Part III

POLICING AND PRIVACY

5

The Exclusionary Rule

Its Effect on Innocence and Guilt

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The exclusionary rule is the principal constitutional remedy for police violations of Fourth Amendment rights. It prevents juries from considering relevant evidence, so as to deter future police misconduct. The Supreme Court acknowledges that preventing admission of potentially determinative evidence will allow some guilty defendants to go free, but it justifies the rule on the ground that no other remedy properly deters police abuse, harassment, or other misconduct. But this assumes two quite questionable facts. First, it assumes that the rule does actually effectively deter, despite the fact that there are still many incentives for police to engage in illegal evidence-gathering mechanisms: to get contraband off the street, to discourage crime by policing aggressively, to maintain arrest statistics, or to legally use illegally gained evidence in other ways, such as against coconspirators. Second, the Court's analysis also assumes that the effect of the rule will only be to set some guilty people free, and not to convict some innocent people. Many scholars, judges, and lawyers have debated whether the exclusionary rule effectively deters police misconduct, but everyone has assumed that the second claim is obvious, since the exclusionary rule only excludes inculpatory evidence, not exculpatory evidence. This chapter outlines a different concern with the exclusionary rule: that it sets the guilty free at the expense of convicting innocent defendants.[1]

The theory of the exclusionary rule is that judges can prevent evidence from ever reaching the jury, but there is strong evidence that this is not how the trial process works in practice. Jurors make inferences about excluded evidence from admitted evidence and trial procedure. For instance, if there are obvious holes in the prosecution's case, such as key evidence that is missing, jurors might reasonably infer that other evidence was found but not allowed to be introduced at trial. Extensive social science evidence shows that when jurors figure out that evidence is being withheld from them, they will alter their deliberative process to work around rules they do not like. And the

exclusionary rule is definitely one of those rules – it is highly unpopular among the populace. So when jurors deduce – or simply assume – the operation of the exclusionary rule, they will take their assumptions about the missing evidence into account. Since only inculpatory evidence is ever excluded under the rule, this means they will discount the prosecution's burden of proof – and the defendant's right to reasonable doubt – by an estimate of the effect of the rule.

It would be bad enough if jurors were, in lieu of seeing the actual evidence, simply substituting their potentially inaccurate assessments of evidence they are inferring exists but has been kept from them; but the inaccuracy inherent in this process will actually mean that defendants who have not had the exclusionary rule exercised in their favor will be systematically penalized. Jurors will assume the rule's operation, even when there is none. Exclusion of tainted evidence does not simply return defendants to the position they would have been in but for the illegal search. Rather, the exclusionary rule benefits defendants most likely to be guilty at the expense of the actually innocent – the exclusionary rule actually *decreases* the chance of finding a reasonable doubt for those defendants most likely to be innocent.

The well-worn debate over the exclusionary rule is framed in terms of the extent we should be willing to allow the guilty to go free so as to interpret the rights of accused criminals expansively.[2] However, wrongly convicting the innocent is not part of that deal. The proverbial ten guilty men are not meant to be set free for their own sake, but rather so that the one innocent person goes free. This chapter establishes that by instituting constitutional protections for actually guilty criminal suspects, the exclusionary rule creates a higher burden of proof for actually innocent defendants. As such, the vast literature justifying or criticizing the exclusionary rule for the extent to which it treads the correct balance for guilty suspects misses the most vital point. The rule undermines the foundation of the criminal justice system, in sorting innocent and guilty defendants.

There are four steps in how jurors process information, which this chapter outlines in turn. The first is juror resistance – jurors resist having information concealed from them; they make inferences from silence, drawing implications about what evidence is missing, and respond to instructions not to consider evidence by giving the evidence even greater weight. The second is juror error – jurors will substitute inaccurate assumptions when they are not given accurate information. The third is juror antipathy – jurors will be most resistant to those rules that they personally oppose. The fourth is the end product, a "perverse screening" effect – the result will be the reversal of the differentiation the criminal justice process would otherwise make between innocent

and guilty defendants, with innocent defendants more likely to be convicted and guilty defendants less likely to be convicted.

