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**THE NEED TO OVERRULE *MAPP V. OHIO***

WILLIAM T. PIZZI\*

*This Article argues that it is time to overrule Mapp v. Ohio. It contends that the exclusionary rule is outdated because a tough deterrent sanction is difficult to reconcile with a criminal justice system where victims are increasingly seen to have a stake in criminal cases. The rule is also increasingly outdated in its epistemological assumption which insists officers act on "reasons" that they can articulate and which disparages actions based on "hunches" or "feelings." This assumption runs counter to a large body of neuroscience research suggesting that humans often "feel" or "sense" danger, sometimes even at a subconscious level, and these feelings may provide a valid basis for action.*

*The Article's main attack on Mapp, however, is an attack on the assumption behind the rule—that a harsh sanction will deter undesirable behaviors. This is not consistent with classic deterrence theory, which insists that deterrence results from the consistent imposition of proportional punishment, not the occasional imposition of very harsh punishments. Moreover, our experience with deterrence, especially the death penalty, demonstrates that the deterrent effect of harsh sanctions will always be speculative and uncertain. Unfortunately, having given harsh deterrent sanctions its imprimatur in Mapp, the Court is not in a position to challenge the many deterrent sanctions that push criminal sentences in the United States higher and higher, setting the United States apart from other Western countries.*

*The Article concludes that it is time for the Court to overrule Mapp and rebuild the exclusionary rule on a proportional basis, such as one finds in other common law countries.*

## INTRODUCTION

*Mapp v. Ohio*,<sup>1</sup> decided almost fifty years ago, stands as one of the most famous Supreme Court cases of the Warren Court era, perhaps eclipsed in the criminal sphere only by *Gideon v. Wainwright*<sup>2</sup> and *Miranda v. Arizona*.<sup>3</sup> In *Mapp*, the Court ruled that "all evidence obtained by searches or seizures in violation of the Constitution is . . . inadmissible in . . . court."<sup>4</sup> The rule is powerful because "all evidence" made inadmissible by the rule includes not just evidence directly seized in the illegal search or seizure, but even incriminating secondary evidence—the so-called "fruits of the poisonous tree"<sup>5</sup>—obtained as a direct result of the illegal action.<sup>6</sup>

The Court in *Mapp* seemed to base its exclusionary rule on both a judicial integrity rationale as well as a deterrence rationale. With respect to judicial integrity, the Court quoted Justice Brandeis's famous warning from his dissent in *Olmstead v. United States* that "[o]ur Government is the potent, the omnipresent teacher. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."<sup>7</sup> The majority opinion in *Mapp* also referenced judicial integrity specifically when it declared that the decision being handed down "gives . . . to the courts, that judicial integrity so necessary in the true administration of justice."<sup>8</sup>

But the Court in *Mapp* also based its decision on the need for a deterrent remedy to protect citizens from police misconduct. The majority opinion noted that in the years since *Wolf v.*

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\* Professor of Law Emeritus, University of Colorado Law School. The author would like to thank Morris Hoffman for his insightful comments on an earlier draft of the Article. The author also wishes to express his gratitude to the editors who worked on this Article. They worked very hard draft after draft and made many suggestions that improved both the style and the substance.

1. 367 U.S. 643 (1961).

2. 372 U.S. 335 (1963).

3. 384 U.S. 436 (1966).

4. 367 U.S. at 655.

5. The phrase comes from *Nardone v. United States*, 308 U.S. 338, 341 (1939).

6. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 218–19 (1979) (suppressing voluntary incriminating statements Dunaway gave the police at the police station because the officers violated the Fourth Amendment in bringing Dunaway to the station to interrogate him).

7. *Mapp*, 367 U.S. at 659 (quoting *Olmstead v. New York*, 237 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

8. *Id.* at 660.

*Colorado*<sup>9</sup> rejected imposing an exclusionary remedy on the states, a majority of states had adopted, by judicial decision or through legislation, forms of exclusionary rules designed to protect citizens from police violations of their Fourth Amendment rights.<sup>10</sup> They did so, the Court noted, because other remedies to deter police wrongdoing have proven “worthless and futile.”<sup>11</sup>

But in the years following *Mapp*, the Court shunted aside the judicial integrity rationale as the basis of the exclusionary rule in favor of a deterrence rationale,<sup>12</sup> to the point that by 1976, the Court could announce that judicial integrity has only a “limited role [to play] . . . in the determination whether to apply the rule in a particular context.”<sup>13</sup> Instead, for close to four decades, the Court has returned again and again to a cost-benefit deterrence analysis to determine whether the exclusionary rule should be extended to new settings or whether an exception should be made to the exclusionary rule for certain types of errors.<sup>14</sup> Thus, in *Calandra v. United States*,<sup>15</sup> the Court concluded that a citizen called to appear before a grand jury could not seek suppression of illegally seized evidence to avoid having to answer questions about such evidence because extending the exclusionary rule to this stage of criminal proceedings would “achieve a speculative benefit and . . . minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.”<sup>16</sup> Similarly, in *Leon v. United States*,<sup>17</sup> the Court created an exception to the exclusionary rule for situations in which an officer relied

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9. 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

10. *Mapp*, 367 U.S. at 651.

11. *Id.* at 652.

12. See generally WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 3.1(b) (5th ed. 2009); JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.02 (5th ed. 2010).

13. *Stone v. Powell*, 428 U.S. 465, 485 (1976).

14. See *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (the deterrent effect of applying the exclusionary rule to suppress evidence obtained by an officer acting in reliance on a statute is outweighed by the substantial social costs of exclusion); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (the deterrent effect of applying the exclusionary rule at a deportation is outweighed by the substantial social costs of exclusion); *Stone*, 428 U.S. at 485 (the deterrent effect of applying the exclusionary rule at a habeas corpus hearing where the defendant litigated the issue earlier at trial would do little to add to the deterrent force of the rule and would result in substantial social costs).

15. 414 U.S. 338 (1974).

16. *Id.* at 351–52.

17. 468 U.S. 897 (1984).

in good faith on a search warrant issued by a magistrate where it was later determined that the warrant lacked probable cause.<sup>18</sup> In reaching this result, the Court reasoned that “[p]enalizing the officer for the magistrate’s error . . . cannot logically contribute to the deterrence of Fourth Amendment violations.”<sup>19</sup> While *Calandra* and *Leon* were cases in which the Court did not extend the exclusionary rule, when the rule is applicable—including in many on-the-street “stop” or “arrest” situations—the rule has a dramatic effect. Even if the police act in good faith, if the action is not justified by the appropriate Fourth Amendment standard, any evidence seized as the direct result of the unlawful act must be suppressed.<sup>20</sup> The Court’s theory has been that a strong deterrent sanction is needed to keep the police mindful of the Constitution in their treatment of citizens. In *Mapp*, the Court explained that “the purpose of the exclusionary rule is ‘to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’”<sup>21</sup>

But, despite *Mapp*’s iconic stature in constitutional criminal procedure, two Supreme Court decisions, *Hudson v. Michigan*<sup>22</sup> and *Herring v. United States*,<sup>23</sup> handed down in recent years have raised concerns that the Court might be prepared to rethink the exclusionary rule.

The first of the two decisions is a 2006 opinion, *Hudson v. Michigan*, in which the Court refused to suppress evidence despite the police officers’ failure to knock and announce their entry before going into Hudson’s home.<sup>24</sup> In *Hudson*, the Court noted that the “common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one.”<sup>25</sup> The issue in

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18. *Id.* at 905.

19. *Id.* at 921.

20. See *Florida v. J.L.*, 529 U.S. 266, 273–74 (2000) (anonymous phone tip that young black male in a plaid shirt on a certain street corner was carrying a gun did not give police reasonable suspicion to stop and frisk the suspect even though the police found a gun during the frisk). See also *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) (where the suspect confessed after being given *Miranda* warnings, confession and other incriminating evidence had to be suppressed because the police had taken the suspect to the station for questioning without probable cause).

21. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

22. 547 U.S. 586 (2006).

23. 129 S. Ct. 695 (2009).

24. *Hudson*, 547 U.S. at 599.

25. *Id.* at 589.

*Hudson* thus seemed straightforward because Michigan conceded that the officers had violated the knock-and-announce principle.<sup>26</sup> Nonetheless, the Court refused to apply the exclusionary rule to the drugs and weapon seized from Hudson, reasoning that the benefits of deterrence did not outweigh the “substantial social costs” of exclusion.<sup>27</sup>

What was particularly upsetting to scholars was not just the holding that seemed to show little respect for a rule with a distinguished common law pedigree, but the way Justice Scalia, writing for the majority, hinted that further limitations to the exclusionary rule might be afoot. He warned that exclusion may not be the proper remedy “simply because we found that it was necessary deterrence in different contexts and long ago.”<sup>28</sup> The opinion noted the “increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.”<sup>29</sup> This suggested to the Court that it would be wrong to force “the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”<sup>30</sup> To many, the Court’s conclusion that policing has greatly improved, making the need for a deterrent remedy less obvious, suggests a Court that is willing to rethink the exclusionary rule.<sup>31</sup>

The second decision that alarmed academics is *Herring v. United States*,<sup>32</sup> decided in 2009. In that case, the Court found a way to avoid applying the exclusionary rule to drugs and a gun that had been seized from Herring’s car as the result of an arrest later determined to have been unconstitutional.<sup>33</sup> The officer who had stopped Herring’s vehicle to make the arrest was acting on information in a computer database indicating there was an outstanding warrant for Herring in a neighboring county.<sup>34</sup> But it turned out there was no longer an outstanding warrant for Herring—the warrant having been recalled five months earlier—and the computer database had not been up-

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26. *Id.* at 590.

27. *Id.* at 596 (discussing the “substantial social costs” created by exclusion in *United States v. Leon*, 468 U.S. 897, 907 (1984)).

28. *Id.* at 597.

29. *Id.* at 599.

30. *Id.* at 597.

31. See *infra* text beginning at note 44.

32. 129 S. Ct. 695 (2009).

33. *Id.* at 698.

34. *Id.*

dated by the police.<sup>35</sup> By the time the error was detected and the arresting officer was informed that there was no outstanding warrant for Herring, fifteen minutes had elapsed and the search of Herring's vehicle had uncovered the drugs and the gun (which Herring, as a prior felon, was not allowed to possess).<sup>36</sup>

As was true in *Hudson*, the language of Chief Justice Roberts's majority opinion suggested frustration with the exclusionary rule. The opinion stressed that "the exclusionary rule is not an individual right" and that "the benefits of deterrence must outweigh the costs."<sup>37</sup> Weighing the need for exclusion, the Court concluded that the error in Herring's case—the negligent failure of a law enforcement official to update the computer database—"was not so objectively culpable as to require exclusion."<sup>38</sup>

While the majority opinion turned on the fact that the lower courts had determined that the failure to update the computer database amounted only to negligence, the opinion suggested that some members of the Court might be willing to go further and restrict the rule to situations where the police conduct in question was flagrantly abusive of Fourth Amendment rights. Chief Justice Roberts's opinion noted that many of the early Supreme Court exclusionary rule cases, such as *Weeks v. United States*,<sup>39</sup> *Silverthorne Lumber Co. v. United States*,<sup>40</sup> and even *Mapp* itself, involved "intentional conduct" by police that was "patently unconstitutional."<sup>41</sup> The opinion quoted approvingly a 1965 law review article by Judge Henry Friendly—one of the leading judicial scholars of that generation—in which Judge Friendly argued that "[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by *flagrant or deliberate violation of rights*."<sup>42</sup>

The outcomes in *Hudson* and *Herring*—that rather obvious errors by police officials did not result in exclusion—when com-

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35. *Id.*

36. *Id.*

37. *Id.* at 700.

38. *Id.* at 703.

39. 232 U.S. 383 (1914).

40. 251 U.S. 385 (1920).

41. *Herring*, 129 S. Ct. at 702.

42. *Id.* (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965)) (alterations in original) (emphasis added).



bined with language suggesting the exclusionary rule might not be as necessary today as it was fifty years ago, have raised grave concerns among scholars that the Court might be ready to overrule *Mapp*. Thus, the decision in *Herring* is seen variously as an “assault” on the exclusionary rule,<sup>43</sup> a decision in which the Court “inched closer to destroying the constitutional protection of the exclusionary rule,”<sup>44</sup> and a decision in which four members of the Court are “busily laying the groundwork for abandoning the exclusionary rule.”<sup>45</sup>

This Article argues, against the tide it would seem, that the Court needs to rethink what it did in *Mapp* because, well intentioned as the exclusionary rule was and appropriate as it may have seemed nearly fifty years ago, the rule is based on an assumption which has proven dangerous over the years, namely, the belief that harsh mandatory punishments will deter undesirable social behaviors. Unfortunately, the Court’s endorsement of the principle that undesirable social behavior by police officers can be prevented by the imposition of harsh deterrent sanctions has encouraged legislatures to take the same route with criminal behaviors. As a result, defendants today often face charges under statutes with very high mandatory minimum sentences designed to deter crime. Unfortunately, nearly forty years of debate over the death penalty has taught us that determining whether a punishment deters or not is deeply problematic. This Article contends that it is time for the Court to face up to the problems that disproportionate deterrent sanctions exact on defendants facing those penalties and that the starting point is to abandon our exclusionary rule.

The previous paragraph calls for abandoning *our* exclusionary rule, because, while this Article is strongly opposed to *Mapp* and its progeny, it is not anti-exclusionary rule per se. Most common law countries have an exclusionary rule—sometimes of constitutional origin<sup>46</sup> and sometimes of judicial creation<sup>47</sup>—but none builds its rule exclusively on the need for deterrence of police misconduct and most permit some measure

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43. See, e.g., Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 787 (2009).

44. Craig M. Bradley, *Red Herring or the Death of the Exclusionary Rule?*, TRIAL, Apr. 2009, at 52.

45. SUSAN BANDES, THE ROBERTS COURT AND THE FUTURE OF THE EXCLUSIONARY RULE 2 (2009), [http://www.acslaw.org/files/Bandes Issue Brief.pdf](http://www.acslaw.org/files/Bandes%20Issue%20Brief.pdf).

