1996

Restrictions on Law Enforcement Investigation and Prosecution of Crime

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Repository Citation
http://scholarship.law.wm.edu/facpubs/1192

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RESTRICTIONS ON LAW ENFORCEMENT
INVESTIGATION AND PROSECUTION OF CRIME*

Professor Paul Marcus**

THE SUPPRESSION OF EVIDENCE

Unlike the situation in many countries,¹ the main remedy for violation by the government of individual rights in the United States is the suppression of evidence. Evidence which would otherwise be valid and reliable is excluded from trial because of the manner in which it was obtained. Typically the suppression of evidence occurs at a pre-trial hearing. If the motion to suppress evidence is granted the prosecution may simply dismiss the charges when the evidence is a vital part of the prosecution. However, if the suppression motion is denied, the defendant may then choose to enter a guilty plea.

A motion to suppress evidence is normally granted for one of three reasons. First is a violation of the Search and Seizure provision of the Fourth Amendment to the United States Constitution.² Suppression is appropriate when no warrant was obtained if necessary, or the warrant which was obtained was facially invalid.³ Second is a violation of the Fifth Amendment Privilege against Self-Incrimination with a statement obtained in violation of the defendant’s right not to speak.⁴ Third is a violation of the

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²The 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 person or things to be seized.


⁴No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.
Sixth Amendment Right to Counsel.\(^5\) This provision is applied when the defendant's statement was obtained without counsel present during interrogation after charges.\(^6\)

Two rationales have been offered for the rule of exclusion. It is said that exclusion of evidence deters improper behavior and encourages stricter compliance with constitutional rights by law enforcement officers.\(^7\) Also, it has been argued that keeping tainted evidence out of the courtroom maintains judicial integrity by allowing judges not to cooperate in connection with illegal actions taken by law enforcement officers.\(^8\)

The exclusionary rule is a highly controversial policy with some contending that the exclusion of evidence does not deter,\(^9\) and that it may adversely affect judicial integrity by resulting in the public losing faith in a system where clearly guilty individuals go free.\(^10\) The critics also assert that other less onerous alternatives for achieving the same goals can be used.\(^11\)

Still, exclusion has remained the chief manner of enforcing restrictions on law enforcement. We have seen, though, over the past two decades serious limitations on the exclusion of evidence. One of the most striking limitations is the so-called "good faith exception." If the police officers in good faith get a search warrant and reasonably believe that it is valid, evidence will not be restricted even if it turns out that the warrant was unlawful.\(^12\) The theory here is that police officers acted properly, proceeding in reasonable good faith; it was the magistrate who made an error in issuance of the warrant so that evidence ought not to be excluded.

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\(^5\) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.


\(^9\) See discussion in Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"? 16 Creighton L. Rev. 565 (1982).

\(^10\) Id.

\(^11\) Specific proposals in the area of the Privilege Against Self-Incrimination can be found in the dissenting opinion of Justice White in Miranda v. Arizona, 384 U.S. 436 (1966), discussed infra.

The inevitable discovery rule also limits exclusion. This rule is used in situations in which the government can demonstrate that in spite of improper searches or interrogation, evidence would have been found in a lawful manner. The notion here is that if the evidence would have been found anyway, inevitably, the public should not be punished when proper police work was present at the same time as illegal action.\textsuperscript{13}

The Supreme Court has also fashioned a general emergency doctrine. Thus, if police officers violate rights of an individual but only do so to prevent a greater harm in an emergency situation,\textsuperscript{14} public policy dictates that the individual rights must be outweighed by the greater public needs so that exclusion would be inappropriate.\textsuperscript{15}

\textbf{THE FOURTH AMENDMENT SEARCH AND SEIZURE PROVISION}

The Fourth Amendment Search and Seizure provision has been an important part of the Bill of Rights, one of the tools used by "courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment."\textsuperscript{16} This provision has been interpreted to mandate warrants, issued by independent magistrates, for searches of houses and offices.\textsuperscript{17} Such warrants are not required for the searches of vehicles which are viewed to have a lesser expectation of privacy.\textsuperscript{18} Also warrants may not be needed for the search of a person, depending when and where that person is being searched.\textsuperscript{19} Only those whose personal constitutional rights have been arguably violated have "standing" to challenge improper searches.\textsuperscript{20} Therefore, a defendant arrested in her own home could challenge evidence searched there, but such evidence which incriminates a friend 200 miles away could be offered against the friend. The troubling standing issue arises with someone who does not own the property but clearly

\textsuperscript{13}\textit{See} Nix v. Williams, 467 U.S. 431 (1984). "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. . . ."


\textsuperscript{16}Boyd v. United States, 116 U.S. 616, 635 (1886).

\textsuperscript{17}"The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." Franks v. Delaware, 438 U.S. 154, 164 (1978).