Finally, these problems manifest themselves not only among jurors, but also among judges. At the trial stage, judges engage in the same resistance that jurors display, through manipulating their fact finding. Appellate judges also display resistance to the rule, and this is even more problematic: in attempting to mitigate the adverse effects of the exclusionary rule, higher court judges twist and subvert the secondary doctrines in this area of law. For instance, certain searches are recategorized as nonsearches, to avoid the rule's operation and its unattractive outcomes. These jurisprudential distortions further undermine innocence-guilt screening. In order to overcome both the direct harms of the exclusionary rule and these secondary manifestations, I propose that future rules should be structured to promote differentiation between guilty and innocent defendants. The ultimate purpose of the criminal justice system, and the approach that is most likely to achieve justice with minimal intrusions on the constitutional rights that the Fourth Amendment is designed to protect, is to differentiate between guilty and innocent defendants. As such, ancillary rules should be assessed in those terms.

1. JUROR RESISTANCE

The exclusionary rule only works if trial courts can effectively control what information juries receive. But that process of control itself provides information to the jury. Even though court rules attempt to ensure that evidence is excluded before it reaches the jury, there will often still be evidence that exclusion has occurred: even without hints such as continued objections or whispered conferences between judges and attorneys, there will be holes in prosecutors' cases that suggest evidence is missing. Studies have established that jurors gain information about the criminal justice system from popular television shows and media reports, and this affects their assessments of guilt. When information is excluded, the story is not going to be complete, but it is the jurors' job to make sense of the case before them, to fill in the blanks in that incomplete story, something they are strongly motivated to do correctly. They draw inferences from gaps in the evidence, they receive and interpret cues throughout the course of the trial, and they introduce their own prejudices and assumptions, including assumptions about the operation of the legal process and the operation of the exclusionary rule.

There is strong evidence in both the civil and criminal contexts that jurors make inferences from silence, that is, from the absence of evidence. This effect has been found in all manner of studies: controlled mock juror

studies, surveys of actual jurors, and observation of actual jurors' process of deliberation. In each, researchers found that jurors make frequent references to topics that are forbidden for them to consider. For instance, observation of actual jurors in civil suits showed they discuss insurance in 85 percent of deliberations and attorney's fees in 83 percent of cases, though both topics are explicitly forbidden. Both considerations also had a clear impact on the verdict in some cases.[3]

When it comes to making inferences about whether evidence of the crime was found by police during a search, jurors similarly draw their own interpretations of ambiguous and missing evidence. If jurors know that a search is successful, that knowledge makes them more likely to interpret other testimony in a manner that favors the police.[4] Even when jurors have not seen the evidence, they are subject to a number of triggers that are likely to activate their general expectations about the operation of the exclusionary rule. The most obvious triggers are steering of witnesses away from particular topics or hushed sidebar conversations. However, another pervasive trigger is a prosecution narrative that does not quite make sense. For example, in a murder trial without a murder weapon when neither side mentions a search of the defendant's home, it stands to reason that a search was conducted but its proceeds excluded. It does not make sense that the police would not search the defendant's home if they could not otherwise locate the murder weapon, or that the defense would fail to mention that a search was conducted and no murder weapon was found.[5] Therefore, jurors seeking to determine the defendant's actual guilt or innocence, and primed with a basic awareness of the exclusionary rule's existence, may rationally infer that the weapon was found in the defendant's possession but excluded (but they make errors in this assessment, as discussed later).

It is practically impossible for jurors to follow instructions not to consider nonadmissible evidence. The proverbial instruction not to think about elephants only emphasizes the relevance of elephants. Empirical studies have repeatedly shown that judges' instructions do not in fact restrict jurors' consideration of the prohibited evidence: inadmissible evidence impacts verdicts in the direction of the content of that evidence that is meant to be ignored – by as much as a 40 percent change in the probability of conviction.[6] Jurors appear to retaliate against judicial instructions by giving the evidence *more* consideration than they would have if no instructions had been given, and the more strongly worded the judicial instructions are, the more this effect occurs.

This is because the notion of excluding evidence is inherently contradictory: "Information is withheld from jurors to prevent it from adversely affecting their decisions, yet [exclusion] is effective only if jurors desist from speculation

and inference – and given the lack of clarity on many complex legal issues and jurors' natural tendencies to make sense of these complexities, both speculation and inference are likely."[7] As such, exclusion is futile when jurors can be expected to come to trial with knowledge that will lead them to speculate about information being withheld from them, as research on criminal exclusion suggests they do.