46. See *infra* text beginning at note 197.

47. See *infra* text beginning at note 211.

of proportionality to be considered in deciding whether to exclude evidence obtained due to a breach of the defendant's rights. It is thus not the exclusion of illegally seized evidence that is under attack in this Article, but the tough, macho U.S. rule based on deterrence that insists on exclusion even for understandable "mistakes" by police, who often must make decisions very quickly and with weak judicial guidance. This Article urges the Court to follow the lead of countries like Canada<sup>48</sup> and New Zealand<sup>49</sup> and build a rule that exists to vindicate the rights of citizens while recognizing that society has an interest in the accurate adjudication of criminal cases. Such a rule would permit courts to balance a range of factors, including the impact of the violation, the culpability of the officer, and the nature of the crime in deciding whether evidence should be suppressed.

The Article consists of four parts. Part I contends that the world of criminal procedure has changed a great deal since *Mapp* was decided and some of the assumptions on which *Mapp* was based are questionable today. In particular, the growing recognition—both nationally and internationally—that crime victims have a stake in criminal cases makes exclusionary remedies for police wrongdoing more complicated.

Part II contends that a strong deterrent remedy is inappropriate considering what we ask police to do. It is unfair to put police on the street and ask them to make forcible stops and custodial arrests consistent with the Fourth Amendment when basic concepts such as "reasonable suspicion" or "probable cause" will always prove difficult to apply in close cases. Making suppression turn heavily on these concepts, instead of a frank balancing of the interests supporting or not supporting suppression, results in opinions that provide poor guidance for the future.

Part III of the Article is a strong attack on the Court's deterrence rationale for the exclusionary rule. The Article rejects the premise that strong deterrent penalties visited on wrongdoers will discourage others who might otherwise engage in similar undesirable behaviors. Powerful deterrent sanctions not only do an injustice to those on whom they are imposed, but they do so in exchange for a benefit that will always be speculative and unknowable. Unfortunately, this faith in the appro-

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48. See *infra* text beginning at note 199.

49. See *infra* text beginning at note 209.

priateness of tough deterrent sanctions and their efficacy starts with *Mapp* and its progeny.

Part IV raises the obvious issue: If the United States is to abandon its deterrence-based exclusionary rule, what should it do instead? This part examines the approaches of four common law countries, each taking different approaches to the same basic problem: How does a society vindicate the rights of citizens while taking into account the societal need for the accurate adjudication of criminal cases? None of these countries builds its exclusionary rule exclusively on deterrence. In the end, Part IV suggests that the Court consider a balancing approach that would take into account the nature of the right violated, the impact of the violation on the defendant, the culpability of the officer or officers who committed the violation, the nature of the evidence at stake, and the seriousness of the crime.

## I. CHANGING CONCEPTIONS OF CRIMINAL CASES

Criminal cases were conceptualized rather simply in 1961. On one side was the defendant and on the other side was “the State.” In a two-sided world, it is easy to enforce rules between the parties—if one side errs, we punish that side to the benefit of the “other side.” But the world of criminal trials is no longer two-sided. Starting in the 1970s, a powerful victims’ movement emerged in the United States (as well as abroad) based on the premise that the criminal justice equation at that time failed to take into account the stake that victims, or the family of victims, have in the criminal case.<sup>50</sup> Victims are not “the State,” they have nothing to do with the police, but at the same time they have a stake in the outcome of the criminal case.

In the United States, understanding how to accommodate the interest of victims in our criminal justice system has not been easy, given our conceptualization of trials as being two-sided. But over the last thirty years, every state has passed either statutes or constitutional amendments insisting that victims be kept informed of the progress of the case, be notified of important court hearings, and be consulted about possible plea

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50. The National Organization for Victim Assistance—the oldest national victims’ rights organization in the international movement—was founded in 1975. See *About NOVA*, NAT’L ORG. FOR VICTIM ASSISTANCE, <http://www.trynova.org/about/> (last visited Feb. 16, 2011).

bargains.<sup>51</sup> Although the system has stopped short of giving victims participatory rights at trial, victims today often have been given the right to be heard on the issue of sentencing or, at least, to submit in writing a statement of the impact of the crime on their lives.<sup>52</sup>

This compromise—not permitting victim participation at trial, but permitting victim participation at sentencing—is controversial because victim impact evidence is often very powerful and emotional, yet its relevance to the issue of punishment is uncertain. This uncertainty is reflected in the Supreme Court's amazing flip-flop on the issue, ruling in 1987<sup>53</sup> and 1989<sup>54</sup> that victim impact evidence in capital cases was inadmissible as violative of the Eighth Amendment and then deciding, in 1991,<sup>55</sup> that victim impact evidence was perfectly admissible and relevant to a jury's sentencing decision in a capital case.

Allowing victims to offer impact statements at sentencing is controversial.<sup>56</sup> Even if one disagrees with that development in the law, there can be no doubt that the system that existed in 1961 has changed and that today, victims are seen as having a legitimate interest in the criminal process. One indication of this shift is the fact that certain federal rules of criminal procedure have been amended recently<sup>57</sup> to conform to provisions

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51. See John Kyl, Steven J. Twist & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 587–88 (2005) (reporting that thirty-three states have constitutional amendments and all states have passed statutes protecting victims' rights); see also David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 627 n.7 (2008); Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 559 n.1 (2005).

52. See John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267–68 (2003).

53. *Booth v. Maryland*, 482 U.S. 496, 501–02 (1987).

54. *South Carolina v. Gathers*, 490 U.S. 805, 810 (1989).

55. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

56. See, e.g., Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 FLA. ST. U. L. REV. 21, 59 (1992) (“The system is not equipped to nurture victims or their representatives.”).

57. Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat 1607 (codified at 18 U.S.C.A. § 3771 (2009)). It is possible that there will be additional amendments to the rules to protect victims' rights. Former federal judge Paul Cassell argues quite forcefully that the first set of amendments to the rules is not sufficient to vindicate the rights granted victims under the federal statute. See Paul Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861 (2007).

of the Crime Victims' Rights Act of 2004.<sup>58</sup> Among the changes are provisions that require notice to victims of court proceedings,<sup>59</sup> that give victims a right to be heard not just at sentencing but also on bail and plea decisions,<sup>60</sup> and that make it much more difficult for defendants to sequester victims—as compared to other witnesses—prior to their testifying at trial.<sup>61</sup>

Many countries that have trial systems not based on the adversary model have gone much further than the United States and have given victims—usually victims of serious crimes—a right to participate in criminal trials, sometimes on an equal basis with the defense. In Germany, for example, rape victims are not only permitted to participate at trial through counsel, but will even be appointed counsel if they are indigent.<sup>62</sup>

Recently, the International Criminal Court adopted procedures granting victims of crimes such as genocide and crimes against humanity a right to participate in trials of these horrific crimes.<sup>63</sup> The International Criminal Court is designed for cases that, even with adequate resources, present enormous logistical difficulties, and victim participation adds yet another layer of complexity.<sup>64</sup> But the recognition that victims of horrific crimes should have a right to some level of participation—a right not granted to victims at previous international crimi-

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58. The Crime Victims' Rights Act of 2004 was Title I of the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260.

59. See FED. R. CRIM. P. 60(a)(1).

60. See *id.* (a)(3).

61. The Crime Victims' Rights Act of 2004 required that exclusion be ordered for a victim only if the defense establishes by "clear and convincing evidence . . . that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 118 Stat. at 2261 (codified at U.S.C. § 3771(a)(3) (2006)). Federal Rule of Criminal Procedure 60(a)(2) now requires a clear and convincing threshold for sequestration of a victim and, in addition, requires that a trial court "make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion."

62. See William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 58–59 (1996).

63. See *Victims and witnesses*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/> (last visited Feb. 16, 2011) ("For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.").

64. The crimes within the jurisdiction of the International Criminal Court are genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90, 92. The group nature of these crimes means that there will often be hundreds of victims, making direct representation at trial problematic.

nal tribunals—suggests how much the treatment of victims has changed over the last few decades and how it continues to evolve.

Against the emergence of laws throughout the United States and international recognition that victims have the right to have their interests articulated and considered on many issues in the criminal process, it has become clearer that the two-sided adversary process in the United States and other common law countries is a conceptual structure for testing evidence, not the reflection of a metaphysical reality. Criminal cases are often multi-sided, and, in a game that is no longer zero-sum, a macho exclusionary rule that demands that reliable evidence be suppressed without any consideration of the seriousness of the crime becomes very difficult to defend.

In short, our conceptualization of criminal cases has shifted considerably since *Mapp* was decided. In 1961, there was no National Organization for Victim Assistance, which was not founded until 1975, and today the organization often files amicus briefs in courts in support of better treatment for victims of crime in the criminal justice system.<sup>65</sup> Nor in 1961 was there a separate office set up in the Justice Department—the Office for Victims of Crime<sup>66</sup>—directed at improving the way victims are treated in the system. One can be certain today that there would be strong opposition from victims' rights organizations to *Mapp*'s deterrence-based exclusionary rule that has no room in its calculus for factors such as the degree of the violation, the good faith of the officer, or the seriousness of the crime.<sup>67</sup> The Court would certainly hear the argument that the suppression of important physical evidence in a serious crimi-

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65. See *About NOVA*, *supra* note 50.

66. The Office for Victims of Crime within the Justice Department was set up in 1984 as a result of the Victims of Crime Act, which was passed in 1984. See *Office for Victims of Crime*, U.S. OFF. OF JUST. PROGRAMS, <http://www.ojp.usdoj.gov/ovc/> (last visited Feb. 16, 2011).

67. *Mapp* was a very strange case procedurally as the Court had granted certiorari to decide if Dolly Mapp's possession of "obscene" films found during the search was protected by the First Amendment. Justice Harlan took the majority to task for resolving the case on the Fourth Amendment basis when the Court had granted certiorari on a First Amendment challenge to the statute under which Mapp had been prosecuted. *Mapp v. Ohio*, 367 U.S. 643, 672–75 (1961) (Harlan, J., dissenting).

Justice Harlan's dissent also noted that Mapp's attorney had specifically stated at oral argument that he was not asking the Court to overrule *Wolf v. Colorado*, 338 U.S. 25 (1949). *Id.* at 673 n.6.

nal case punishes victims and their families far more directly than it does the police.

## II. THE COURT'S FAILURES IN PROVIDING WORKABLE STANDARDS FOR FOURTH AMENDMENT DECISIONS

An exclusionary rule that insists that police officers be punished with the sanction of exclusion if they make an unconstitutional arrest or stop or if they carry out an unconstitutional search demands clear rules to help officers sort out permissible actions from those deserving condemnation and punishment. These rules need to be clear because they are often applied by nonlawyers on the street at times of stress. This part will show that the Court has failed to provide the sort of guidance that a powerful exclusionary rule demands because concepts such as “probable cause” and “reasonable suspicion” cannot be refined in such a way as to produce clear answers in specific situations. In addition, this part will suggest that the Court’s insistence that police have “articulable reasonable suspicion” that a person is dangerous before they can initiate a protective frisk is being somewhat undercut by recent social science research showing that humans have evolved to sometimes “feel” or “sense” danger at a subconscious level without being able to explain the source of their fear.

### A. *Deterring Crime v. Deterring Fourth Amendment Violations*

Due in part to *Mapp*, the United States has become the “deterrent nation.” We pass gun laws,<sup>68</sup> drug laws,<sup>69</sup> three-strikes laws,<sup>70</sup> etc., with high minimum sentences or tough mandatory sentences with the goal of deterring these crimes. Part III will argue against this faith in deterrence. But even if one has a general faith in deterrence, there is a big difference between deterring crime and deterring Fourth Amendment violations.

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68. See Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 284–86 (2008) (describing passage in mid-1970s through the late 1980s of gun laws intended to deter use of weapons in crimes).

69. See *infra* text beginning at note 144.

70. See Tonry, *supra* note 68, at 285–86 (describing deterrent purposes of California’s three-strikes law).

When we pass criminal laws intended to deter a certain type of crime, we hope that potential criminals will avoid not only conduct that clearly fits within the statute but even conduct that *might* be prohibited by the statute. Thus, for example, we hope that shady characters will avoid not only obvious attempts to defraud others, but also schemes that might or might not constitute criminal fraud as defined in the statutes. Nor do we want those with a sexual motive studying criminal statutes to see whether certain enticements to young people to engage in certain types of conduct would constitute sexual exploitation of minors or slip through a loophole in the law. Rather, we pass criminal laws in the hope that citizens will stay far away from conduct condemned as criminal.

But it is different with arrests and searches by police. The nature of policing asks that officers who are trying to solve crimes make arrests as soon as they can because the sooner police are able to make an arrest after the crime, the greater the likelihood of conviction. If a police officer fails to arrest a suspect on the street because she believes the evidence she has gathered is just short of probable cause, there is the risk that she may have trouble locating the suspect at a later point in time when there is additional evidence linking the suspect to the crime. It is also possible that the suspect, alerted to his status as a suspect by the earlier police interest, may have destroyed incriminating evidence in the meantime or alerted others involved in the crime to take similar precautions, making convictions less likely.

Thus, police have a fine line to tread. They need to make proper arrests or conduct proper searches, but if they act too quickly and they violate the Fourth Amendment, the evidence they seized—no matter how reliable—will be excluded from use at trial. The *Mapp* exclusionary rule thus puts tremendous pressure on concepts such as “probable cause” and “reasonable suspicion.” These concepts in isolation should not be the lynchpin on which suppression turns as reasonable judges will often disagree on their application in individual cases. Additionally, suppression rulings turn on individualized sets of facts that provide little guidance for situations where the facts will inevitably differ in some respects.<sup>71</sup>

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71. A rather common issue with which courts struggle concerns the propriety of forcible stops based on anonymous tips about criminal behavior by a certain described individual at a particular location. For example, what if the anonymous tip to the police states that the person possesses a gun? The Supreme Court ruled



### B. Probable Cause

One of the key concepts in Fourth Amendment jurisprudence is the term “probable cause.” To make a lawful arrest, an officer must have probable cause to justify such action.<sup>72</sup> Similarly, to secure a warrant to search a suspect’s home or office, the police must show a magistrate that they have probable cause that the items being sought are at the location specified in the warrant.<sup>73</sup>

But the general contours of the concept are uncertain. Law professors love to debate even such a basic issue as how “probable” probable cause needs to be.<sup>74</sup> The Supreme Court has said that probable does not mean “more likely than not,”<sup>75</sup> but what if the odds are only one out of five or even one out of ten? Or is probable cause to be determined using a sliding scale based on the seriousness of the crime or the dangerousness of the item sought, with a lower level of probability being needed for, perhaps, evidence directed to a brutal murder and a much higher level of probability needed to search for a small amount of drugs?<sup>76</sup> These are fun questions to debate in law school classes, but it is a testament to the vague contours of the concept that such questions have no clear answers.

