The Exclusionary Rule in the Chicago Criminal Courts

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The fourth amendment protects "the people" from "unreasonable searches and seizures." In Mapp v. Ohio, the Supreme Court imposed the "exclusionary rule" on the states to safeguard this right. The rule forbids the use of evidence in court that is derived from an "unreasonable" search. For many, there is something intuitively troubling about this concept. Cardozo's often quoted line has it that "the criminal is to go free because the constable has blundered." Adding to this uneasiness, perceptions of the rule have been exaggerated by television "cop shows" and movies like "Dirty Harry." There violent, often psychopathic, criminals are set free when good cops have tripped over hyper-technical rules established by "liberal" judges isolated from the "reality" of police work. Occasional newspaper stories concerning criminals released because of the exclusionary rule, or because of any other "technicality," stir the pot of discontent.

Contrary to the impression created by the popular media, the exclusionary rule affects only a small percentage of crimes and an even smaller percentage of serious crimes. In Chicago in 1983-84, a jurisdiction with a comparatively high rate of suppression, evidence was lost to the exclusionary rule in only 0.9 percent of armed robbery cases, 0.5 percent of residential burglary cases, and 0.5 percent of cases involving violent crimes. Moreover, in many of these cases, convictions were obtained with other evidence. (A sample of 2759 cases revealed no convictions lost to suppression in crimes involving physical injury to a victim.) Ninety-eight percent of cases in which evidence was suppressed involved offenses which, if the defendant were convicted, would result in a sentence between probation and six months. The vast majority were minor drug possession cases.

Nevertheless, in the generation following Mapp, rising crime rates, public outcry against the perceived injustice of the rule, and increasingly conservative judicial appointments, produced a series of Supreme Court decisions limiting the rule's application. By 1984, "good faith" had become watchwords in fourth amendment jurisprudence. Throughout this process, the Court increasingly centered its concern on whether the exclusionary rule deters unlawful police activity. In the last decade, the Court has voiced growing skepticism concerning the capacity of

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In 1986, as a second-year law student, Myron Orfield (J.D. '87) began an empirical study to determine whether the fourth-amendment exclusionary rule deters unlawful police conduct. His results were published in 1987 in the University of Chicago Law Review. In 1988, Professor Stephen Schulhofer, Director of the Center for Studies in Criminal Justice, invited Orfield to return to the Law School as a full-time research scholar to pursue his study in greater depth. This paper represents a preliminary summary of some of his results. Orfield's research is supported by the Frank D. Mayer, Sr., Fund.

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the rule to change police behavior and has indicated that unless firm empirical evidence of a deterrent effect is forthcoming, it will continue to limit the rule.

In 1986, as a second year law student, with the help and encouragement of Professors Albert Alschuler and Hans Zeisel at the Law School, I drafted a lengthy, standardized "social science" questionnaire centering on the issue of deterrence and administered it to twenty-six of approximately one hundred narcotics officers in the Chicago police department. (Narcotics is the area of police work in which the exclusionary rule affects the greatest percentage of cases.)

The results indicated that the exclusionary rule has significant deterrent effects both in educating police officers in the law of the fourth amendment and punishing them when they violate constitutional standards. Further, my research identified an "institutional response" to the exclusionary rule through which the criminal justice system as a whole (police, prosecutors, and courts) responded to the loss of evidence by designing programs and procedures to ensure compliance with the fourth amendment. Finally, the study identified and began to explore the incidence and effect of police perjury on the operation and effectiveness of the rule.

Many of the officers interviewed believed the exclusionary rule did little harm and made them more professional. Strikingly, all of the officers wished to preserve the exclusionary rule, albeit modified to include a good faith exception.

The study I completed as a student at the Law School3 presented the impressions of police officers. To test my findings—particularly those concerning police perjury at suppression hearings—and to learn more about the operation of the exclusionary rule in practice, I recently began a second and more detailed study with the support of the Law School’s Center for Studies in Criminal Justice. As the basis of this research, I randomly selected fourteen of the forty-one felony trial courts in the Criminal Division of the Circuit Court of Cook County and interviewed the judge, an assistant public defender, and an assistant state’s attorney assigned to each courtroom.4

This second study confirms the findings of the first, with one significant exception. The second study suggests that police perjury is a more significant problem than I initially reported and indicates that it significantly affects the operation of the rule in practice. This article briefly summarizes my findings on the issues of deterrence and perjury. These issues, and others, will be examined in greater detail in the paper that is still in progress.

Deterrence

Judges, public defenders, and state’s attorneys, like the police officers I interviewed, uniformly believe that the exclusionary rule deters unlawful police behavior. Like the police, these groups believe that the rule is more likely to deter in "big cases," in which the officer hopes to obtain convictions, than in "small cases."

