

## Are Prosecutors the Constitution's Gatekeepers?

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Russell M. Gold, [Beyond the Judicial Fourth Amendment: The Prosecutor's Role](#), 47 *UC Davis L. Rev.* 1591 (2014).

This is a bad time for the police officers. Last year, a [series of cases](#) in New York federal court exposed the NYPD's stop and frisk policy as unlawful and racially biased. Following the shooting in Ferguson and the death of Eric Garner in Staten Island, thousands took to the streets to protest. The prosecutors in these two cases were widely criticized as well for failing to obtain indictments against the officers. Many wondered whether the prosecutors were complicit in a system fraught with inequality and prejudice. Secretary of State, Hilary Clinton, responded that the criminal justice system is "out of balance." In a new article, [Russell Gold](#) argues that we can help restore the reputation of the criminal justice system by implementing what he calls, "administrative suppression."

Administrative suppression would require prosecutors to decline to use illegally seized evidence even if courts would rule the evidence admissible. Prosecutors, in other words, have a constitutional and ethical obligation not to use evidence seized in violation of an individual's Fourth Amendment rights. In the past few decades, the Court has radically restricted the scope of the exclusionary rule, and as a result, illegally seized evidence is often admissible in criminal cases. Gold argues that these decisions only pertain to the judicial branch. Rather than exploit the increasingly weak remedy to obtain more convictions, prosecutors, in their role as arbiters of justice and agents of the executive branch, should respond by refusing to use the tainted evidence in their cases.

Gold argues that the prosecutor's duty to refrain from using illegally seized evidence derives from the executive branch's responsibility to interpret and abide by the constitution's mandates. He draws on Larry Sager's seminal article on "constitutional underenforcement" to argue that the Supreme Court's distinction between the Fourth Amendment right and the exclusionary rule's remedy has left us with exactly the sort of void Sager identified.<sup>1</sup> Gold argues that the Court has restricted the scope of the exclusionary rule and declined to exclude evidence in many cases in which there is a violation of a constitutional right because it does not want to infringe on the prerogative of the executive branch. Separation of powers, in other words, has led the court to limit its institutional role in policing Fourth Amendment violations. As Sager argues, this is the moment when the executive must step in to the breach.

This argument is both innovative and compelling. Gold does not, however, analyze a parallel and perhaps even more pervasive argument that the Court makes in support of its gradual erosion of the exclusionary remedy. It is not exactly institutional incompetence that has led to the disintegration of the court-made remedy as much as it is the Court's sense that the benefit of deterring police misconduct is outweighed by the cost of keeping truthful evidence from the fact finder.

The Supreme Court abandoned an earlier understanding of the exclusionary rule as an integral part of the constitutional guarantee. The Court no longer sees the judicial branch's integrity compromised when courts admit evidence seized in violation of an individual's rights. In the 1970s, the twin rationales supported a robust exclusionary rule but in the following decades the Court began to recast the argument. The Supreme Court now defines the Fourth Amendment as a constitutional right and the exclusionary rule as a judicially crafted remedy designed to deter constitutional violations. The deterrence rationale has led the Court to restrict the scope of the exclusionary rule precisely because in its view, the benefit to the public in protecting individual rights is often outweighed by the damage done by excluding truthful evidence in criminal cases. In Justice Cardozo's famous words, "the criminal is to go free because the constable has blundered."<sup>2</sup> Gold does not fully engage the fact that, in this regard, his proposal for administrative suppression would lead to the same problems as judicial suppression.<sup>3</sup>

Gold argues that prosecutors should do precisely what the court declines to do itself. When he argues that prosecutors cannot be complicit in police illegality, Gold's reasoning sounds much like the Court's old and currently out-of-fashion integrity argument: Using illegally seized evidence compromises prosecutors' integrity. Gold's argument that prosecutors' ethics demands administrative suppression is more persuasive than his argument that the Constitution does. A prosecutor has the obligation to serve justice under Model Rule 3.8, which Gold argues means that he must not use evidence seized illegally. But the mandate to serve justice is complicated. Of course, respecting the rights of defendants is part of the calculation but so too is obtaining a just outcome by using all evidence the court deems admissible. The duty to act competently and diligently similarly require a prosecutor to serve the interests of the client, in this case the people or the community. There is a tension between Gold's conclusion and the countervailing duty to protect the client by using admissible evidence to secure a conviction when one is warranted. While Gold favors the former, it is not clear that the complex rules governing prosecutors' conduct mandate this choice.

Courts may not be fully enforcing Fourth Amendment rights but that does not dictate how the other branches should address the problem. Administrative remedies, such as direct police sanctions, would be more consistent with the Court's understanding of the constitutional problem than administrative suppression. Fines and employment consequences for offending officers, unlike administrative suppression, would not involve the exclusion of relevant evidence from criminal trials. These sorts of solutions would not create the same windfall to individual defendants that the Court laments. Nor would the community suffer as much for the police misconduct. The value of direct police sanctions, however, may be beside the point if prosecutors' ethical obligations require them to decline to use illegally seized evidence, as Gold suggests.

Gold argues that prosecutors are bound by ethical obligations to "suppress" the fruits of Fourth Amendment violations. Gold makes a more persuasive case that ethical obligations demand this response than that the Court's increasing unwillingness to order the suppression of illegally seized evidence creates this responsibility. Prosecutors are, as Gold points out, supposed to serve justice. They are supposed to protect the rights of defendants and the civil liberties of all citizens as well as pursuing convictions. Professional ethics may mean that the rejected rationale for the exclusionary rule – that integrity is compromised by the use of illegally seized evidence – applies with even greater force to prosecutors than to courts. Gold makes an interesting and provocative argument that in this instance protecting defendants rights should trump pursuing the client's interest in obtaining a conviction by using admissible evidence but it is not entirely clear that he has supported his choice between competing obligations and competing conceptions of justice.

Gold's article stayed with me and provoked me to think about the criminal justice system in a different way. Gold concludes that by suppressing tainted evidence, prosecutors will restore faith in the system, and in the long run, this will lead to greater respect for the law, which in turn will ultimately mean less crime. This is an empirical conclusion and it's hard to say for sure whether it is so, but it is certainly true that we need to think more creatively about how to restore faith in a system whose legitimacy is so often in doubt. Recent events make this endeavor even more urgent. Gold's article inspires his readers think critically about how changing the prosecutor's role in the system might help.

1. Lawrence Gene Sager, [Fair Measure: The Legal Status of Underenforced Constitutional Norms](#), 91 **Harv. L. Rev.** 1212 (1978). [?]
2. *People v. Defore*, 242 N.Y. 13, 21 (1926). [?]
3. Christopher Slobogin, [Why Liberals Should Chuck the Exclusionary Rule](#), 1999 **Ill. L. Rev.** 363. [?]

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