There is one search category where the Supreme Court has tried to provide guidance: searches where the police obtained a warrant based heavily on information supplied by a confiden-

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in *Florida v. J.L.*, 529 U.S. 266 (2000), that an officer had acted improperly when he saw a person fitting the description and frisked the person. But despite the Supreme Court decision, lower courts continue to struggle in applying *J.L.* to particular fact situations. Thus a badly split Florida Supreme Court suppressed a gun, see *Baptiste v. State*, 995 So. 2d 285 (Fla. 2008), whereas the United States Court of Appeals for the Seventh Circuit upheld a stop and frisk in similar circumstances, see *United States v. Wooden*, 551 F.3d 647 (7th Cir. 2008).

72. *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

73. *Warden v. Hayden*, 387 U.S. 294, 301 (1967).

74. A leading casebook on criminal procedure has a series of case notes on the issue, one of which starts, “How probable is ‘probable cause?’” JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 166 (4th ed. 2010) (emphasis omitted); see also Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 307–08 (2004); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 496–97 (1984).

75. See *Texas v. Brown*, 460 U.S. 730, 742 (1983) (holding that the probable cause standard does not demand that the likelihood of evidence being present is “more likely true than false”).

76. See Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777 (2004); see also DRESSLER & THOMAS, III, *supra* note 74, at 167–68.

tial informant. Even this area has proven problematic as the leading case on the issue, *Illinois v. Gates*,<sup>77</sup> demonstrates.

The case arose when an anonymous letter was sent to the Bloomingdale Police Department reporting that Susan and Lance Gates were selling drugs out of their condominium.<sup>78</sup> The letter gave the Gates's address and stated that the pair bought their drugs in Florida and, when they made their buys, Susan drove their car to Florida, left it to be loaded with drugs, and then Lance flew down and drove the car back to Illinois.<sup>79</sup> The letter reported that Susan would be driving down in a few days, and Lance would then fly down and drive the car back with over \$100,000 in drugs.<sup>80</sup> After receiving the letter, the police were able to corroborate some details consistent with the letter, including the Gates's Bloomingdale address as well as the fact that "L. Gates" had a reservation to fly to West Palm Beach, Florida, in a couple of days.<sup>81</sup>

Arrangements were made with drug agents in Florida, and, when Lance Gates got off the plane, the agents followed him and observed him going to a room at a Holiday Inn rented by a "Susan Gates."<sup>82</sup> Early the following day, Lance Gates was seen heading north on a highway with a woman in a car with Illinois plates.<sup>83</sup> The police then confirmed, through the car's registration, that it belonged to the Gateses.<sup>84</sup>

All of this information was put in an affidavit for a search warrant with the anonymous letter attached.<sup>85</sup> The judge decided that there was probable cause and issued the warrant.<sup>86</sup> The upshot was that when the Gateses arrived at their home, police were waiting, and a search of the car turned up "approximately" 350 pounds of marijuana.<sup>87</sup> The police found more marijuana, weapons, and other contraband in the home.<sup>88</sup> When the defendants were charged with the drug crimes and sought to suppress the evidence, the Illinois courts were faced with the obvious question: Did the magistrate issuing the war-

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77. 462 U.S. 213 (1983).

78. *Id.* at 225.

79. *Id.*

80. *Id.*

81. *Id.* at 225-26.

82. *Id.* at 226.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 227.

88. *Id.*

rant have probable cause to believe that drugs would be found in the Gates's car and home?

The key decision which the lower courts struggled to apply to answer that question was *Spinelli v. United States*.<sup>89</sup> *Spinelli* required that such warrants satisfy a "two-pronged test." The first prong required that the warrant indicate to the issuing judge the basis of knowledge for the anonymous tip, and the second prong required that the warrant provide facts that showed either the veracity of the informant or the reliability of the information given by the informant.<sup>90</sup>

In *Gates*, the trial judge and a majority of the Illinois Supreme Court ruled that the warrant did not satisfy the two-pronged test.<sup>91</sup> But two justices of the appellate court said that this warrant was fine under the *Spinelli* test.<sup>92</sup> The case then went to the United States Supreme Court, which also split on probable cause.<sup>93</sup> In his concurring opinion, Justice White reasoned that the warrant met the standard of *Spinelli* because the police work after the receipt of the letter corroborated "quite suspicious" behavior by the Gateses and, hence, showed both that the informer was credible and that the informant had gathered the information in the letter in a reliable manner.<sup>94</sup>

The majority disagreed with Justice White on whether the warrant really satisfied the two-pronged test of *Spinelli* because, even though there was corroboration of some information in the letter, the majority worried that this did "not permit a sufficiently clear inference regarding the letterwriter's 'basis of knowledge.'" <sup>95</sup> But the majority then decided to abandon the two-pronged test and set lower courts free to review warrants simply by considering the "totality-of-the-circumstances" and considering "whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."<sup>96</sup> Using this standard, the majority concluded that the warrant passed with flying colors.<sup>97</sup>

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89. 393 U.S. 410 (1969), *overruled by Gates*, 462 U.S. 213.

90. *Id.* at 412–13 (citing *Aguilar v. Texas*, 378 U.S. 108 (1964)).

91. *People v. Gates*, 423 N.E.2d 887, 893 (Ill. 1981), *rev'd*, 462 U.S. 213.

92. *Id.* 893–96 (Moran, J., dissenting).

93. The majority opinion held that under the new "totality of the evidence" standard, the warrant met the probable cause requirement. *Gates*, 462 U.S. at 246. But Justice Stevens, in a dissent joined by Justice Brennan, disagreed. *Id.* at 291–94 (Stevens, J., dissenting).

94. *Id.* at 269–72 (White, J., concurring).

95. *Id.* at 245–46 (majority opinion) (quoting *Gates*, 423 N.E.2d at 890).

96. *Id.* at 238.

97. *Id.* at 246.

But the saga doesn't end there, because there were two dissenters on the probable cause issue: Justice Stevens and Justice Brennan.<sup>98</sup> They dissected the warrant very differently from the majority and came to the opposite conclusion.<sup>99</sup> Even under the "totality-of-the-circumstances" test, they concluded that the warrant did not show probable cause because there were important discrepancies between the letter and subsequent events.<sup>100</sup> In particular, they noted that the letter said that Sue Gates drove the car down and *flew back*, but the affidavit showed that Sue Gates was actually traveling north with Lance Gates, an activity which the dissenters described as suggesting nothing "unusual" or "probative of criminal activity."<sup>101</sup> In short, even under the Court's rather tautological definition of probable cause—"a fair probability that contraband or evidence of a crime will be found in a particular place"—there was disagreement over whether the probability was fair or far-fetched.<sup>102</sup>

This litany of state and Supreme Court opinions is somewhat embarrassing. We have a series of judges analyzing the exact same warrant using two different standards for probable cause and not agreeing on whether this warrant was supported by probable cause *under either standard*.

It is not surprising that, a year after the shambles of *Gates*, the Court withdrew from the world of probable cause determinations in warrant cases. Instead, it has announced a reasonable good faith exception for warrants so that, in close cases, a warrant will be upheld if the police acted in reasonable good faith.<sup>103</sup> This takes some pressure off of the issue of probable cause in close cases involving warrants.<sup>104</sup> But there is no good faith exception for police actions on the street, where the vast majority of Fourth Amendment confrontations take place. The result is continued pressure on concepts like probable cause or reasonable suspicion that must often be applied quick-

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98. *Id.* at 291 (Stevens, J., dissenting).

99. *Id.* at 293.

100. *Id.* at 291-93.

101. *Id.* at 291-92.

102. *Id.* at 238 (majority opinion).

103. See *United States v. Leon*, 468 U.S. 897 (1984).

104. The good faith exception for warrants has helped lessen embarrassing disagreements about probable cause, but they still occur. Consider, from the author's state, *People v. Leftwich*, 869 P.2d 1260, 1272-73 (Colo. 1994), in which the majority found that there could be no reasonable good faith reliance on the warrant allowing the search, and, yet, two of the justices concluded that the warrant had been supported by probable cause.

ly on the street with very little guidance from the Supreme Court. It is very difficult to explain why police on the street deserve to be sanctioned with exclusion when judges flatly disagree on the propriety of what the police did.

### C. *Reasonable Suspicion*

When one turns to the standard for forcible stops on the street, this “standard” is even more problematic because it is so obviously a matter of individual judgment. Police, the Court tells us, need reasonable and “articulable” suspicion that the suspect has committed a crime.<sup>105</sup> This is the same problem that surfaced in *Gates* where Justice White and Justice Stevens could not agree on whether the fact that someone flies from a Chicago suburb to Florida and then starts the return drive to Chicago the next day is “quite suspicious”<sup>106</sup> behavior or something not even “unusual.”<sup>107</sup> Reasonable people and reasonable judges can differ on the inferences to be drawn from the same facts.

The most heavily publicized forcible stop case over the last few decades was not a Supreme Court case, but a federal district court case, *United States v. Bayless*,<sup>108</sup> decided in 1996. The case arose after two police officers pulled over Carol Bayless early in the morning on April 21, 1995, in Washington Heights, a part of New York City known for its prolific drug trafficking.<sup>109</sup> The police, as part of a drug task force, had seen four men—two carrying large duffel bags—make what they thought was a controlled drop of drugs into Bayless’s double-parked car with Michigan license plates at five o’clock in the morning.<sup>110</sup> The four men had crossed the street single file to where Bayless’s car was double-parked; then the first opened the trunk, the next two men each deposited one of the duffels in the trunk, and the fourth closed the trunk.<sup>111</sup> This was all done without a single word being exchanged between the men and Bayless.<sup>112</sup>

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105. See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

106. *Illinois v. Gates*, 462 U.S. 213, 269 (White, J., concurring).

107. *Id.* at 291–92 (Stevens, J., dissenting).

108. 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

109. *Id.* at 234–35.

110. *Id.* at 235, 239.

111. *Id.* at 235.

112. *Id.*

Bayless then started to drive away, but stopped shortly at a red light.<sup>113</sup> At this point, the officers, who were in an unmarked car, drove up behind Bayless's car where they were also close to the four men who had deposited the duffels into the trunk of Bayless's car.<sup>114</sup> Two of the men noticed the officers and spoke briefly to the other men.<sup>115</sup> The four men then moved quickly—"at a rapid gait"—away from the police "in different directions."<sup>116</sup>

The officers continued to follow Bayless for two more blocks and then pulled her over just before she would have entered a major traffic artery.<sup>117</sup> The forcible stop led to a search of the trunk where the police found and seized thirty-four kilograms of cocaine and two kilograms of heroin<sup>118</sup> with an estimated street value of \$4 million.<sup>119</sup> Bayless later gave the police a videotaped confession in which she told the detectives that she had made twenty similar drug trips between Detroit and Manhattan in the previous five years.<sup>120</sup>

But the trial judge in the *Bayless* case suppressed the drugs and the confession, reasoning that the police lacked reasonable suspicion to stop Bayless as she headed out of New York City on her way back to Detroit.<sup>121</sup> The case, of course, brought down an avalanche of criticism from political leaders in both parties, reaching up even to the President of the United States.<sup>122</sup>

The opinion in *Bayless* was condescending in the extreme as the judge stretched to rationalize away each of the suspicious details the police had put forward to justify the forcible stop. A car double parked? Happens all the time in New York

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 235–36.

118. *Id.* at 237 n.10.

119. This is the value that news accounts placed on the drugs. See, e.g., Patricia Hurtado, *Judge Changes Mind: Drugs, Video Allowed As Evidence*, NEWSDAY, Apr. 2, 1996, at A2.

120. *Bayless*, 913 F. Supp. at 236–37 & n.9.

121. *Id.* at 243.

122. See Don Van Natta, Jr., *A Publicized Drug Courier Pleads Guilty to 3 Felonies*, N.Y. TIMES, June 22, 1996, available at <http://www.nytimes.com/1996/06/22/nyregion/a-publicized-drug-courier-pleads-guilty-to-3-felonies.html>; *She Pleads Guilty This Time: Previous Judge Had Tossed Evidence*, NEWSDAY, June 22, 1996, at A13, available at 1996 WLNR 551171. See also Viet D. Dinh, *Threats to Judicial Independence, Real and Imagined*, 95 GEO. L.J. 929, 934 (2007).

City.<sup>123</sup> A delivery of luggage to a car with out-of-state plates? New York City is a city of tourists.<sup>124</sup> The four men ran or walked quickly away when they realized there were plain clothes officers on the scene? Perfectly normal for citizens in Washington Heights to fear the police.<sup>125</sup> That four men were needed to put two pieces of luggage into a car trunk at five o'clock in the morning? Completely "innocuous."<sup>126</sup> And so on.

It is easy to dismiss the *Bayless* case as a terrible ruling by an arrogant judge, but the case shows the problems with the exclusionary rule, which requires subtle after-the-fact assessments under a test, like reasonable suspicion, that has no edges to it. The most obvious problem is the harshness of the rule. Maybe the officers did not have quite enough reasonable suspicion to stop Ms. Bayless, but where is any sense of proportion in suppressing \$4 million in drugs to punish the officers for their transgression? It is one thing to punish officers for flagrant violations of the Constitution, but to punish them for actions taken in good faith under a highly subjective standard is unfair.

Besides the obvious fact that "reasonable suspicion" is not a standard but a judgment call on which reasonable people will often differ, there is another problem with the law of stop-and-frisk. According to the Court's template in *Terry v. Ohio*, an officer deciding to make a forcible stop or to frisk someone must be able to articulate to herself the *reasons* for taking action against the suspect so that a reviewing court can review the adequacy of these reasons to determine if they were sufficient justification for the stop or the frisk.<sup>127</sup> More specifically, the Court noted in *Terry* that a lower court, when evaluating the constitutionality of a stop or frisk, must not rely on an officer's "inchoate and unparticularized suspicion or 'hunch,' but" must evaluate the officer's action measured against "the specific reasonable inferences" the officer was "entitled to draw from the facts in light of his experience."<sup>128</sup>

This seemed completely logical and sensible at the time *Terry* was decided. But the epistemological assumption that we *see* certain things and then *reason* from them to conclude

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123. *Bayless*, 913 F. Supp. at 240.