In a big case, officers are more likely to invest the time and care necessary to comply with the fourth amendment. In a small case, a less serious crime has been committed and less effort is invested. Further, if evidence is lost and the suspect goes free, the officer is often satisfied in the knowledge that the offender has been deprived of the seized contraband.

Internal police incentives reinforce this difference between "big" and "small" cases. A detective or specialized officer who investigates mostly big cases is rated both formally and informally on the number of convictions obtained. The officer has powerful incentives to comply with the fourth amendment. Patrol officers ("districts" or "beat cops") focus more frequently on small cases and operate under a system of incentives that places heavier emphasis on arrest. The mission of tactical (tac) teams—described by one state’s attorney as "flying affronts to the fourth amendment"—often includes "sweeps" of dangerous neighborhoods or housing projects. In a sweep, I have been told, tac teams are often directed to search individuals indiscriminately in order to seize guns and drugs and to make their presence felt.

When asked: "Does the exclusionary rule deter unlawful police behavior?" all of the judges in the sample, all of the public defenders, and thirteen of the fourteen state’s attorneys responded "yes." Moreover, the respondents confirmed the findings of the prior study that police care about winning cases and that they experience adverse personal reactions when evidence is suppressed.

When asked to describe the officer’s reaction when evidence is suppressed in a big case, 74 percent of the judges, public defenders, and state’s attorneys who responded described the officer as "angry"; 69 percent described the officer as "frustrated"; 64 percent of those responding described the officer as "disappointed"; and 33 percent described the officer as "humiliated."

In small cases, respondents also attributed adverse personal responses to the police officers, though somewhat less frequently.

The second series of interviews also confirms that suppression causes the police to change their behavior. Seventy-eight percent of the judges*, public defenders, and state’s attorneys who responded believe that suppression in a big case causes the officer to change his search and seizure behavior in "future big cases involving similar factual circumstances." Moreover, 74 percent of the judges*, public defenders, and state’s attorneys who responded believe that suppression in a big case causes the officer to change his

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4All the public defenders, thirteen of the fourteen judges, and eleven of the fourteen state’s attorneys chosen at random agreed to participate. In place of the state’s attorneys who would not participate, I substituted others assigned to the same courtroom. I could not substitute for the judge. The percentages listed are based upon those who responded to a given question. For some of the questions—particularly those concerning police perjury—the response rate was low (between 50 and 75 percent) among judges and state’s attorneys. Where this is the case, it will be indicated by an asterisk (*) placed next to the group with the low rate of response.
search and seizure behavior in "future big cases which do not necessarily involve similar factual circumstances." Finally, 57 percent of those who responded to the question believe suppression in a big case makes the police more careful generally.

Illustrating this principle, one state's attorney noted:

When evidence is suppressed, the police learn about the law of search and seizure, by going to court and seeing what is new.... Cops are like anybody else. Cops want to do their job right. Most police officers want to stay within the bounds of what is proper. Most police officers are really conscientious. They listen to the judge. Most of them learn something when evidence is suppressed. The majority of police officers learn from what they do wrong and then follow the rules....When evidence is suppressed a great majority of the officers change their behavior and they don't just change their behavior, but they become more concerned with doing everything properly—of really covering all the bases.

Another prosecutor explained:
The vast majority of your police officers, because of the implementation of the exclusionary rule, know that there has to be probable cause and without it, they know that the case will go nowhere.

In small cases, deterrence is less powerful. In this light, one state's attorney noted, "If they've got a big case on their mind, they may be apt to be more careful than in a small case." "Still," he maintained, "they learn from Terry stops. They learn that they just can't go and stop anybody in the street for any old reason."

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Perjury

I interviewed an elderly judge one afternoon. In the middle of the interview, he told me a story.

I was a young man right out of law school and I was trying my first case to a federal court for the Northern District of Illinois, Edwin Robson presiding. My client was a young black man accused of stealing a box of mink furs at O'Hare airport and trying to peddle those furs in the Loop. My client told me that he was walking into a building carrying a heavy box and the police, I guess FBI, just grabbed him, took him into a room, and started beating on the box to get it open. It took them fifteen minutes to beat it open. They found furs on the inside, and then they arrested him.

Before the case was called, I wanted to talk to the officer. I asked him what happened. The officer said, "What did your client say?"
told him what my client said and he said, "That's right. What your client said is what happened. But you tell him that we will get him right the next time."