Worse yet, an inference of exercise of the exclusionary rule can also taint subsequent evidence of innocence at trial. One study found that taped telephone confession evidence not only was considered incriminating at the time when the evidence was given (as tested on a handheld dial response measurement device), it also altered the way jurors perceived subsequent evidence.[8] Of particular note, jurors for whom the evidence was inadmissible because of the exclusionary rule interpreted subsequent evidence as considerably more incriminating.

Juror resistance to the mandate to ignore evidence or not make inferences from the absence of evidence arises in various forms: jurors expressly consider excluded evidence when forming their verdicts, attach increased weight to other similar evidence, and further rely on that evidence when instructed not to do so. In addition, as the following section shows, the extent of this resistance varies with their preexisting attitudes and biases.

2. JUROR ANTIPATHY

The extent that jurors do cooperate with the prohibition on considering excluded evidence depends on juror idiosyncrasy – particularly, whether the rationale for exclusion aligns with their own sense of propriety or whether it accords with their sense of the integrity of the investigative process and the reliability of evidence.

This conclusion is supported by a study by Professors Saul M. Kassin and Samuel R. Sommers that compared jurors' reactions to two rulings of admissibility of a taped telephone confession, excluded either because the tape was illegally obtained or because the tape was of poor quality.[9] In the latter group, jurors largely followed the instruction to disregard the evidence, convicting at the same rate as a control group that had not seen the evidence at all. But in the former group, they did not. In fact, the group that was meant to ignore the evidence because it was inadmissible by virtue of the exclusionary rule convicted the defendant at the same rate as those who were explicitly allowed to consider the evidence – and at considerably higher rates than those who were instructed to disregard the evidence because of its unreliable quality. This shows not only that jurors selectively consider evidence they are meant

to ignore, but also that they show particular reluctance to ignore evidence excluded on the basis of the exclusionary rule. Such a result has important implications for the exclusionary rule, suggesting that the extent of resistance to the rule will reflect individual biases.

The cause of these differences appears to be that jurors have different preconceptions of the inherent fairness of using different types of evidence. Similar effects have been found with other forms of evidence: just as with the unreliable tape, jurors show a strong inclination to comply with the duty not to make inferences from hearsay testimony, since that too tends to be unreliable. But they display the opposite response, a strong inclination to rely on evidence, when that evidence is suggestive of guilt without having an unreliable foundation. Like evidence excluded because of improper police procedures, prior conviction evidence is indicative of guilt, given high rates of recidivism among offenders. And just as jurors showed particularly resilient partiality to inferences regarding evidence excluded only because of the means by which it was obtained, multiple studies have shown that jurors will willingly consider evidence of, and make inferences from, prior conviction evidence.

These results are unsurprising given that numerous polls have shown that jurors are actively opposed to rules of the criminal justice system that are seen to give unfair advantage to guilty suspects. Public attitudes to criminal justice generally tend strongly toward preferences for greater criminal sanctions. In testing attitudes toward the severity of criminal courts in a person's local area, studies have asked people, "In general, do you think the courts in this area deal too harshly or not harshly enough?" Between 1985 and 2002, a large majority always responded, "not harshly enough." The percentage of those responding "too harshly" was always in the single digits. Those responding "about right" ranged from 8 to 18 percent.[10] These figures vary surprisingly little when broken down by demographic characteristics; there is always a solid majority in the "not harshly enough" category, regardless of sex, race, age, education, income, occupation, region, religion, or politics of the respondent.

As for the exclusionary rule itself, there is "an instinctive and deep-seated hostility to the exclusionary rule," and "the perception that the rule sets the guilty free undermines public confidence in our system of justice."[11] The overwhelming majority of Americans think more needs to be done, and that it should be the top priority of reform objectives, to make sure that punishments fit the crimes.[12] The exclusionary rule is seen as a means by which criminals "get off on technicalities" and is viewed as contrary to this populist goal. The effect is that "as an empirical matter, the rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law

and involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty."[13]

This attitude is further reflected in public support for police, which contrasts with the dim view of judges. Whereas 58 percent of people believe police and law enforcement are doing an excellent or good job, in contrast, only 37 percent feel the same way about judges. The single most popular reason given for this negative assessment of judges is flaws in the criminal justice system, particularly "loopholes that allow criminals to 'get off,'" which account for 18 percent of those expressing dissatisfaction with judges.[14] Criminal punishment is perceived as being overly lenient, and a strong cause of this excess lenience is lack of fit between crime and punishment, in particular allowing criminals to avoid appropriate sanction through technical prodefendant rules like the exclusionary rule. These attitudes exacerbate juror resistance to ignoring excluded evidence.