124. *Id.*

125. *Id.* at 242.

126. *Id.*

127. 392 U.S. 1, 2-3 (1968).

128. *Id.* at 27.

there is something amiss is being challenged on many fronts today. Neuroscience suggests that many important decisions—in fact, some of our basic moral judgments—are based on intuitions or feelings that we may not be able to explain.<sup>129</sup>

This is especially the case with perceptions of dangerousness. An article in the *New York Times*, titled *In Battle, Hunches Prove to Be Valuable*, discusses research indicating that, perhaps as a result of evolution, our brains sometimes “sense” or feel danger, even if we cannot explain what has triggered this sensation.<sup>130</sup> The article explains that this ability to sense or feel something is wrong, without being able to explain it, saves lives when soldiers are on patrol; thus, the military is very interested in this research.<sup>131</sup>

In the *Times* article, Dr. Antonio Damasio, a leading neuroscientist and the Director of the Brain and Creativity Institute at the University of Southern California, explained how research has changed the way we understand decision-making:

Not long ago people thought of emotions as old stuff, as just feelings—feelings that had little to do with rational decision making, or that got in the way of it . . . . Now that position has reversed. We understand emotions as practical action programs that work to solve a problem, often before we’re conscious of it. These processes are at work continually, in pilots, leaders of expeditions, parents, all of us.<sup>132</sup>

Social science research has made us aware of the fact that, even from childhood, we “read” faces at a subconscious level and sometimes sense danger or hostility before we realize it at a conscious level.<sup>133</sup> Some of this social science and neuroscience research on the way we “think without thinking” has been made accessible to non-scientists in bestselling books such

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129. See Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCIENCE* 2105 (2001).

130. Benedict Carey, *In Battle, Hunches Prove to Be Valuable*, *N.Y. TIMES*, July 28, 2009, available at <http://www.nytimes.com/2009/07/28/health/research/28brain.html>.

131. *Id.*

132. *Id.* (quoting Dr. Antonio Damasio).

133. See, e.g., Paul Ekman & Maureen Sullivan, *Facial Expression: Methods, Means and Mores*, in *FUNDAMENTALS OF NONVERBAL BEHAVIOR* 163 (Robert S. Feldman & Bernard Rimé eds., 1991); Paul Ekman & Wallace V. Friesen, *Constants Across Cultures in the Face and Emotion*, 17 *J. PERSONALITY & SOC. PSYCHOL.* 124 (1971).



as Malcolm Gladwell's *Blink: The Power of Thinking Without Thinking*<sup>134</sup> and Jonah Lehrer's *How We Decide*.<sup>135</sup>

As regards reasonable suspicion, this research suggests that an officer who states that she could "see" that the suspect "was up to no good" or that she "knew" that the suspect "meant trouble" is not necessarily lying or trying to cover up an improper motive if the officer cannot do better by way of explanation. It also explains why, in a quickly developing situation like the drug drop in *Bayless*, there will likely be layers of information that the officers had available to them at a subconscious level of which they would not be aware.<sup>136</sup>

In short, the Court's Platonist view that insists on reason as the basis for police action and that distrusts feelings and hunches flies in the face of neuroscience research showing that emotions are capable of providing deep insights because they reflect an enormous amount of invisible analysis.<sup>137</sup> Human emotions, far from being unrestrained instincts, have their source in brain cells that are constantly adjusting to reflect reality. As Jonah Lehrer puts it, "[o]ur emotions are deeply empirical."<sup>138</sup>

Obviously, this does not mean that officers do not sometimes, or even often, act on improper motives in making stops or in deciding to frisk someone. Nor does it mean that one's instinct or "feeling" about danger is never wrong. But a powerful deterrence-based exclusionary rule that puts sole emphasis on an after-the-fact review of the "reasons" for stops or frisks as-

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134. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

135. JONAH LEHRER, *HOW WE DECIDE* (2009).

136. The inability to explain what we know to be accurate is not just a phenomenon about police and danger. A nurse who had experience in intensive care units states that she could sometimes see just by looking at a patient when she came on duty that the patient would have trouble surviving the night. Anne-Marie Hislop, Comment to *In Battle, Hunches Prove to Be Valuable*, N.Y. TIMES, (July 28, 2009, 8:54 AM), <http://community.nytimes.com/comments/www.nytimes.com/2009/07/28/health/research/28brain.html>. Yet, she states, nothing in the charts of the patient supported her intuition. *Id.* Malcolm Gladwell's book is full of similar cases of someone who can see that something will happen, but cannot explain why. One of them is the famous tennis coach, Vic Braden, who could watch a match and tell when a professional player serving a second-serve was going to double-fault, yet he was frustrated that he could not explain how he knew it. GLADWELL, *supra* note 134, at 48–51.

137. See LEHRER, *supra* note 135, at 46–48 (explaining how dopamine neurons are able to detect patterns in complex information around us which we cannot consciously apprehend so that even when we think we know nothing, our brains know something and that is what our feelings are trying to tell us).

138. *Id.* at 41.

sumes an epistemological premise that runs counter to a growing body of research suggesting that we sometimes *sense* danger rather than reason to a conclusion that we are in danger and, even when our feelings about being in danger are proven correct, we may not be able to explain after the fact why we sensed danger.<sup>139</sup>

In short, an exclusionary rule that makes suppression turn on whether officers can give adequate reasons for their actions on the street puts tremendous pressure on the concept of "reasonable suspicion" which can never be given hard edges. Additionally, the epistemological structure underlying suppression hearings is being called into question by social science demonstrating that we often "feel" or "sense" danger rather than "reasoning" that a person or situation is dangerous.

None of the above is meant to suggest that the Court give up attempts to explain concepts like probable cause or reasonable suspicion. But the imposition of harsh deterrent sanctions for violations of concepts such as these puts pressure on such concepts for clear "yes" or "no" answers in many close cases—answers that these concepts cannot provide.

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139. Lehrer provides a fascinating account of a British radar officer on a destroyer fifteen miles off the coast of Kuwait during the invasion in 1991. *Id.* at 28–34. The British ship was charged with the task of using its radar to protect the allied fleet. *Id.* at 30. Late in his watch in the radar room, the officer saw a blip on the radar screen coming toward the fleet that frightened him, causing his pulse to race and his hands to become clammy. *Id.* But the problem was that the blip was indistinguishable in size and speed from the blip of American A-6 fighter jets returning from their missions which the officer had been seeing for several hours. *Id.* at 30–31. The officer watched the blip for forty seconds until he could delay no longer and he ordered a missile sent to destroy the incoming object. *Id.* at 31. Four hours later, an examination of the surface wreckage of the object, which had fallen seven hundred yards from the battleship USS *Missouri*, and an inventory of allied planes confirmed that the blip had been a Silkworm missile that had been heading directly for the battleship. *Id.* at 32. A subsequent British investigation of the incident, including reviews of a tape of the radar screen the officer had been viewing for forty seconds between the time when he first spotted the blip to the point that he ordered missiles sent to destroy the blip, was unable to determine how the officer could have distinguished the missile from friendly aircraft on the information available to the officer. *Id.* at 32–33. The conclusion of the officer and those reviewing his actions was that the officer had been "lucky." *Id.* at 33. A few years later, a cognitive psychologist who had heard of the incident determined to find the reason the blip had frightened the officer. *Id.* After reviewing the tapes of the incident many times he found the difference—the missile had not appeared on the radar screen until the third radar sweep, which was eight seconds after a fighter jet would normally appear, because the missile traveled at a lower altitude and could not be picked up until it was distinct from ground interference. *Id.* at 33–34. It was this subtle but clear distinction in the blip of the missile that had triggered the physical reaction in the officer's nervous system warning him that this object was something to be feared. *Id.* at 34.

### III. DETERRENCE AND INJUSTICE

The imposition of harsh deterrent sanctions for undesirable social behaviors is not consistent with traditional deterrence theory that sought to deter crime through consistent application of *proportional* punishments. Unfortunately, as demonstrated in Section A of this part, the United States has distinguished itself from other Western countries by accepting a form of deterrence that tries to deter criminal behaviors by threatening the imposition of harsh punishments that will often be disproportional to the crime. Section B then shows that, after nearly forty years of research into our deterrence practices, it is still subject to debate whether or not harsh punishments deter.

Section C argues that the deterrent effect of the exclusionary rule is even more deeply problematic because the effect of exclusion on the offending officer is so indirect. Moreover, as described in Section D, harsh penalties take a toll on the integrity of the system as it tries to avoid harsh results in difficult cases.

#### A. *The Distortion of Deterrence*

The belief that one of the main purposes of punishment is to deter others from committing similar crimes has a long and distinguished history. In 1764, the Italian political philosopher, Cesare Beccaria, published the famous essay *On Crimes and Punishment*, which expressed a theory of punishment based heavily on deterrence as a goal of punishment.<sup>140</sup> In Chapter XII on *The Purpose of Punishment*, Beccaria wrote:

The purpose of punishment, therefore, is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.<sup>141</sup>

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140. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press 2008) (1764).

141. *Id.* ch. XII, at 26.

As a result of passages such as this one, Beccaria is credited with the insight that punishment has, at least in part, a preventative function, namely, that of deterring others from committing crime.<sup>142</sup> But notice that Beccaria is not endorsing deterrence through the imposition of *harsh* penalties. Beccaria actually believed in mild penalties and was a strong opponent of the death penalty.<sup>143</sup> Rather, Beccaria declares that punishments must be chosen such that, “*in keeping with proportionality*,” they will deter others from committing the same crime.

Over the last four decades, this caveat that sentences not offend the requirement of proportionality has been repeatedly ignored in the United States. For example, in the drug area, many states have passed laws with high mandatory minimum sentences. Some of the best known are New York’s “Rockefeller drug laws”—passed when Nelson Rockefeller was the governor—which imposed sentences ranging from a minimum of fifteen years-to-life up to twenty-five years-to-life on those selling two ounces of heroin or cocaine or possessing four ounces of these drugs.<sup>144</sup> This put the punishment level for these drug crimes at the same level as second degree murder.<sup>145</sup> Nearly as well known is Michigan’s “650 Lifer” law, passed in the late 1970s, which mandated a life sentence without parole on those convicted of possession of 650 grams of cocaine or certain other scheduled drugs.<sup>146</sup> The federal system also passed a set of

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142. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 180 (2008); Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547, 593–94 & n.221 (2005).

143. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 50 (2003) (“Beccaria believed that punishment, while it should be unbending, should generally be mild, with relatively brief terms of incarceration and relatively light punishments of other kinds.”).

In his essay, Beccaria aligns himself with Montesquieu in declaring that “every punishment that does not derive from absolute necessity is tyrannical.” BECCARIA, *supra* note 140, ch. II, at 11.

144. See N.Y. PENAL LAW §§ 220.00–.65 (McKinney 1999). These laws were only recently scaled back. See Jeremy W. Peters, *Albany Reaches Deal to Repeal ‘70s Drug Laws*, N.Y. TIMES, Mar. 25, 2009, at A1, available at <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>.

145. Second degree murder in New York, which includes felony murder and killing as the result of extreme recklessness, N.Y. PENAL LAW § 125.25 (McKinney 2009), carries a minimum punishment of between fifteen and twenty-five years, N.Y. PENAL LAW § 70.00(3)(a)(i) (McKinney 2009).

146. See MICH. COMP. LAWS ANN. § 333.7401 (West 1992). This law—referred to later by the governor who signed it as a “draconian mistake”—was finally mod-

stiff drug laws in 1986 that included high mandatory minimums with no parole for those found in possession of drugs even if they had no prior record.<sup>147</sup>

Deterring violations of the Constitution by means of an exclusionary rule is different from deterring crime through harsh criminal sanctions, as no one goes to prison if a court suppresses evidence. But the theory has the same flaws as harsh deterrent sentencing laws—it is simply unjust to aim at deterrence through a harsh penalty that is not, in Beccaria's words, "in keeping with proportionality." There are times when the conduct of an officer is flagrantly unconstitutional and outrageous, but there are also times when an officer acts in reasonable good faith trying to apply concepts that do not have defined edges. These are different categories of constitutional offenses deserving different consequences.

### *B. Do Harsh Punishments Deter?*

The argument will no doubt be that a powerful deterrent sanction is needed in the Fourth Amendment area because lesser sanctions will not work to deter police wrongdoing. But what is the evidence that this powerful remedy actually deters police wrongdoing? Or, to put the matter in a more nuanced way, what is the evidence to suggest that a proportional exclusionary rule that would allow a court to consider factors such as the pressures the officer was under at the time, the nature of the violation, and the seriousness of the crime in deciding whether to suppress would not have just as strong a deterrent effect? The problem in answering such questions is that the deterrent effect of harsh sanctions has proven almost completely resistant to definitive answers.

The classic case for deterrence study is, of course, the death penalty. The death penalty would seem a perfect instrument against which to determine whether the penalty of death deters homicides. A large majority of states—thirty-four—have the death penalty, but there are sixteen states that do not have the death penalty.<sup>148</sup> There are detailed statistics

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ified in 1998. See Lisa R. Nakdai, *Are New York's Rockefeller Drugs Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 574 (2001).

147. See 21 U.S.C. §§ 841–865 (2006).

148. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (updated Apr. 1, 2011), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

on murder rates over the years, so we know when and where the rates are increasing or declining.<sup>149</sup> We also have developed powerful mathematical tools over the last fifty years, such as multivariate regression analysis, that some economists have applied to the death penalty data in an effort to help determine whether the death penalty deters.<sup>150</sup> But what we have learned about the death penalty over the last few decades is that, despite numerous studies, we do not know if the death penalty deters. Instead, what we see is an ebb and flow of scholarship as an economist or statistician publishes an article claiming to show a deterrent effect from the death penalty which is then followed by a barrage of articles claiming that the variables used were not independent, or that the data failed to include certain other influences, or that there was some other shortcoming that casts doubt on the validity of the findings in the original study.