Of course, I was excited by all of this and I told the officer, "Yes sir, I will sir, absolutely." I thought I had my client off. So then I come into court and the first thing I do is call the officer. The judge looked at me like I was crazy. The officer as my first witness! "Now officer," I said, "will you tell the court what happened?" The officer then said, "We saw the suspect come into the building, whereupon the box he was carrying busted open and mink tails fell out all over the floor." The officer there—right on the stand—burst out laughing. Even the judge, who was a somber old man, broke out laughing. The game was played. I pled my man guilty and crawled out of there.

The judge was now laughing himself, with a deep throaty laugh, leaning back in his chair, and wiping his eyes repeating to himself, "The mink tails fell out of the box. That sonofabitch beat on that box for fifteen minutes—for fifteen minutes." As the judge quieted himself and continued to wipe his eyes, he said, "The point of this story, young man, is that the police lie. Yes they do."

The concept of police lying under oath is difficult for many of us to accept. Yet it unquestionably occurs in Chicago. While the judge's story may be colorful, the message is common.

While virtually all the participants in the study believe that the exclusionary rule deters unlawful police behavior, all but one (a state's attorney) of those responding believe that the police lie in court to evade the requirements of the fourth amendment.

"Academic" discussion of police perjury assumes one of two worlds. Either the police perjure themselves so frequently that the exclusionary rule is substantially frustrated, or police lying is so infrequent that it does not substantially impede the rule. This study suggests that a more accurate picture lies somewhere in between.

All of the judges and public defenders, and 46 percent of the state's attorneys believe that at least sometimes the threat of suppression causes an officer to change his testimony in court rather than his behavior. When those who believed that testimony changes were asked whether an officer is more likely to change his testimony or behavior in a big case, 50 percent of the judges*, 21 percent of the public defenders, and 86 percent of the state's attorneys reported, that officers were equally likely or more likely to change their behavior; whereas 50 percent of the judges, 79 percent of the public defenders, and 14 percent of the state's attorneys who responded stated that the police are more likely to change their testimony. In a small case, the respondents believe the police are even more likely to change their testimony rather than their behavior.

There are many stages in the process of police perjury. The process generally begins with police offense reports (also called arrest or case reports). Here the police sometimes fabricate evidence to create "probable cause" upon which they base later testimony. More frequently police leave these reports vague so that they can expand upon them in court without contradiction. As one state's attorney told me:

In Felony Review,³ they learn [about] writing reports the right way and they can't be impeached. The report is vague. The report is written that way for a reason. A good police report is written in such a way that the officer can expand anyway and anything. And it's true, we do tell them how to do that.

Second, the police repeatedly use boiler-plate language when drafting affidavits for search warrants. Preliminary investigation indicates that a large percentage of warrant affidavits based on tips from an unidentified "reliable informant" in narcotics cases are based on a virtually identical probable cause scenario.

As one state's attorney told me:

If you take a thousand search warrants issued by OCD [Organized Crime Division of the Chicago Police Department], nine hundred and fifty say the same thing. In terms of the scenario in them, they are the same scenario....

They say the confidential informant says, "Yes, I bought drugs in someone's home." The police believe that they better have that in the warrant. But people are not selling drugs out of their houses. People sell them elsewhere. These lies are caused by the policeman's belief that the judge won't issue the warrant unless they say the person is selling drugs out of the house....

The police are partially lazy. It is partially nonsense. Defendants selling drugs out of their houses is nonsense. What really happens is that the informant buys a large amount of drugs from the defendant in a tavern. The police don't realize that you could get a search warrant based on these facts. If it is a large amount of drugs involved, where else is the defendant going to keep them except in his house. They need to be reasonable.

When asked how often police use the same fact improperly for different search warrants, a judge responded:

In every narcotics search warrant. They are "fill in the blanks" search warrant affidavits. It is beyond my comprehension how everyone is ratiing on suppliers and no one is killed in retribution.... I have a jaundiced eye toward search warrants—toward the absolute similarity of all the warrants.

When I asked a prosecutor whether the officers use the same warrant because the law is too complicated or demanding, he explained:

Laziness. The reason they use the same warrant is that it is easier to Xerox and fill in the blanks than to type out what actually happened. I think they always really do have probable cause, but they don't want to type it out. I believe that they do have a confidential informant, but I disbelieve that he bought drugs in the defendant's house. There is always probable cause. I have never gotten the impression that the police are lying about the existence of probable cause. I accept that they have, that they do know of, an ongoing type of thing in terms of the defendant selling drugs. In all cases there is probable cause. The police are lying for no reason.