So in summary, it is well established that jurors commonly ignore instructions to exclude; that even where they do follow exclusion instructions, they will only do so in some circumstances that accord with their own sense of justice rather than judicial instructions; and that instructions to ignore evidence commonly backfire, leading jurors to rely even more heavily on that evidence than they otherwise would have. Given the unpopularity of the exclusionary rule, the evidence that juror resistance is exacerbated by juror antipathy renders jurors especially likely to consider any evidence they infer has been excluded under the rule. Overall, this suggests that exclusion instructions are more likely than not to be ignored, and excluded evidence will shape verdicts. The next two sections explore *how* those inferences from excluded evidence will shape verdicts.

3. JUROR ERROR

Like Sherlock Holmes, jurors will make inferences from the "dog that did not bark"; however, unlike the fictional master detective, jurors will often make the wrong inferences. As discussed, there will be many triggers that suggest that the exclusionary rule has been exercised, but many of these triggers will in fact be false. Jurors' inclinations to consider inferences stemming from the exclusionary rule can result in both inaccuracy and bias; this section considers the former, the next section the latter.

When the exclusionary rule is exercised, the result may be that obvious holes are created in the prosecution's case. The victim was shot and there was evidence of gun residue on the defendant's hands, but no gun was ever admitted into evidence – one possible inference from that information is that the gun was seized in contravention of the Fourth Amendment and excluded. At other times, however, those holes in the prosecution's case may arise because the

prosecutor does not in fact have all of the information about the crime – that is, the case may be incomplete even without the operation of the exclusionary rule. The police may simply have never found the gun used to shoot the victim, rather than having found the gun in the defendant's possession and its being subsequently excluded. Cues that exclusion has operated do not invariably stem from actual exercises of exclusion. Gaps in the evidence may manifest, for instance, because the prosecution witness proved to be unreliable. Since prosecutors are subject to significant resource constraints, they may also push ahead with a prosecution in the hope that all of the dots will connect by the end of the trial, or else that the jury will be willing to overlook some deficiencies in the case. The problem is that the existence of the exclusionary rule may create an impression that evidence has been excluded even where the rule has not in fact operated. This misinformation can be extremely harmful.

The foregoing evidence showed that jurors will adjust their expectations of guilt, and so their probable verdicts, on the basis of excluded and absent evidence, but jurors will not always be accurate when adjusting their assessments of guilt on the basis of inferences of excluded information. Typically, jurors know about the existence of the exclusionary rule but cannot know with any certainty whether it has operated in a given case, versus when natural holes have arisen in the prosecutor's case. As such, they will only have impressions of whether the rule has operated in any case. Jurors will base their expectations of guilt on the information that they have been presented with, along with their inferences of whether additional evidence exists but has been excluded by the rule. Because the exclusionary rule only works in favor of the defense, these estimates of whether the exclusionary rule has operated, and consequent reestimates of the defendant's guilt, will only shift in one direction: in favor of the prosecution. As such, jurors will adjust their beliefs in a way that effectively reduces the burden of proof that the prosecution ordinarily has to bear.

For instance, in a case where jurors hear that evidence implicating the defendant was found in his office, but no mention is ever made of a search of his home, jurors may estimate that the odds that the exclusionary rule has operated to exclude evidence found in the home are high. Without other evidence, this inference may not take the jurors very far, but if there is considerable other evidence – gunshot residue, bloodied clothing, and so on – but the gun was never found, jurors might feel confident in dismissing the doubt that the missing piece of evidence otherwise might create; whereas if there were no exclusionary rule, that missing gun could constitute reasonable doubt.

If jurors do infer that the exclusionary rule operated to some extent, and they recalculate their expectations of the defendant's guilt accordingly, that inference will translate into giving the prosecutor a discount in her burden of

proof. Say jurors estimate that, given the other evidence found and the lack of a search producing the gun, the odds that the gun was found but excluded are fifty-fifty, then they would give the defendant only half of the benefit of the doubt over whether he had the gun.