This ebb and flow began in 1975 when an economist, Isaac Ehrlich, published a paper in which he used data from 1963 to 1969 and found that there was a statistically significant negative correlation between the murder rate and execution rate, meaning that there was a deterrent effect from the death penalty.<sup>151</sup> He estimated that for each execution approximately seven or eight murders were deterred.<sup>152</sup>

In the years following publication of the Ehrlich study, there were numerous articles in economics journals and law reviews that challenged Ehrlich's methodology and his conclusions.<sup>153</sup> Ehrlich used data from the seven-year period from 1963–69 and claimed that executions had triggered a decline in homicides during that period.<sup>154</sup> But the problem was that the decline in homicides in that period had taken place across all

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149. The Federal Bureau of Investigation Uniform Crime Reporting Program keeps detailed data on violent crime, which includes murder, nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. See *Violent Crime*, FED. BUREAU OF INVESTIGATION CRIM. JUST. INFO. SERVICES DIVISION, [http://www2.fbi.gov/ucr/cius2009/offenses/violent\\_crime/index.html](http://www2.fbi.gov/ucr/cius2009/offenses/violent_crime/index.html) (last visited Feb. 23, 2011). This data can be explored state by state and, in addition, the data includes five- and ten-year trends in the level of individual crimes. *Id.*

150. The first major study to use these mathematical tools was that of Isaac Ehrlich. See *infra* text accompanying notes 151–59.

151. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

152. *Id.* at 414.

153. See, e.g., Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977).

154. *Id.* at 447–48.

states, including those that did not have the death penalty, so that Ehrlich's model did not show a correlation between state-sponsored executions and criminal murders.<sup>155</sup>

Because Ehrlich's study had caused such an uproar in the academic community, the National Academy of Sciences put together a panel chaired by Alfred Blumstein to evaluate Ehrlich's work.<sup>156</sup> The panel, relying heavily on research on Ehrlich's study that was conducted by Nobel Laureate Lawrence Klein,<sup>157</sup> concluded that "the available studies provide no useful evidence on the deterrent effect of capital punishment."<sup>158</sup> The panel then went on to state that "research on the deterrent effects of capital sanctions is not likely to provide results that will or should have much influence on policy makers."<sup>159</sup>

Despite skepticism from the National Academy of Sciences that econometrics can contribute much to the death penalty debate, pro or con, there continue to be attempts to apply econometric methods to new data sets in an attempt to show the deterrent effects of the death penalty. In 2003, Hashem Dezhbakhsh, Paul H. Rubin, and Joanna Shepherd analyzed twenty years of data from 3,054 counties to test the effect of county differences on murder rates and estimated that each execution prevents as many as eighteen murders.<sup>160</sup> This was followed the same year by a study by Naci Mocan and Kaj Gittings, using Justice Department data for the period from 1977 to 1997, which claimed to find that each execution deters five murders.<sup>161</sup>

Not surprisingly, as was true of the Ehrlich study, other economists quickly followed up claiming not only that these

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155. See John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS' VOICE, Apr. 2006, at 1, 2, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1170&context=ev>.

156. PANEL ON RESEARCH ON DETERRENT & INCAPACITATIVE EFFECTS, NAT'L RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3, 9, 12 (Alfred Blumstein et al. eds., 1978) [hereinafter DETERRENCE AND INCAPACITATION].

157. See Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in DETERRENCE AND INCAPACITATION, *supra* note 156, at 336, 338–359.

158. See DETERRENCE AND INCAPACITATION, *supra* note 156, at 9.

159. *Id.* at 12.

160. See Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003).

161. See H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003).

studies are flawed, but that it is doubtful any econometric analysis can tell us whether the death penalty has a deterrent effect or not.<sup>162</sup> Among those questioning the validity of the new studies on deterrence were Professors John J. Donohue and Justin Wolfers, who came to a conclusion that closely tracks that of the National Academy of Sciences panel nearly thirty years earlier: "The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain."<sup>163</sup>

In an article entitled *Learning from the Limitations of Deterrence Research*, Michael Tonry, a leading criminologist, reviewed not only deterrence studies conducted with respect to the death penalty, but also studies in the wake of mandatory arrest statutes passed to deter domestic violence and right-to-carry laws designed to deter violent crimes.<sup>164</sup> He noted that each legislative initiative was claimed to be supported by research showing that the law would have deterrent effects. In each case, however, the research findings were "subsequently repudiated," but the legislation remained in place nonetheless.<sup>165</sup> Based on this experience, he cautioned that "policy makers should set very high evidentiary standards when considering evidence about the deterrent effectiveness of penalties before adopting policies predicated on deterrence rationales."<sup>166</sup>

It sounds logical to think that imposing high mandatory minimum sentences on those who carry guns during a crime will deter criminals from using guns or that imposing a high mandatory minimum sentence on those in possession of large amounts of drugs will deter citizens from entering the drug business. But what we have learned, somewhat sadly, over the last few decades is that the deterrent effect of a punishment is very difficult to assess. What this means is that we impose punishments that are harsh and disproportional to the crime in exchange for a goal that is highly uncertain.

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162. See, e.g., Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

163. See Donohue & Wolfers, *supra* note 162, at 843.

164. See Tonry, *supra* note 68, at 279.

165. *Id.* at 282–83.

166. *Id.* at 283.



*C. Does the Exclusionary Rule Deter?*

If we do not know after decades of study whether the death penalty—when compared to a lesser penalty such as life without parole—deters, it would be much more difficult to prove or disprove that the exclusionary rule deters police misconduct. In evaluating the effect of the death penalty on homicides, at least it is possible to determine the number of homicides that take place each year in a given jurisdiction over a given period of time because cities and states keep accurate crime statistics of serious crimes.

But when it comes to violations of the Fourth Amendment, it is difficult to know how many take place. Many such violations—one suspects the vast majority—will not be reflected in a statistical database because they will not lead to a formal arrest or prosecution where a citizen might challenge the officer's action. Put another way, if the goal of the officer is simply to harass and humiliate the citizen on the street, then that goal is achieved by the constitutional violation alone. Further complicating the difficulty of determining how often police violate the rights of citizens is the fact that many citizens will be reluctant to report illegal treatment to police authorities, perhaps feeling that it will only subject them to greater abuse in the future (especially if the abuse took place in the jurisdiction in which they live) or perhaps feeling that they will not be believed by police authorities inclined to believe "one of their own."

Moreover, unlike the death penalty, where the threatened punishment will be visited directly on the offender, the deterrent sanction of the exclusionary rule is indirect, sometimes very indirect. The prosecutor who decides to file charges is most directly punished by the suppression of evidence, but the prosecutor will often have had nothing to do with the actions of the offending officer. Because of our adversary tradition, it is customary to speak of defendants as facing the power of "the State" in the criminal process.<sup>167</sup> But there are many different loyalties and responsibilities lying behind the concept of "the State." State prosecutors enforce state law, but they are most often county employees and handle criminal cases for that

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167. Justice Marshall sometimes spoke of "the awesome power of the State" in describing the forces aligned against a suspect in the criminal process. See, e.g., *Perry v. Leeke*, 488 U.S. 272, 292 (1989) (Marshall, J., dissenting); *Brewer v. Williams*, 430 U.S. 387, 409 (1977) (Marshall, J., concurring).

county.<sup>168</sup> The police may work for the county, but they may also be employed by a city within the county.<sup>169</sup> And, of course, in many major criminal cases, there may be several police agencies—perhaps even federal as well as state agencies—participating in different phases of the investigation.<sup>170</sup>

Even in situations where there is a single police agency that works on a daily basis with a particular prosecutor's office, the relationship between the two entities will often be complicated.<sup>171</sup> The two offices may work closely on important cases, but there are often likely to be tensions between the police agency and the prosecutor's office. As one scholar of the relationship between police and prosecutors noted: "Police are often disappointed with and wary of the prosecutor's decisions; the prosecutor often distrusts and questions the actions and motives of the police. In many instances, the two work together more in an atmosphere of sullen resignation than in one of trust and cooperation."<sup>172</sup>

Because the impact of the exclusion of evidence on officers is so indirect, the deterrent effect of suppression on police behavior seems doubtful. This is not to say that the exclusionary rule has no effect—certainly it impacts the training of officers or it may dominate the thinking of prosecutors and police officers in important cases. But to say that it strongly deters police

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168. See Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1246, 1247 (Joshua Dressler ed., 2d ed. 2002).

169. That there are more than 20,000 state and local police agencies in the United States shows how fragmented policing is in the United States. See Edward R. Maguire & Carol Archbold, *Police: Organization and Management*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1083, 1083–84 (Joshua Dressler ed., 2d ed. 2002).

170. Many criminal cases that are investigated initially by state officers may end up being prosecuted in federal court. *Herring* itself is an example of such a case: the investigation and search in question were carried out by local officers (from the Coffee County Sheriff's Department in Alabama), but the defendant was indicted in federal court for the drugs and weapon found in his car. *Herring v. United States*, 129 S. Ct. 695, 698–700 (2009). See also *United States v. Patane*, 542 U.S. 630 (2004) (local officers investigated domestic issue but prosecution occurred in federal court); *Whren v. United States*, 517 U.S. 806 (1996) (local officers stopped vehicle but drug prosecution in federal court).

171. One law professor claims that the exclusionary rule "works" because, when evidence is suppressed, "the prosecutor calls the offending officers on the carpet to point out the error of their ways or contacts their superior." See Bradley, *supra* note 44, at 54. When reviewing courts are often divided on the issue on which suppression is based, this account of what should happen seems simplistic and naïve.

172. JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 110 (1980).

abuse of citizens seems naïve. If one wanted to determine whether the police in Stockton, California, are far more respectful of the rights of citizens than the police in Stockholm, Sweden, one suspects that the fact that one department operates under a powerful deterrent exclusionary rule and the other operates under no exclusionary rule<sup>173</sup> would have very little bearing on the answer.

Another way to gain perspective on police misconduct directed against citizens is to recall that for a period of eight years, ending only on July 20, 2009,<sup>174</sup> the Los Angeles Police Department (“LAPD”) operated under the direct supervision of the Civil Rights Division of the United States Department of Justice (“DOJ”) as a result of a lawsuit alleging a pattern or practice of police misconduct including

the unconstitutional use of force by LAPD officers, including improper officer-involved shootings; improper seizures of persons, including making police stops not based on reasonable suspicion and making arrests without probable cause; seizures of property not based on probable cause; and improper searches of persons and property with insufficient cause.<sup>175</sup>

Additionally, the DOJ found serious deficiencies in the training, supervising, and disciplining of police officers, including a failure by the LAPD to respond properly to citizen complaints of officer misconduct.<sup>176</sup> The failure to adequately investigate complaints of misconduct meant that officers engaging in such conduct were “unlikely to be discovered and

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173. Sweden does not have an exclusionary rule to punish police wrongdoing because Sweden, like other Scandinavian countries, has a governmental institution—the ombudsman—that is charged with taking complaints, conducting investigations, and making recommendations about alleged wrongdoing by governmental actors including the police. See Robert P. Davidow, *Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal*, 4 TEX. TECH L. REV. 317, 321–22 (1973).

174. See Laura Conaway, *Justice Frees LAPD from ‘Rampart Scandal’ Consent Decree*, NAT’L PUB. RADIO (July 20, 2009, 4:52 PM), [http://www.npr.org/blogs/thetwo-way/2009/07/judge\\_frees\\_lapd\\_from\\_rampart.html](http://www.npr.org/blogs/thetwo-way/2009/07/judge_frees_lapd_from_rampart.html) (explaining the ruling by U.S. District Judge Gary Freed lifting the decree under which independent monitors had been imposed over the police department).

175. Letter from Bill Lann Lee, Acting Assistant Attorney Gen., Civil Rights Div., to James K. Hahn, City Attorney, L.A., Cal. (May 8, 2000) (on file with *University of Colorado Law Review*).

176. *Id.*

disciplined” and were, thus, “not deterred from engaging in misconduct.”<sup>177</sup>

This plague of police misconduct in Los Angeles, the country’s second largest city, is not meant to suggest that such extreme lawlessness by officers is common in American cities—though news accounts suggesting widespread levels of shocking police misconduct in other major U.S. cities abound<sup>178</sup>—or even to suggest that a large percentage of officers in Los Angeles engaged in such behaviors. Rather, the situation in Los Angeles puts the exclusionary rule in perspective. The exclusion of unconstitutionally seized evidence from admission at trial has a small role to play in deterring police misconduct. Moreover, the issue is not the U.S. exclusionary rule or nothing, but the macho exclusionary rule developed by the Court as compared to a more balanced exclusionary rule not justified on its supposed deterrent effect that would take into consideration factors such as the nature of the crime and the level of culpability of the officer in deciding whether exclusion is appropriate.

Obviously, it may seem a bit unfair to criticize the Court’s policy-making four decades ago or more based on what we have learned about the limits of deterrent sanctions since that time. This Article is not about blame, but about recognizing that the exclusionary rule the Court fashioned in the line of cases starting with *Mapp* has serious structural problems, and it is time for the Court to acknowledge these deficiencies and move on.

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177. *Id.*

178. For example, the New York Times reported in 2007 that a federal investigation was taking place into what the U.S. Attorney described as a “culture of misconduct” in Atlanta, including lying to obtain search warrants and the fabrication of evidence against suspects. See Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Dept. Is Widespread*, N.Y. TIMES, Apr. 27, 2007, at A18, available at <http://www.nytimes.com/2007/04/27/us/27atlanta.html>.

More recently, articles have appeared about a group of police officers in Tulsa—aided by a federal agent—who planted evidence, coerced perjured testimony, fabricated informants, and intimidated witnesses, leading to false convictions including that of a man sentenced to federal prison for twenty-two years whose conviction has been overturned after the informant admitted to lying on the stand as instructed by Tulsa officers. See Stephanie Simon, *Scandal Roils Tulsa Police*, WALL ST. J., Dec. 10, 2010, at A3, available at <http://online.wsj.com/article/SB10001424052748704720804576009812869266014.html>; Omer Gillham, *Freed Man Alleges False Conviction in Suing Tulsa Police Department*, TULSA WORLD (June 3, 2010), [http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100603\\_11\\_0\\_AGlenp234465](http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100603_11_0_AGlenp234465).