The third phase of police perjury occurs when the police lie under oath at suppression hearings. Of the nine judges, thirteen public defenders and eleven state's attorneys willing to respond to this inquiry, the judges estimated that judges disbelieve police officers 18 percent of the time in rela-

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³In "Felony Review," assistant state's attorneys screen police arrests and make the decision whether the case should be prosecuted.
tation to fourth amendment issues; public defenders estimated 21 percent of the time; and state's attorneys estimated 19 percent of the time. While this suggests a potentially shocking level of police perjury, the majority of judges and public defenders, and almost half of the state's attorneys stated that the police lie in court more frequently than they are disbelieved.

Moreover, the respondents—including prosecutors—believe that prosecutors frequently tolerate and, less often, encourage police perjury at all the steps in the process. Forty-three percent of the judges*, 73 percent of the public defenders, and 33 percent of the prosecutors* who responded stated that at least half the time prosecutors "know or have reason to know" that police witnesses fabricate evidence at suppression hearings. Further, all of the judges* and public defenders, and 89 percent of the state's attorneys* responding stated that prosecutors "knew or had reason to know" that the police lie in suppression hearings at least some of the time.

One prosecutor remarked:

Prosecutors encourage [perjury] sometimes. I've known of it. They tell the police to toughen up certain aspects. No question about it. [Pause] How do you think I know this?

Q: So you have encouraged police perjury?
A: It is never on the issue of guilt or innocence. This happens on Miranda issues. Never on the issue of guilt or innocence. Those who advocate the exclusionary rule don't understand something. The reason that no one has done something about the rule, is there is a line society draws like John Wayne Gacy. He won't go home and eat dinner because the police don't get a warrant. I won't ever live to see this.

One of the "benefits" of the exclusionary rule is visible to people who work for the sovereign. All those who claim that the exclusionary rule is wonderful, they don't think of this. When Earl Warren and the Court came down with Mapp, they didn't realize that they were substituting one swearing contest for another. They didn't realize that some prosecutors and police officers just weren't going to let some people go....

Another prosecutor summed up his experience with police perjury in the following way:

I just don't want to know if the police officer is telling the truth. If it is a wild-ass story, I will say, "that's incredible." I will not supplant my judgment about whether the officer is telling the truth for the judge's. That is the judge's job. If it is an extreme case, I will sit down and ask him what the story is. I will not put my judgment in place of the judge's.

The vast majority of officers are telling the truth. They don't care enough to lie about the case. Their emotion is "OK, a year old case is gone." They will be hurt by it, but they will not perjure themselves to nail street drugs. They are pretty calmed down about it. Most of the time they are telling the truth.

I will not cross-examine my own witness, except in relation to what the defense attorney asks. I make a presumption that he is telling the truth.

When asked whether they equate police fabrication at suppression hearings with the felony crime of perjury, 20 percent of the judges, 43 percent of the public defenders, and 21 percent of the state's attorneys said "no." Further, many of those who answered "yes" did so very hesitantly. These responses may indicate that the police perjury is such an ingrained part of the system that at least some participants in the criminal justice system do not recognize how serious a violation of the law it is.

A striking example of this attitude came from a judge (who happened to teach trial practice at a local law school). When I asked whether he equated police fabrication with perjury, he answered,

"Of course it is not perjury. Who would ever think it was perjury? Do you know what perjury is?"

"Sure," I responded, "perjury is any time that you lie in court under oath."

"You're nuts," he declared. "Perjury is when you contradict a prior sworn statement while you are under oath."

"No judge, you're wrong," I replied.

"Let me show you," he said, pulling off the shelf a copy of the Illinois Criminal Code. He turned to the section that defined the substantive crime of perjury and began to read out loud in a confident manner. His voice slowed considerably as he began to realize his error and suddenly he stopped reading. "Shit," he quietly exclaimed, then a second later, looking up and shaking his head, "Then there is sure a hell of a lot of perjury going on in this courtroom."

A more common response came from a state's attorney who after some thought decided that he did equate police fabrication with perjury:

[Laughter] In my own mind, perjury is where the officer lied about guilt or innocence. They don't lie about that. As far as the problem with the exclusionary rule, I do [equivocate police fabrications at suppression hearings with perjury]. There is no excuse, but there is an explanation. There is a big difference. In most cases where the exclusionary rule is applied the defendant is guilty.

When asked whether the criminal justice system effectively controls police perjury at suppression hearings, 100 percent of the public defenders, 60 percent of the judges and 42 percent of the state's attorneys responding said "no."

The exclusionary rule has a substantial effect on police officers. This effect can be envisioned as a point somewhere on a continuum, with one end indicating a change in police behavior and the other a change in police testimony. The results of this research provide further evidence concerning the interaction of deterrence and perjury. Even this brief summary, however, points to the irony of the Supreme Court's move toward a broad "good faith" exception to the exclusionary rule, while police in cities such as Chicago consistently attempt to evade the rule by perjury.