Even if jurors are unsure whether the exclusionary rule operated, there is considerable evidence that people are generally overconfident of their ability to make such assessments. But even if juror estimates are right, the outcome will be wrong. Even assuming that an estimate is perfectly accurate, the conclusion that follows will nonetheless be inaccurate. For example, if jurors estimate that the odds that the exclusionary rule has been exercised are fifty-fifty, in the actual case where the gun was excluded, they will be underestimating the operation of the rule by 50 percent, and where it was not excluded, they will be overestimating by 50 percent. If the defendant did in fact have the gun and it was excluded from admission as evidence, the jurors will have only assumed away half of the benefit of the exclusionary rule to the defendant – they will still give the defendant half of the benefit of the doubt. And in the case where the defendant did not have the gun and it simply was never found, the defendant will not receive the benefit of the doubt that he otherwise would have – he will effectively be penalized for the prosecution's failure to find the murder weapon. The exercise of the exclusionary rule is an either/or outcome, but the jurors' best estimate of the probability that the rule has been exercised is necessarily a fraction. So by necessity, the jury will have overestimated the effect of the exclusionary rule half of the time and underestimated it in the other half.

Juror resistance and antipathy mean that jurors will be filling in gaps in prosecutors' cases with potentially inadmissible evidence; juror error means this process of gap filling increases the inaccuracy of the criminal justice system. The next section shows that gap filling also introduces a bias against innocent defendants.

4. PERVERSE SCREENING

For defendants for whom the exclusionary rule has been exercised, juror resistance and juror antipathy to the rule will mean that much of the intended protective effect of the exclusionary rule will be undermined. Nonetheless, these defendants will still receive some benefit from the rule – juror inaccuracy will mean they will never mitigate the full inculpatory effect that excluded evidence would have had were it admitted (unless jurors are massively overestimating how common operation of the rule is). The real harm occurs when we consider the effect on defendants for whom the exclusionary rule has *not* in fact been exercised. They will be penalized by the very existence of the rule. Instead of their

being given the benefit of the doubt, that doubt will be reduced, as before, but with a foundationally different effect. There will be no direct benefit from exclusion, since nothing is excluded, and at the same time jurors will nonetheless reduce the prosecutor's burden, out of the same estimation that the exclusionary rule has been exercised. Whereas without the exclusionary rule these defendants would have the full benefit of the doubt, with the rule jurors will often wrongly conclude that these defendants probably have benefited from exclusion and thus penalize them for the wrongs that the police have done to others. These defendants will be worse off than if the exclusionary rule did not exist.

Worse yet, the fact that the absence of evidence can be seen as a trigger means that jurors could actually take a weak prosecution case as implying the operation of the exclusionary rule. Then, the very feebleness of the prosecution's case would increase the discount of the prosecutor's burden. Ironically, the more stringent the exclusionary rule is understood to be, the greater the discount to the prosecutor's burden. This is because the more that the exclusionary rule operates automatically to translate any minor technical breach by the police into an evidentiary exclusion, the more likely jurors are to assume it will have operated in any given case, and the more likely they are to reduce the prosecution's burden of proof.

It is possible that the distribution between the two groups of defendants – those for whom the exclusionary rule has been exercised and those for whom it has not – could be random, with some defendants gaining a benefit from the exclusionary rule (a positive benefit even when discounted) at the cost of other defendants. But the more likely outcome is that the guilty will benefit at the cost of the innocent. The rule necessarily operates where there is evidence to be excluded – and only applies to inculpatory evidence. That the probability of guilt will increase with each additional piece of inculpatory evidence is axiomatic to the criminal justice system. Since Fourth Amendment exclusions do not raise reliability concerns (unlike, for instance, coerced confessions excluded under the Fifth Amendment), then logic dictates that any exclusion of evidence under the Fourth Amendment is more likely to benefit guilty rather than innocent defendants. In fact, the Supreme Court has implicitly recognized this relationship in its repeated acknowledgment that the cost of the exclusionary rule is to let guilty criminals go free.

There are two forms of empirical evidence that are strongly suggestive that it will be guilty defendants who benefit most from the exclusionary rule. First, there is evidence that it is overwhelmingly reoffenders who successfully exercise the exclusionary rule at the trial stage. Second, there is evidence that those who do successfully exercise the exclusionary rule subsequently reoffend. When these two findings are combined with evidence of the relationship between

prior offenses and conviction rates, these data confirm that actually guilty defendants are most likely to benefit from the exclusionary rule. Defendants who exercise the exclusionary rule are very commonly subsequently rearrested; they are also overwhelmingly those with prior records, and having a prior record is the best predictor of a guilty verdict, whether or not the jury knows of those prior crimes. As such, there is strong empirical evidence that those who benefit from the exclusionary rule are those most likely to be actually guilty. So guilty defendants are being encouraged to make use of the exclusionary rule, while innocent defendants are being denied their full benefit of the doubt.