*D. Harsh Punishments and Their Toll on Integrity*

If the exclusionary rule cannot be shown to be the powerful deterrent its supporters claim or, in fairness, if critics of the rule cannot show that the rule does *not* deter violations of the Constitution, what is the harm of the rule? At this point, one might expect an argument that the exclusionary rule hamstringing police in fighting crime so that far too many murderers and rapists go free, laughing at their good fortune as they hurry out of courtrooms where critical evidence of their crimes has just been suppressed. Certainly, there are cases where perpetrators of terrible crimes have gone free as a result of the exclusionary rule.<sup>179</sup> But this Article does not contend that large numbers of defendants charged with serious crimes go free because, in Justice (then Judge) Cardozo's words, "the constable has blundered."<sup>180</sup>

Nor does this Article base its critique on empirical research published in 2003 claiming to show that the exclusionary rule increases the rate of crime for larceny, burglary, robbery, and assault by encouraging potential criminals to commit crime.<sup>181</sup> While some of the numbers reported in the study are troubling—a 7.7 percent increase in robberies and a whopping 18 percent increase in assaults<sup>182</sup>—this Article takes an agnostic position on this study, in part because it is relatively recent, but also because the study found a big jump in assaults but no increase in murders,<sup>183</sup> which suggests other factors may have triggered the crime increase.

So then what is the harm of the exclusionary rule?

The first problem with disproportionate and harsh punishments is that they erode the integrity of the criminal justice system. The system—judges, prosecutors, and defense attorneys—tries to find ways around harsh punishments. We are, of

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179. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (murderer of a young girl went free due to exclusion of evidence). Another case involved serial killer Larry Eyler, who went free when evidence seized from Eyler's truck linking Eyler to a series of murders of homosexuals was suppressed. Eyler went on to kill three more victims before finally being arrested and convicted. See PAUL ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE* 147–49 (2005).

180. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

181. See Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157 (2003).

182. *Id.* at 166.

183. *Id.*

course, accustomed to the avoidance of harsh penalties as part of plea bargaining where well-founded charges get dropped or “reshaped” in a bargain that spares the defendant the deterrent punishment. Thus, if there is a harsh mandatory punishment for possession of 500 or more grams of cocaine, the prosecutor, as part of the plea bargain, may accept the defendant’s plea to possession of a lesser amount even though the lab analysis showed the amount to be considerably greater than the amount that was bargained.<sup>184</sup>

But sometimes plea bargaining is restricted in its effects, so judges and lawyers need to find a way around these restrictions so a defendant can avoid a harsh punishment. In the federal system under the Federal Sentencing Guidelines (“Guidelines”) regime—now thankfully reduced in importance by a Supreme Court decision making them advisory only<sup>185</sup>—sentencing was supposed to be based on the defendant’s “real offense,” not her offense of conviction.<sup>186</sup> This threatened many defendants with longer sentences compared to what they would receive for similar plea bargains in state courts or under the pre-Guidelines regime in federal court because judges were required to sentence for the “real offense” as described in the police reports in the prosecutor’s file, and, hence, defendants received no sentencing discount from pleading to a less serious charge.<sup>187</sup> To solve this problem, prosecutors and defense at-

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184. See Cassia C. Spohn, *Sentencing Options and the Sentencing Process*, in CRITICAL ISSUES IN CRIME AND JUSTICE 277, 293–94 (Allen R. Roberts ed., 2d ed. 2003) (explaining how prosecutors charge defendants with possessing a lesser amount of drugs in order to obtain the agreed sentence bargain because a higher penalty would be mandatory if the defendants were charged with possessing the actual, higher amount).

185. *United States v. Booker*, 543 U.S. 220 (2005). See generally Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387 (2006); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005).

186. See U.S. SENTENCING COMM’N, 2004 FEDERAL SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (2004), available at [http://www.ussc.gov/Guidelines/2004\\_guidelines/2004\\_manual.cfm](http://www.ussc.gov/Guidelines/2004_guidelines/2004_manual.cfm). Perhaps the most startling example of the effects of “real offense” sentencing is *United States v. Watts*, 519 U.S. 138 (1997), where Watts received four additional years in prison on the basis of an offense on which the jury had acquitted him, namely, using a firearm during a drug offense. See William T. Pizzi, *Watts: The Decline of the Jury*, 9 FED. SENT’G. REP. 303 (1997).

187. In plea bargaining, one normally is subject to the penalty for the conviction offense. Thus, when a defendant pleads guilty to a lesser offense, the defendant’s maximum sentence is thereby reduced to the statutory range for the lower offense. See generally WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 21.1, at 1000 (5th ed. 2009).

torneys would frequently stipulate as to the “facts” in the case and judges were only too happy to accept these stipulations even though they were not consistent with the description of the crime in the prosecutor’s file.<sup>188</sup>

Professor Kate Stith, an expert in sentencing in federal court, reports a study that concluded that prosecutors did not fully apply the Guidelines’ enhancement factors, as they were required to do when the Guidelines were in full effect, in approximately one-third of cases.<sup>189</sup> This is not surprising as it is often observed that institutional actors routinely circumvent most habitual-offender and three-strikes laws because the penalties would be so disproportionate under prevailing sentencing norms for what the defendant had actually done.<sup>190</sup>

The exclusionary rule’s suppression penalty takes a similar toll on the system’s integrity. The most obvious dishonesty occurs in court when officers are called to testify on a motion to suppress and they embellish their testimony or give testimony that is false in an effort to avoid suppression. This phenomenon is common enough that police even have coined a name for it—“testilying.”<sup>191</sup> We do not know precisely how often testilying occurs, but it is certainly not a rare occurrence.<sup>192</sup> In the right case, facing suppression of important evidence, there is a strong temptation for an officer to supply a lawful justification for the search, such as a defendant’s “furtive gesture” before a frisk or a defendant’s “voluntary consent” to a car search when neither event happened.

Harsh rules also encourage judicial dishonesty. If the crime is serious and the evidence important, judges will accept dubious explanations or justifications for a search in order to find the search constitutional, where they would be openly

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188. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1450–51 (2008).

189. *Id.* at 1450.

190. See Tonry, *supra* note 68, at 281.

191. See Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996).

For a powerful account by a former police officer of the corrosive effect of “testilying” and the way the exclusionary rule encourages such behavior, see WALTER P. SIGNORELLI, *THE CONSTABLE HAS BLUNDERED: THE EXCLUSIONARY RULE, CRIME, AND CORRUPTION* 143–58 (2010).

192. Slobogin, *supra* note 191, at 1041. One survey of prosecutors, public defenders, and judges in Chicago estimated that “testilying” occurred between 20 and 50 percent of the time at suppression hearings in that jurisdiction. 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, 83 (1992).

skeptical of the officer's testimony if the crime were less serious.<sup>193</sup> Judges also engage in their own dishonesty when they stretch Fourth Amendment exceptions to uphold dubious searches in serious cases. There is talk, for example, of a "one kilogram exception" to the exclusionary rule in some locales, meaning that judges will be very unlikely to suppress amounts of hard drugs that exceed one kilogram.<sup>194</sup> Given the various exceptions to the exclusionary rule, there will often be ways that a judge can work with an officer's testimony to find a loophole to avoid suppression. The result is an exclusionary rule that is sometimes avoided in a rather cynical way, leaving scholars lamenting a theoretically tough exclusionary rule that is "riddled with exceptions and limitations."<sup>195</sup>

This should not surprise us. Just as the criminal justice system tries to work around three-strikes laws, high mandatory minimums, and other harsh deterrent sanctions (thereby making the application of these sanctions haphazard and inconsistent),<sup>196</sup> the system also tries to avoid strict application of the *Mapp* exclusionary rule where the result would be disproportional and unfair.

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193. In the Chicago survey of prosecutors, public defenders, and judges in the criminal courts described in footnote 192, when asked if "judges ever fail to suppress evidence when they know police searches are illegal," nine of the twelve judges, fourteen of the fourteen public defenders, and nine of the fourteen state's attorneys responded "yes" to the question. See Orfield, *supra* note 192, at 115. See also JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATION § 8.03[C], at 123 n.45 (5th ed. 2010) (explaining that judges usually accept police testimony they suspect is perjurious in part because they "wish to help law enforcement officers convict persons whom the judge believes is guilty").

194. Donald Dripps gives the following account of the "one kilogram exception" to the exclusionary rule:

Courthouse regulars will sometimes speak as though Fourth Amendment fraud were part of established jurisprudence. They may, for example, quite casually refer to the kilogram exception to the exclusionary rule. The kilogram exception provides that the exclusionary rule does not apply to quantities of heroin or cocaine that exceed one kilogram in weight.

See Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 21 (2001).

195. See Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 209 (1995).

196. See Tonry, *supra* note 68, at 281, 285 (explaining how the system works to avoid the application of habitual offender statutes, three-strikes laws, and the like).



## IV. REFORMING THE U.S. EXCLUSIONARY RULE

This Article challenges the American exclusionary rule and the deterrence theory on which it is based. We know much more about the difficulties of determining whether punishments deter and we have learned over time that defining concepts like “probable cause” and “reasonable suspicion” is more complicated than we may have thought. Harsh deterrent sanctions only put more pressure on these concepts, leading to decisions that are often confusing and inconsistent with each other. But if the Court were to depart from the exclusionary rule developed in *Mapp* and its progeny, what should it do?

Before turning specifically to this question, it is worth considering by way of background the development of exclusionary rules in other common law countries. This part, in Sections A through D, reviews the development of exclusionary rules in Canada, New Zealand, England, and Ireland to offer perspective on reform of the U.S. exclusionary rule.<sup>197</sup> All of these countries have struggled to find a balance between the need to protect the rights of citizens from lawless actions of the police and the strong societal interest in the accuracy of trials, especially when the crime is serious. The approaches of these countries vary, but they are consistent in one thing: none of these countries base their exclusionary rule exclusively on the need to deter police wrongdoing. Section E discusses lessons the United States may draw from these various approaches.

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197. This part discusses only common law countries because civil law systems do not usually have exclusionary rules. See, e.g., Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 243, 251–52 (Craig M. Bradley ed., 2d ed. 2007).

The European Court of Human Rights has left exclusion of evidence as a remedy for police misconduct up to individual countries by ruling that a conviction based on evidence illegally obtained in violation of a defendant’s right to privacy, guaranteed by Article 8 of the European Convention of Human Rights, does not deprive a defendant of a fair trial, which is guaranteed by Article 6 of the same document. See *R v. Khan*, [1997] A.C. 558 (H.L.) (appeal taken from Eng.). In *Khan*, the defendant had attempted at trial in England to exclude recordings made as the result of illegal electronic surveillance which showed Khan was involved in the importation of a large amount of heroin seized from a cousin with whom Khan was traveling from Pakistan to Manchester. *Id.* at 3–4. The Court of Appeal, *R v. Khan*, [1994] 4 All E.R. 426, and the House of Lords, *R v. Khan*, [1997] A.C. 558, both ruled that the trial judge was within his discretion not to exclude the evidence under section 78 of the Police and Criminal Evidence Act.

### A. *Canada*

Canada was late developing a written constitution and only adopted its Charter of Rights and Freedoms in 1982.<sup>198</sup> Section 8 of the Charter guarantees "everyone . . . the right to be secure from unreasonable search or seizure."<sup>199</sup> But unlike the U.S. Constitution, which contains no explicit exclusionary rule for illegal searches, the Charter in Canada contains a specific exclusionary provision. Section 24(2) states that evidence found by a court to have been obtained in violation of a right in the Charter—which also includes statements obtained from a suspect in violation of the Charter—"shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."<sup>200</sup> Section 24(2), like the U.S. exclusionary rule, does not give a wronged citizen a right to the exclusion of evidence, but unlike the U.S. model, the section considers the impact of the admission of unlawfully seized evidence on the integrity of the system.

In basing exclusion on the impact of the admission of unconstitutionally seized evidence on the system's integrity, the Charter departs from the deterrent objective of the U.S. exclusionary rule.<sup>201</sup> But eliminating deterrence as an objective does not eliminate controversy over the application of section 24(2) because there remains the difficulty of determining when the admission of evidence will bring the system into disrepute so as to require exclusion.

The Canadian Supreme Court has struggled in providing guidance on this issue. In 1987, in *R. v. Collins*,<sup>202</sup> the Court ruled that courts should balance a number of factors in deciding whether the admission of evidence obtained in violation of a Charter right should be suppressed, including (1) the type of evidence obtained, (2) the nature of the right violated, (3) the seriousness of the violation, (4) the culpability of the officer, (5)

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198. For a history of the Charter of Rights and Freedoms leading up to its adoption in 1982, see Brian Dickson, *The Canadian Charter of Rights and Freedoms: Context and Evolution*, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS 5, 5–15 (Gérald-A. Beaudoin & Errol Mendes eds., 4th ed. 2005).

199. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, s. 8 (U.K.).

200. *Id.*

201. See, e.g., *R. v. Genest*, [1989] 1 S.C.R. 59, 92 (Can.) ("[T]he purpose of [section] 24(2) is not to deter police misconduct. . . .").

202. [1987] 1 S.C.R. 265 (Can.).

the urgency of the action taken, (5) the seriousness of the offense, (6) the importance of the evidence to the case, and (7) the availability of other remedies.<sup>203</sup> In reaching this conclusion, the Court emphasized that “[section] 24(2) is not a remedy for police misconduct” but rather is intended to protect the administration of justice from being tarnished by the admission of improperly seized evidence.<sup>204</sup>

In 2009, in *R. v. Grant*,<sup>205</sup> the Court revisited section 24(2), acknowledging that *Collins* had been somewhat difficult to apply, and explained what it had been trying to do in *Collins* more simply. The Court stated that, in deciding whether to exclude evidence,

a court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society’s interest in the adjudication of the case on its merits.<sup>206</sup>

The Canadian approach to the exclusion of evidence has been quite influential in the common law world. Indeed, it has influenced the development of the law in New Zealand and it has been proposed as a model for reform in Ireland. It asks Canadian judges to balance the seriousness of the violation and the impact of the illegal action on the defendant against the societal interest in the adjudication of the case. This test does not provide easy answers in close cases,<sup>207</sup> but it permits a far more honest discussion of what is at stake than the American model, where this sort of balancing must take place behind technical battles over probable cause or reasonable suspicion.

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203. *Id.* para. 35.

204. *Id.* para. 31.

205. [2009] 2 S.C.R. 353 (Can.).

206. *Id.* para. 71.

207. For a recent case showing the difficulties applying *Collins* and *Grant*, see *R. v. Beaulieu*, [2010] 1 S.C.R. 248 (Can.).