\textsuperscript{18}\textit{See} Cady v. Dombrowski, 413 U.S. 433 (1973).


has a privacy interest of some sort in the place to be searched, such as an overnight guest in a home which is searched.\textsuperscript{21}

One of the most complicated features of the search and seizure provision is the so-called fruit of the poisonous tree principle. This doctrine relates to evidence which is indirectly found as a result of unlawful police activity. The issue goes to whether evidence which is far removed from the illegal search is still sufficiently tainted by that search so as to be excluded against the individual whose privacy was invaded by that first improper search.\textsuperscript{22}

**THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCrimINATION**

A treasured portion of the Bill of Rights, the right to remain silent was placed in the Fifth Amendment.\textsuperscript{23} Individuals generally cannot be made to testify against themselves at trial or even to offer any other evidence at trial. The failure to do so cannot in any way be used against them, there cannot be any adverse comment by the prosecution and the jury may not consider the silence or lack of evidence.

The right to remain silent also applies to pre-trial proceedings. In one of the most famous decisions ever reached by the United States Supreme Court, a majority of the Justices found that the privilege applied even in connection with police interrogation of persons suspected by crimes. *Miranda v. Arizona*\textsuperscript{24} held that under certain circumstances, not only does the privilege apply, but the police must inform the suspect of his rights under it. The remedy for failure to provide such information is the exclusion at trial of the defendant's subsequent confession. The information, placed in the form of warnings, is well known not only to the American public, but to people throughout the world. When a suspect is in custody -- arrested, or unable to move about freely\textsuperscript{25} -- and she is being interrogated either through questioning or through actions of the police reasonably likely to illicit a response\textsuperscript{26} the *Miranda* rule applies. Incriminating statements may only be used to prove guilt at trial if these warnings were given:

the right to remain silent,

\textsuperscript{21}See Minnesota v. Olson, 495 U.S. 91 (1990).

\textsuperscript{22}Wong Sun v. United States, 371 U.S. 471 (1963).


\textsuperscript{24}384 U.S. 436 (1966).


\textsuperscript{26}Rhode Island v. Innis, 446 U.S. 291 (1980).
all said will be used against him,

the right to have an attorney present during questioning,

the right to have an attorney provided if the defendant has insufficient funds to retain a lawyer.

Of the warnings, the most controversy surrounds the notion of having an attorney present. We have seen an ongoing debate, as some contend that the use of an attorney limits the number of confessions police will receive.27 Others, however, argue that to ensure understanding of the privilege, the defendant must have the advice of counsel at the earliest stages.28

The *Miranda* rule has had a great impact on the criminal justice system. While some would argue that the impact has been tremendous in terms of the number of confessions decreasing29 the empirical evidence for that view is limited.30 The general public, however, is reasonably well aware of the rights through education programs as well as various forms of media. As a result of *Miranda* and the Fourth Amendment rules of exclusion, concerns have been raised as to effective law enforcement, resulting in funds being provided for far greater training for police officers. In addition, many steps have been taken to ensure police compliance with the rules and a greater degree of professionalism such as having observers present during interrogation or the tape recording of interrogation sessions.

The *Miranda* rules have not changed much in the period since the decision was offered. Some major limitations, however, have been imposed. These include the initial restriction that the rules only apply if the suspect is in custody and undergoing interrogation when he makes an incriminating statement. In addition, while the statement cannot be used in the government's case against the defendant, it can be used to impeach his confession if he takes the witness stand at trial and affirmatively makes a statement which is inconsistent with the earlier confession.31 Moreover, as indicated earlier, if the statement is taken for purposes of averting a greater harm (such as finding a victim of a crime or a weapon) rather than simply being taken to garner incriminating evidence, the confession would be admissible.32

One recurring problem which has never been fully resolved under *Miranda* is what should happen to evidence which police officers find as a result of the defendant's confession when the confession itself

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is not constitutionally obtained. Some argue that the evidence which is then found ought to be excluded in order to promote a policy which prohibits violation of the Privilege against Self-Incrimination. Others counter by asserting that the evidence is reliable and ought to be admitted, for the Privilege is served when the defendant’s statement itself in such a situation is not admitted.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

One central feature of the Sixth Amendment Right to Counsel has always been that the defendant can never be prohibited from bringing his own retained counsel to court proceedings. The question for most of the past century was whether the government could be required to provide an indigent defendant with an attorney. The rules are now settled. In virtually all cases, the defendant has the right to a lawyer and may well also be entitled to other expert assistance when necessary for a fair trial. The lawyer is required during interrogation sessions after the defendant has been charged, whether or not she is formally in custody and at most forms of identification such as line ups which occur after the defendant has been formally charged. In addition, counsel must be provided for pretrial hearings such as preliminary examinations and hearings on motions to suppress, and also for post-trial matters such as sentencing and appeals.

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Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.

34Scott v. Illinois, 440 U.S. 367, 373-74 (1979). Actual imprisonment is the line defining the constitutional right to counsel.

The Sixth and Fourteenth Amendments . . . require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense.