The usual solution to adverse selection problems of this kind is to create "screening" – structuring incentives so as to encourage innocent defendants to exercise their full rights, leading to self-revelation of innocence or guilt. However, what the exclusionary rule does is create *perverse screening*, whereby the opposite result is achieved: guilty defendants are encouraged to exercise their full exclusionary rule rights, making it more difficult for juries to differentiate between innocent and guilty defendants, and at the same time innocent defendants are effectively hampered in exercising their full rights.

This means that those who benefit from the exclusionary rule are primarily actually guilty, but they do not gain that benefit at the cost of police and society more generally, as the Supreme Court claims. Rather, guilty defendants gain that benefit at the cost of the actually innocent. The actually innocent have their entitlement to the benefit of the doubt considerably diminished by the exercise of the exclusionary rule, without any correlative benefit.

This undermines the claim that the costs of the exclusionary rule are the costs of the Fourth Amendment itself. In fact, the exclusionary rule does not simply undo a constitutional violation; rather, it just shifts the burden for that violation from one defendant to another. That shift occurs by increasing the burden at the judicial stage onto the actually innocent.

5. JUDICIAL DISTORTION OF THE EXCLUSIONARY RULE

Recent jurisprudence has seen the Supreme Court developing numerous exceptions to the exclusionary rule, a process that has arguably steadily eroded Fourth Amendment protections over time. But this is not simply a result of an ideological turn of the Court against criminal defendants; rather, the exclusionary rule itself is responsible for much of this doctrinal development. The problem is that the rule was developed as an automatic and binary mechanism whereby evidence is admitted or not admitted, depending on the violation of a fixed constitutional line, regardless of the substantive unfairness to the defendant or the probative value of the evidence. This engendered the unpopularity of the

rule, which in turn causes it to be underenforced, not only by jurors but also by judges. Like jurors, judges respond to the inherent overreach of exclusion and attempt to mitigate its effects in two ways: through avoidance and contraction. That is, trial court judges display similar resistance to jurors and avoid applying the rule in criminal cases, and higher court judges also display resistance, which leads to contraction of the doctrinal substance of associated rules, as they attempt to minimize the effects of exclusion. As a consequence, judges both make errors and increase perverse screening by confusing signals of guilt.

The unpopularity of the exclusionary rule and the view of a majority of citizens that the courts are "too easy" on criminals mean that at the trial level, judges may be reluctant to apply the exclusionary rule in criminal cases. For elected judges, there are obvious electoral incentives to avoid appearing to let criminals off on technicalities. But more generally, judges are uncomfortable applying the rule, particularly for minor violations of police procedure, and especially in the case of more serious crimes. For instance, judges themselves report knowingly accepting police perjury as truthful to avoid applying the exclusionary rule.[15] Judges are reluctant to free, or be seen to free, seemingly guilty defendants, so they manipulate the jurisprudence so as to avoid exclusion.

The second way that judges mitigate the effect of the exclusionary rule is through the formation of law. Numerous cases in various areas of constitutional criminal law have developed rules that strain the definitions of searches and seizures. For instance, individualized close examination by a trained narcotics dog was not considered a search,[16] and a person is not seized by police when questioned without reasonable suspicion within the cramped confines of a bus that he did not feel free to leave.[17] These rules constitute doctrinal distortions that arise out of higher court judicial attempts to narrow the application of the exclusionary rule. Such attempts to mitigate the ill effects of the exclusionary rule create confused jurisprudence, which will necessarily result in unfair outcomes.

So the exclusionary rule causes distortion of the facts, which is problematic because it fails to recognize or remedy violations of individual defendants' Fourth Amendment rights; its effect on doctrine is worse, as this causes a ratchet effect, whereby future violations are even less likely to be dealt with.