### B. *New Zealand*

Like Canada, New Zealand lacked a written constitution until relatively recently. It was only in 1990 that the Parliament of New Zealand passed a statutory Bill of Rights.<sup>208</sup> But unlike Canada's Charter, which contained an exclusionary rule applicable to any violation of rights under the Charter, New Zealand courts were left to fashion an exclusionary principle for violations of the Bill of Rights.<sup>209</sup>

Prior to the adoption of the Bill of Rights, the exclusion of evidence unfairly obtained came under the traditional common law approach that left exclusion to the discretion of the trial judge who would decide if the violation created such unfairness as to constitute an abuse of process.<sup>210</sup> In understanding the common law approach, it is important to note that this traditional protection against the unfairness of the criminal process was aimed not at privacy violations, but at violations of rights going directly to the unfairness of the criminal process, such as infringement of the right to counsel or abusive questioning of a suspect.<sup>211</sup> But with the enactment of the Bill of Rights, the Court of Appeal was not willing to continue leaving the matter to the discretion of judges, and it developed a *prima facie* rule of exclusion which demanded exclusion once a violation of the Bill of Rights was established unless (1) the breach was inconsequential, (2) there was no substantial connection between the breach and the evidence, (3) the evidence would have been discovered in any event, or (4) there were overriding interests of justice demanding admission of the evidence.<sup>212</sup>

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208. New Zealand Bill of Rights Act 1990.

209. Section 21 of the New Zealand Bill of Rights Act states: "Unreasonable search and seizure. Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."

210. See *R v Coombs* [1985] 1 NZLR 318 (CA). See also *R v Hartley* [1978] 2 NZLR 199 (CA); *Police v Hall* [1976] 2 NZLR 678 (CA).

211. Professor Michael Zander sums up the common law approach to exclusion as follows:

The English common law tradition in regard to the exclusion of improperly obtained evidence . . . was that such evidence was basically admissible subject to a rarely exercised judicial discretion to exclude it. This approach was in marked contrast to that of the common law in regard to confession evidence where . . . judges adopted a much more rigorous approach.

See MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984* § 8-49 (5th ed. 2005).

212. See *R v H* [1994] 2 NZLR 143 (CA).

While the prima facie rule seemed on its face to give judges flexibility in admitting evidence of illegal searches where there were “overriding interests of justice,” this exception was rarely used by courts.<sup>213</sup> It has been suggested that the reluctance to admit evidence from illegal searches or seizures is the result of the fact that the prima facie rule of exclusion was developed in the context of improperly obtained confessional evidence which will almost always directly affect the fairness of the process.<sup>214</sup>

This nearly automatic exclusion of illegally seized evidence sufficiently troubled the New Zealand Court of Appeal that it indicated in 1997 that it might be prepared to reconsider the prima facie rule.<sup>215</sup> The Court of Appeal followed up on that warning in 2002, when it handed down the landmark decision *R v Shaheed*.<sup>216</sup> In *Shaheed*, the Court of Appeal replaced the prima facie rule with a balancing test whereby courts were to weigh six factors in deciding whether to exclude evidence obtained in violation of the Bill of Rights.<sup>217</sup> The six factors were (1) the nature of the right and the nature of the breach; (2) whether the breach was done in bad faith, recklessly, negligently, or due to a genuine misunderstanding of the law by the police; (3) whether other investigatory techniques were available to the police but had not been used; (4) the reliability, cogency, and probative value of the evidence at stake; (5) the seriousness of the crime; and (6) the importance and centrality of the evidence to the Crown’s case.<sup>218</sup>

This is a controversial decision that has its critics<sup>219</sup> and its defenders.<sup>220</sup> What is important for purposes of this Article is that New Zealand does not base its exclusionary rule on deterrence; instead, *Shaheed* asks courts to balance the need to vindicate violations of the Bill of Rights against other factors

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213. See Simon Mount, *R v Shaheed: The Prima Facie Exclusion Rule Re-examined*, 2003 N.Z. L. REV. 45, 61.

214. *Id.* at 60–61.

215. *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA).

216. (2002) 2 NZLR 377 (CA).

217. *Id.* at 419–22.

218. *Id.*

219. See, e.g., Scott L. Optican & Peter J. Sankoff, *The New Exclusionary Rule: A Preliminary Assessment of R v Shaheed*, 2003 N.Z. L. REV. 1 (arguing that *Shaheed*’s test is too vague and will leave the test subject to judicial manipulation in order to obtain desired results).

220. See, e.g., Simon Consedine, *R v Shaheed: The First Twenty Months*, 10 CANTERBURY L. REV. 77 (2004) (suggesting that the initial criticisms of *Shaheed* have proven unfounded); Mount, *supra* note 213, at 69–70 (suggesting that *Shaheed* has the potential to bring clarity and transparency to the law).

that might suggest exclusion is too strong a remedy in a particular case.<sup>221</sup>

### C. *England*

In 1984, Parliament passed a sweeping piece of legislation—the Police and Criminal Evidence Act 1984 (“PACE”)<sup>222</sup>—that had been under study for nearly ten years prior to its passage.<sup>223</sup> PACE deals with rules of evidence,<sup>224</sup> as the title of the act suggests, but it is also a detailed administrative statute meant to govern police conduct in almost every phase of criminal procedure. It includes the powers of the police and rules to

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221. *Shaheed* was a very interesting case on the merits. *Shaheed* was initially arrested for an incident at a secondary school. *Shaheed*, (2002) 2 NZLR at 388. The police requested a blood sample from him for the police database, and they told him that if he refused, they would get an order for such a sample from a judge. *Id.* In fact, the police did not have this power. *Id.* at 389. After *Shaheed* gave the sample, it was shown to link him to the rape of a fourteen-year-old girl that had taken place a year earlier. *Id.* at 388. *Shaheed* had not been a suspect in the crime, but once *Shaheed* was linked to the crime, the victim identified *Shaheed* from a photo display, and the police obtained a court order for a second blood sample. *Id.* at 388–91. At issue was the admissibility of the photo identification of *Shaheed* as well as the second blood sample and DNA report linking *Shaheed* to the rape (the Crown conceded the inadmissibility of the first sample). *Id.* at 380–81. The trial judge excluded the photo identification and the blood sample, and the case went to the Court of Appeal on interlocutory review. *Id.* at 391–93.

Although six of the seven judges concurred in the opinion of Judge Blanchard that the balancing test should replace the *prima facie* rule of exclusion, *id.* at 419, the judges were badly split on the merits. Four judges agreed that the second DNA sample and the report based on it must be suppressed under the balancing test. *Id.* at 424–25. Three judges disagreed with respect to the second DNA sample, believing that the sample was not obtained in violation of the defendant's rights because the police had followed the proper procedure for taking that sample. *Id.* at 428–29.

With respect to the victim's identification of *Shaheed*'s picture, three judges would also suppress that evidence under the balancing test. *Id.* at 425. Four judges would not suppress the victim's identification of *Shaheed*'s photo, three because they believed the second blood sample was not obtained in violation of *Shaheed*'s rights and, thus, there was no basis for suppressing the victim's photo identification, which followed. *Id.* at 428. The fourth judge concurred in the suppression of the second DNA sample and agreed also that the photo identification was a direct result of the initial illegal action in taking the first blood sample, but he would admit the photo identification evidence under the balancing test. *Id.* at 430.

For an excellent summary of the opinions in *Shaheed*, see Scott L. Optican & Peter J. Sankoff, *supra* note 219, at 9–18.

222. Police and Criminal Evidence Act, 1984, c. 60 (U.K.).

223. See ZANDER, *supra* note 211, at xi–xv.

224. See generally Police and Criminal Evidence Act, 1984, c. 60, pts. VII–VIII, (U.K.).

be followed in stopping citizens on the street,<sup>225</sup> the powers of the police and rules to be followed in entering a home or office to search,<sup>226</sup> and the powers of the police and rules to be followed in questioning suspects who are detained.<sup>227</sup> The statute also sets out detailed rules for the proper treatment of suspects in custody,<sup>228</sup> rules to be followed in the fingerprinting of suspects,<sup>229</sup> and even rules for the handling of complaints against police officers.<sup>230</sup> PACE has no analog in the United States because the statutory provisions and the codes of practice mandated by PACE are far more detailed and cover many more issues than rules or statutes touching on criminal procedure issues in jurisdictions in the United States. Thus, for example, simply on the treatment to be accorded to someone in custody, PACE has provisions on the right to have someone notified of the detention,<sup>231</sup> the right to search someone in custody for identification,<sup>232</sup> the treatment of juveniles who have been taken into custody,<sup>233</sup> the procedures for taking intimate samples from suspects,<sup>234</sup> and the right of a person in custody to have access to legal advice and the time limits for complying with such a request.<sup>235</sup>

Prior to the passage of PACE, trial judges possessed the traditional common law discretion to exclude evidence obtained from illegal actions of the police that would call into question the fairness of the trial, but this power of exclusion was rarely invoked for physical evidence, and case law did not encourage exclusion.<sup>236</sup> But PACE went beyond the common law rule by providing a specific statutory provision that governs the exclusion of evidence—physical evidence, identification evidence, testimonial evidence, and other types of evidence—for violating the rights of suspects. Section 78 provides that a court should

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225. *See id.* pt. I.

226. *See id.* pt. II.

227. *See id.* pt. V.

228. *See id.* pt. IV.

229. *See id.* § 64A.

230. *See id.* pt. IX.

231. *See id.* § 56.

232. *See id.* § 54.

233. *See id.* § 57.

234. *See id.* § 55.

235. *See id.* § 58.

236. While evidence seized from a suspect's home during a blatantly illegal search was suppressed in *Jeffrey v. Black*, [1978] 1 Q.B. 490 (D.C.), the following year the House of Lords indicated that apart from situations of improperly obtained testimonial evidence, courts should not exclude the product of unlawful searches, *R v. Sang*, [1980] A.C. 402 (H.L.) (Eng.).

exclude evidence in violation of PACE if "it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."<sup>237</sup>

While this is not a broad exclusionary principle—it does not, for example, demand that evidence obtained as the result of a deliberate violation be automatically excluded—it is nonetheless broader than the common law. It is concerned not only with the effect of an illegal search on the fairness of the trial but also with the effect of the illegality on the fairness of "the proceedings." The House of Lords has made it clear that the power to exclude evidence under section 78 is a broad one.<sup>238</sup> While section 78 lacks a clear standard for exclusion, Professor Michael Zander, in his treatise on PACE, notes that since its passage, "English courts have abandoned the amoral common law tradition of receiving non-confession evidence regardless of how it was obtained,"<sup>239</sup> and he notes that there are many cases in which the justification for exclusion is simply the "significant and substantial" breach of the rules set out in PACE.<sup>240</sup> Indeed, Professor Zander notes that courts have sometimes excluded evidence for breaches under PACE where there is no causal connection between the breach and the evidence being excluded.<sup>241</sup>

In the final analysis, it is difficult to compare what England is doing in PACE with what the United States, Canada, or New Zealand have done because the English rule is part of a very detailed code of practice and procedure. Under the English rule, the range of violations that may lead to exclusion will include many, many regulatory violations that would not be considered improper in these other countries. Thus, for example, one of the provisions dealing with the intimate search of a detainee requires that the police note in the detainee's custody record the parts of the body searched and the reasons for searching those parts.<sup>242</sup> If an officer fails to make such notations in the detainee's custody record after an otherwise proper

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237. Police and Criminal Evidence Act, 1984, c. 60, § 78 (U.K.).

238. See *R v. Looseley* Attorney General's Reference (No. 3 of 2000), [2001] UKHL (H.L.) 53, [2001], [2001] 1 W.L.R. 2060 (Eng.). See ZANDER, *supra* note 211, at 364–65.

239. See ZANDER, *supra* note 211, at 366.

240. *Id.* at 368.

241. *Id.* at 389.

242. See Police and Criminal Evidence Act, 1984, c. 60, § 55(10) (U.K.).



intimate search, it would be appropriate to ask whether drugs found during the search should be excluded under section 78. In other countries, this would be a nonissue because it seems to involve a matter of administrative detail following a search, not a challenge to the search itself.<sup>243</sup>

Thus, England has developed an approach to suppression that is *sui generis*. Its exclusionary provision seems weaker than that in Canada or New Zealand, but it applies to a much broader range of issues. What is similar to those other countries is that England does not base exclusion on deterrence.

#### D. Ireland

The exclusionary rule in Ireland has been developed through decisions of the Irish Supreme Court, and one source of the rule as it applies to searches is Article 40.5 of the Irish Constitution, which states: “The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.”<sup>244</sup> What should happen if the police gather evidence during a search not “in accordance with law”?

The Irish exclusionary rule was first announced in a 1964 decision, *People (Atty. Gen.) v. O'Brien*.<sup>245</sup> In that case, authorities had searched the home of Gerald and Patrick O'Brien, which was located at 118 Captain Road in Dublin, and found stolen property leading to charges of larceny and receipt of stolen goods against the O'Brien brothers.<sup>246</sup> The problem with the search stemmed from the fact that the Garda Síochána (“Gardaí”)—the Irish national police force—had wanted a warrant for the O'Briens' home, but an error in transcription had put the address in the warrant as 118 Cashel Road,<sup>247</sup> which is

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243. The failure in England of an officer to note in the detainee's custody record which intimate parts of the body were searched and what evidence was obtained might best be analogized in the United States to the failure of an officer who has conducted a warrant search to provide an inventory of the items seized to the issuing authority after the search. This is generally considered to be a violation of a ministerial matter that does not negate an otherwise valid search. See generally *LAFAVE ET AL.*, *supra* note 12, at 198.

244. IR. CONST., 1937, art. 40.5, available at <http://www.constitution.ie/reports/ConstitutionofIreland.pdf>.

245. [1965] I.R. 142 (Ir. 1964). For an overview of the evolution of the exclusionary rule in Ireland, including proposals for change, see generally Yvonne Marie Daly, *Unconstitutionally Obtained Evidence in Ireland: Protectionism, Deterrence and The Winds of Change*, 19 IRISH CRIM. L.J. 40 (2009). See also John P. Byrne & Raymond Byrne, *Criminal Law*, 2007 ANN. REV. OF IRISH L. 212, 314–18.

