would be completely compatible with the constitutional structure. How can it be "unconstitutional" or a breach of the original scheme of separation of powers for the Court to be deprived of the

Even on the assumption, again, that only the judiciary can issue warrants, and that illegal searches emanating from the executive are a violation of its "legal territory," it by no means logically follows that the only conceivable defense of its prerogatives is to throw out (otherwise) valid evidence. If remedies not found in the text of the Constitution may be proposed to address the problem of unconstitutional searches (the exclusionary rule is nowhere in the Constitution, after all), any number of other provisions might theoretically be used to protect this branch of government; e.g., fines, firings, community service requirements, etc.

Then there is the question of whether the exclusionary rule, even if it is sanctioned by the Fourth Amendment, should apply to the states. Lynch does not explicitly argue that it should. Nevertheless, he approvingly discusses a case in which the Supreme Court declared that New Hampshire police had violated the Fourth Amendment (pp. 728-729). Lynch calls the decision "sound." This assessment, however, overlooks the essential difference between the federal government and the states: the former is a government of enumerated powers, and completely lacks any power not explicitly granted in the Constitution, whereas the latter do not derive their powers from the federal Constitution. Alexander Hamilton recognized this in *The Federalist* No. 32[39] where he wrote that under the Constitution "the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by [the Constitution] exclusively delegated to the United States."[40]

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ability to exclude evidence obtained in violation of the Fourth Amendment, if it is constitutional for Congress to completely exclude the entire issue of violation of the Fourth Amendment from judicial review by the Court?

39. *See* THE FEDERALIST NO. 32 (Alexander Hamilton), *available at* http://www.foundingfathers.info/federalistpapers/fed32.htm (last visited Dec. 16, 2003).

40. *See* THE FEDERALIST PAPERS No. 39 (James Madison) (stating that "the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); *see also* THE FEDERALIST PAPERS No. 40 (James Madison) (stating that "the general powers [of the federal government] are limited; and that the States, in all unencumbered cases, are left in the enjoyment of their sovereign and independent jurisdiction"); *see also* The Slaughter-House Cases, 83 U.S. 36 (1872) (referring to the general "police power" of the states); *see also* Letter from James Wilson, to the

The Bill of Rights – including, of course, the Fourth Amendment – was therefore largely redundant, because the powers it expressly denied to the federal government were never enumerated to begin with. Indeed, the anti-federalists opposed the inclusion of a Bill of Rights for fear that it would somehow imply more powers for the federal government. After all, why provide a limit to a power that did not exist? For example, why provide that Congress shall make no law abridging the freedom of speech, if no power to regulate speech had been given to Congress in the first place? Thus the very idea that the Fourth Amendment could "apply" to the states is incoherent. The Fourth Amendment is a restriction on the power of the *federal* government – its very purpose was to *retain* the power of the states against federal usurpation. How could a limit on federal power, intended to preserve the power of the states, "apply" to the states and restrict their power as well?[41]

Libertarians should also oppose the exclusionary rule because it is a tool for expanding and centralizing federal power. The federal government cannot legally wield any power that is not specifically granted to it by the Constitution. According to the Tenth Amendment, powers not expressly delegated to the

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Pennsylvania State Legislature (Oct. 6, 1787), *available at* http://www.lexrex.com/enlightened/writings/jwilson.htm (last visited Apr. 8, 2005) (stating that "[i]t will be proper... to mark the leading discrimination between the State constitutions and the constitution of the United States. When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question respecting the jurisdiction of the House of Assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the former case everything which is not reserved is given; but in the latter the reverse of the proposition prevails, and everything which is not given is reserved.")

41. It is worth nothing that Lynch is a proponent of jury nullification. Timothy Lynch, *When Judges Overreach*, *at* http://www.cato.org/dailys/01-25-00.html (January 25, 2000). However, jury nullification is based on the idea that justice is paramount: that guilty people should be punished and innocent people acquitted, regardless of what the "law" says. But by similar reasoning, Lynch is logically required to oppose the exclusionary rule because it causes actually guilty people to go free. *Id.*

federal government are reserved "to the states respectively or to the people." Nowhere in the Constitution is the power to exclude probative evidence delegated to the federal courts. And nowhere in the Constitution is the power to impose rules of evidence on state courts delegated to the federal government. If these powers are not delegated to the federal government, then they must be among those powers reserved "to the states respectively or to the people." Simply put, the federal courts are not constitutionally *empowered* to exclude probative evidence – and they are certainly not empowered to enforce this rule against the states. The Fourth Amendment does not sanction the exclusionary rule, and even if it did, it should apply only against the federal government, not against the states.

In its current form, therefore, the exclusionary rule is a means by which federal courts illegally usurp powers that are constitutionally reserved to the states. Of course, libertarians must oppose the states as well as the federal government, since both by their nature commit aggression against innocent victims.[42] From the libertarian standpoint, however, it is better that government power be dispersed rather than centralized.[43] A weak federal government is preferable to a strong one, *ceteris paribus*. It is generally better for the federal government not to have a particular power, even if that power could be used to protect individual freedom. This is all the more true where the power in question is the power to exclude probative evidence, something that can only protect criminals. Criminals do not deserve protection, least of all from the federal government, itself a criminal organization.

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42. For this theory of government, see Murray N. Rothbard, *The Anatomy of the State,* in *Egalitarianism as a Revolt Against Nature and Other Essays, at* http://www.mises.org/easaran/chap3.asp (last visited Dec. 16, 2003).

43. For an excellent defense of this idea, see Gene Healy, *Against Libertarian Centralism*, *available at* http://www.lewrockwell.com (last visited Dec. 16, 2003). For a decentralist argument that nevertheless acknowledges the occasional superiority of federal power to state power, see Walter Block, *Decentralization, Subsidiarity, Rodney King and State Deification: A Libertarian Analysis*, 16 EUROPEAN JOURNAL OF LAW AND ECONOMICS 139 (Sep. 2003).

V. CONCLUSION

What is the likelihood that the exclusionary rule would have come into being in a stateless society, or, if it somehow did, that it would long endure? In our view, the answer to the first of these questions is "not very likely," and to the second it is, "not long at all." This is because under a regime of private competing court systems, customer satisfaction would be emphasized, vis a vis the present constitutional system. With a free market in judges, it would be the rare one indeed who would turn loose on the community a perpetrator everyone knew to be guilty of a heinous crime. If he did so, he would find his customer base melting away rather quickly. Thus, he would be unlikely to engage in any such public miscarriage of justice in the first place.

In contrast, under the present institutional arrangements, it is likely that the exclusionary rule will be with us forever. Changing things with governments is like getting an ocean liner to make an about face; it takes almost forever, even if the alteration is hugely popular. The present alteration would indeed likely be favored by everyone except the criminal classes. However, for this change to occur judges must acquiesce, and they are insulated not only from the market process, but even from the ballot box.