Since much of this jurisprudential manipulation appears to be driven by a desire to avoid the cost of "letting the criminal go free," a better, more direct way to achieve that goal is to embrace rules that aid screening between innocent and guilty defendants and forgo rules that blur those categories. This may sound obvious, as it is the role of the criminal justice system to sort the innocent from the guilty, but in fact numerous doctrines do the opposite, and this extends beyond the Fourth Amendment search and seizure examples

described. For instance, threatening a suspect at gunpoint does not violate the Fifth Amendment,[18] despite the fact that it is likely to induce confessions by innocent as well as guilty suspects; yet words or actions stated by the police that are likely to elicit an incriminating response from the suspect when counsel is not present do violate the Sixth Amendment, even when they are only likely to elicit a confession from a guilty suspect.[19] Both of these rules undermine differentiation between innocent and guilty defendants – in the first case by incentivizing innocent defendants to confess, in the latter by discouraging guilty defendants from confessing.[20]

It is not enough to address the extensively debated question of whether the exclusionary rule should be kept or abolished; either way, we will be left with numerous doctrines that undermine guilt-innocence screening, that have been developed as part of judicial attempts to avoid the application of the exclusionary rule. I propose that a core criterion in assessing whether constitutional criminal procedure doctrines should be embraced or rejected is whether they create ideal or perverse screening, of the type described. This will complement rather than replace other criteria, such as the level of intrusion or greater protection given for a search of a home. It will not entirely eradicate the cost to innocent defendants of the exclusionary rule, but it will provide some means of assessing the secondary doctrinal components of the surrounding law and provide a mechanism for reforming the most harmful effects of the exclusionary rule.

Notes

1 This chapter is based on an article that provides greater detail, including citation information, and that also more formally proves the effects described here. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 *Notre Dame L. Rev.* 585 (2012).

2 See Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."). Other disagreements about the exclusionary rule include whether it is more harmful to the truth-seeking function of the court system to exclude pertinent evidence, or to have the courts tainted by using illegally gained evidence.

3 Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 *Va. L. Rev.* 1857, 1894 (2001).

4 Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 *Law & Hum. Behav.* 291, 306 (1989).

5 Defendants cannot claim that no evidence was found if the evidence was actually found and excluded. Fed. R. Evid. 403. While this does mean it is theoretically possible that jurors can infer the operation of the exclusionary rule from the reasons given or not given for that absence of evidence, this will only mitigate the problem described here to the extent that it undermines the rule itself, rather than combating the perverse effect of the rule.

6 See Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 *Law & Hum. Behav.* 469, 476 (2006).
7 Edith Greene et al., *'Shouldn't We Consider … ?': Jury Discussions of Forbidden Topics and Effects on Damage Awards*, 14 *Psychol. Pub. Pol'y & L.* 194, 199 (2008).
8 Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 *Personality & Soc. Psychol. Bull.* 1046, 1049–50 (1997). A similar result was found by Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 *J. Experimental Psychol.: Applied* 91, 91 (2001).
9 Kassin & Sommers, supra note 7, at 1048.
10 U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 140–1 tbl. 2.47 (Ann L. Pastore et al., eds., 2003), available at http://www.albany.edu/sourcebook/toc.html (citing Nat'l Op. Res. Ctr., General Social Surveys 1972–2002 (reporting years 1985 to 2002)) (last visited Apr. 29, 2013). Similarly large majorities – between 63% and 67% – responded that courts do not deal harshly enough with criminals, in biennial surveys between 2002 and 2008. Nat'l Data Program for the Soc. Sci., General Social Survey 1972–2008. This is a decline from the 1980s and 1990s, when those numbers never dropped below 70% in any category.
11 L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 *Iowa L. Rev.* 669, 672 (1998).
12 Nat'l Ctr. for State Courts, The NCSC Sentencing Attitudes Survey 38 (2006).
13 Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. Ill. L. Rev.* 363, 436–7; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 793 (1994); Lawrence Crocker, *Can the Exclusionary Rule Be Saved?* 84 *J. Crim. L. & Criminology* 310, 311 (1993) ("[The exclusionary rule] is attacked as one of the chief technical loopholes through which walk the guilty on their way out of the courthouse to continue their depredations."). This led to its negative position in public opinion, long before that view was reflected by the Court. Id.
14 Nat'l Ctr. for State Courts, supra note 11, at 16.
15 See Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 *U. Colo. L. Rev.* 75, 118 (1992). Orfield conducted interviews in which 58% of judges admitted being "biased in favor of the prosecution and less likely than they should be to disbelieve police testimony" in big cases. Id.
16 United States v. Place, 462 U.S. 696 (1983).
17 Florida v. Bostick, 388 U.S. 218 (1967).
18 See Chavez v. Martinez, 538 U.S. 760 (2003).
19 See Brewer v. Williams, 430 U.S. 387 (1977).
20 The application of this proposal to the Fifth and Sixth Amendments is explored in more detail in a work in progress by the author.