246. *O'Brien*, [1965] I.R. at 142–43.

247. *Id.* at 144.

actually around the corner from the Captain Road address.<sup>248</sup> The trial court had admitted the evidence, relying simply on the traditional common law reluctance to exclude reliable evidence, and the Court of Appeal had upheld the admission of the evidence on the same basis.<sup>249</sup>

But the Supreme Court took a different approach toward exclusion. In a famous opinion, Justice Walsh stated that “[t]he defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such a citizen for a criminal offence.”<sup>250</sup> He went on to declare that, where there has been a “deliberate conscious breach” of the constitutional rights of the accused, evidence obtained as a result of the violation should be excluded in the absence of extraordinary excusing circumstances.<sup>251</sup> On the facts, however, the Court upheld the admission of the evidence because there had been no suggestion that what the police had done had been anything other than “a pure oversight.”<sup>252</sup> Since there was no conscious and deliberate violation of the rights of the defendants, the evidence had been properly admitted.<sup>253</sup>

In the years following *O'Brien*, the Irish courts have struggled over what the terms “deliberate and conscious violation” mean.<sup>254</sup> The issue centers on whether courts should look only to the actual violation of the defendant’s rights by deliberate action of the police or whether courts should consider the good faith of the officers in deciding whether the violation is deliberate and conscious.

One of the cases where members of the Irish Supreme Court differed on their interpretation of the terms “deliberate and conscious violation” was a 1980 decision, *People (DPP) v. Shaw*.<sup>255</sup> *Shaw* involved not physical evidence obtained in an illegal search, but a confession obtained after a prolonged pre-trial detention, which had violated the defendant’s right to lib-

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248. I am grateful to Professor Yvonne Marie Daly for background information on the mistake over the two addresses in *O'Brien*. See E-mail from Professor Yvonne Daly to author (Sept. 21, 2010) (on file with the *University of Colorado Law Review*).

249. *O'Brien*, [1965] I.R. at 145–46.

250. *Id.* at 170 (Walsh, J.).

251. *Id.*

252. *Id.* at 161 (Kingsmill Moore, J.).

253. *Id.* at 170 (Walsh, J.).

254. See, e.g., *People (DPP) v. Madden*, [1977] I.R. 336 (C.C.A.) (Ir. 1976) (reasoning that the reasons why the Gardaí breached the right does not matter as long as they did so deliberately and consciously).

255. [1982] I.R. 1. (Ir. 1980).

erty under Article 40.4.1<sup>256</sup> of the Irish Constitution. The majority in *Shaw* reasoned that “deliberate and conscious” related to the violation of the Constitution, not simply to the actions of the Gardaí.<sup>257</sup> But the minority—in another opinion by Justice Walsh—stated that it should be the act of the Gardaí which need be deliberate and conscious whether or not the officers were aware of the fact that they breached a constitutional right.<sup>258</sup>

Matters came to a head in 1990 in another search warrant case, *People (DPP) v. Kenny*.<sup>259</sup> In *Kenny*, the warrant had been issued by a Peace Commissioner after a member of the Gardaí had sworn information before him orally, but due to the death of the Peace Commissioner—Peace Commissioners usually testify at trial as to the reasons they issued warrants—the trial judge felt unsure, based on what the Gardaí stated in court, that there had been sufficient evidence such that the Peace Commissioner had satisfied himself as to the basis for the warrant.<sup>260</sup> This was thus a perfect case to determine the meaning of a “deliberate and conscious violation” as there was no bad faith involved.<sup>261</sup> Not surprisingly, the Court of Criminal Appeal—citing in support *United States v. Leon*<sup>262</sup>—had found no conscious and deliberate violation of the Constitution since the Gardaí were unaware of any warrant problem and had acted in good faith.<sup>263</sup>

But the Irish Supreme Court ruled that the evidence found in the search should have been excluded at trial because the act of the police in searching the defendant’s home had been deliberate, even if they were unaware that the search was not constitutional.<sup>264</sup> The majority in *Kenny* reasoned that the purpose of the exclusionary rule in Ireland was not to deter po-

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256. Art. 40.4.1 states: “No citizen shall be deprived of his personal liberty save in accordance with law.” IR. CONST., 1937, art 40.4.1.

257. *Shaw*, [1982] I.R. at 55–56 (Griffin, J.).

258. *Id.* at 32 (Walsh, J.).

259. [1990] 2 I.R. 110 (Ir.).

260. I am grateful to Professor Yvonne Marie Daly for this background information that explains why the authorities could not defend the warrant in *Kenny*. See E-mail from Professor Yvonne Daly to author, *supra* note 248.

261. Daly suggests that, given the intervening death of the Peace Commissioner, perhaps *Kenny* might have been resolved under the exception in *O’Brien* for situations where there are “extraordinary excusing conditions” that suggest exclusion should not be required. *Id.*

262. 468 U.S. 897 (1984).

263. [1990] 2 I.R. at 111.

264. *Id.* at 133 (Finlay, C.J.).

lice from unconstitutional actions, but to protect and vindicate constitutional rights from violation. In powerful language, the majority opinion of Chief Justice Finlay stated:

[E]vidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion.<sup>265</sup>

The exclusionary rule as put forward in *Kenny* is very controversial, as one might imagine, because even police actions done in reasonable good faith that turn out to violate the law become “deliberate and conscious violations” under *Kenny*'s sweeping interpretation of that language. In 2007, the Balance in the Criminal Law Reform Group (“the Group”), an independent advisory board appointed by the Department of Justice, issued a 296-page report on eleven different reform topics.<sup>266</sup> One of the issues addressed in the report was the exclusionary rule.<sup>267</sup>

The Group—noting the approaches to exclusion in other countries, including New Zealand<sup>268</sup> and Canada,<sup>269</sup> as well as the good faith exception for warrants in the United States<sup>270</sup>—called for changing the exclusionary rule put forward in *Kenny* to a balancing approach.<sup>271</sup> Under this approach, a judge would consider a number of factors, including the seriousness of the rights violation, the good faith or not of the officer, the seriousness of the crime, the nature of the evidence, and the interests of the victim in deciding whether exclusion was proper.<sup>272</sup>

Hoping to avoid the need for a constitutional amendment to change the exclusionary rule, the Group urged the government to try to get the Court to change *Kenny* by seeking review

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265. *Id.* at 134.

266. BALANCE IN THE CRIMINAL LAW REVIEW GRP., FINAL REPORT (2007), available at <http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf>.

267. *Id.* at 147–66.

268. *Id.* at 155–56.

269. *Id.* at 165.

270. *Id.* at 156 (citing *United States v. Leon*, 468 U.S. 897 (1984)).

271. *Id.* at 164–66.

272. *Id.* at 164–65.

in a suitable case.<sup>273</sup> The appropriate vehicle for review of *Kenny* seemed to present itself in *Director of Public Prosecutions (Walsh) v. Cash*.<sup>274</sup> The case stemmed from a set of fingerprints obtained in March 2002 from Cash—a juvenile—which were used more than a year later in July 2003, to link Cash to a burglary where fingerprints had been left in a window frame of the burglarized home.<sup>275</sup> After his arrest for the burglary, the police obtained a second set of prints from Cash that also matched those at the scene.<sup>276</sup> The problem was that Irish law required that fingerprints not used in a prosecution be destroyed after six months, which meant the Gardaí should never have had in their possession the first set of prints that were later used to link Cash to the burglary.<sup>277</sup> Hence, the issue was whether the defendant could be convicted based on the fingerprints at the scene and the match with the second set of prints, when Cash's arrest for the burglary was based entirely on evidence that was unlawfully in the possession of the police.<sup>278</sup>

The trial judge had been uncertain of her conclusion that the evidence of the second set of prints could be admitted against Cash, so she certified that question to the High Court.<sup>279</sup> The High Court judge had issued an opinion that was highly critical of *Kenny*,<sup>280</sup> but had avoided applying *Kenny* by ruling that Ireland's exclusionary rule was concerned only with challenging evidence that was to be admitted at trial, not with the seizure of evidence that might justify an arrest.<sup>281</sup> When the Irish Supreme Court agreed to review the decision in *Cash*, it was widely anticipated that the Court was getting

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273. *Id.* at 165–66.

274. *Dir. of Pub. Prosecutions (Walsh) v. Cash*, [2007] I.E.H.C. 108 (H. Ct.) (Ir.), *aff'd*, [2010] I.E.S.C. 1 (S.C.), [2010] 1 I.L.R.M. 389.

275. *Dir. of Pub. Prosecutions (Walsh) v. Cash*, [2010] I.E.S.C. 1, paras. 5–12 (Ir.), [2010] 1 I.L.R.M. 389.

276. *Id.* para. 10.

277. *Id.* para. 12.

278. *Id.* para. 15.

279. *Cash*, [2007] I.E.H.C. 108, para. 9, *aff'd*, [2010] I.E.S.C. 1, [2010] 1 I.L.R.M. 389.

280. The opinion criticized *Kenny* for failing to balance the interests of the victim and of society against the interests of the defendant, as was required in Canada and New Zealand, when deciding whether to exclude evidence. *Id.* paras. 25–31.

281. *Id.* para. 68.

ready to take another look at the exclusionary rule as interpreted in *Kenny*.<sup>282</sup>

When the Supreme Court handed down its *Cash* opinion in 2010,<sup>283</sup> the result was stunning. Instead of taking the opportunity to reconsider *Kenny*, the Court announced its agreement with the High Court judge that the exclusionary rule was not available to challenge the legality of an arrest made on illegally seized evidence so long as any evidence used at trial was obtained in conformity with the law.<sup>284</sup> According to this reasoning, evidence seized even in flagrant violation of a citizen's rights that causes police to make an arrest would not bar the police from using statements, fingerprints, or other evidence obtained as a result of the unlawful arrest as long as the initially seized evidence is not used at trial.

The result in Ireland is an exclusionary rule that is, on one hand, more powerful than the exclusionary rules in other common law countries but, on the other hand, applicable to a much narrower range of illegal conduct. Where the rule is applicable, exclusion is automatic given the sweeping interpretation of what act constitutes a "deliberate and conscious violation" of a defendant's rights. But the rule permits very serious violations of a defendant's rights prior to arrest as long as evidence gathered after the arrest has been gathered consistent with the law. These are both rather extreme positions.

#### *E. Where Do We Go From Here?*

The discussion of exclusionary rules in other common law countries is meant to show that there are different paths a country might take in vindicating the privacy and liberty rights of citizens to determine if there are lessons for the United States. The paths taken by England and Ireland seem to be ones that the United States cannot or should not go down. England has built a criminal justice system based on elaborate statutory codes that carefully detail the proper treatment of suspects at every phase of proceedings. These statutes provide tremendous guidance for police, but this alternative is not possible in the United States, where there is no national police

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282. See, e.g., Yvonne Daly, *Exclusionary Rule Soon to be Before the Supreme Court*, HUM. RTS. IN IR. (Oct. 29, 2009), <http://www.humanrights.ie/index.php/2009/10/29/the-exclusionary-rule-soon-to-be-before-the-supreme-court>.

283. *Cash*, [2010] 1 I.L.R.M. 389, [2010] I.E.S.C. 1.

284. See *id.* paras. 41–42.

structure under the authority of Congress, and policing is largely the responsibility of local police departments that vary tremendously in size, resources, and sophistication.

While Ireland's exclusionary rule, like the U.S. rule, has been developed by its highest court, the Irish rule seems both too narrow and too broad. It does not punish even intentional constitutional violations leading to the discovery of incriminating evidence if this evidence can be developed later by other means. But at the same time, it would exclude evidence in a serious case as a "deliberate and conscious violation" of the defendant's rights, even if the police acted reasonably and in good faith. Not surprisingly, the rule is under considerable pressure; chances are it will not endure in its present form.

The best reform model for the United States would be to take the path blazed by Canada and, more recently, by New Zealand, that attempts to vindicate the rights of citizens but, at the same time, acknowledges society's interest in the proper adjudication of criminal cases, especially very serious cases. The exact expression of the balancing test the Court might employ in fashioning such a modified exclusionary rule could vary: New Zealand judges weigh six factors in deciding whether to exclude<sup>285</sup> while Canada has reinterpreted its rule to balance three factors.<sup>286</sup> But the exact formulation of the rule seems less important than the frank recognition that the rule exists to vindicate the rights of citizens and to protect the integrity of the system, not to deter police misconduct.

All exclusionary rules are controversial, and exclusionary rules that specifically require the courts to balance factors pulling in different directions, like those rules in Canada and New Zealand, are not exceptions.<sup>287</sup> But there is one major advantage that balancing would provide U.S. courts: opinions that are far more transparent and provide more guidance to lower courts. One example is a Canadian decision, *R. v. Harrison*, where the Canadian Supreme Court confronted the problem of

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285. See *supra* text accompanying note 219.

286. See *supra* text accompanying note 207.

287. In New Zealand, Professor Scott Optican has been a particularly strong critic of *Shaheed*. See Scott L. Optican, *A Change for the Worse: R v. Shaheed and the Demise of the Prima Facie Rule*, [2003] NZLJ 103, 103-05; see also Optican & Sankoff, *supra* note 219. But *Shaheed* has its defenders as well. See Mount, *supra* note 213, at 45 (concluding that *Shaheed* "has the potential to be a positive development in the law").

how a court should balance a blatant violation of a defendant's rights in a case where the crime is relatively serious.<sup>288</sup>

The case arose when a police officer in Ontario stopped the car Harrison was driving because the officer noticed that the car had no front license plate.<sup>289</sup> After stopping the car, the officer realized that the car was registered in Alberta where no front license plate is required.<sup>290</sup> Even though he had had no reason for stopping the vehicle or for continuing to detain the driver, the officer continued the encounter and arrested Harrison when he discovered that Harrison's license was suspended.<sup>291</sup> He then searched the vehicle and found two cardboard boxes containing thirty-five kilograms (approximately seventy-seven pounds) of cocaine.<sup>292</sup>

The trial judge found serious violations of Harrison's right to be free from "unreasonable searches and seizures"<sup>293</sup> as well as his right not to be "arbitrarily detained"<sup>294</sup> under sections 8 and 9, respectively, of the Canadian Charter of Rights and Freedoms.<sup>295</sup> In coming to this conclusion, the judge found that the officer's explanation for his actions was "contrived and def[ic]ied] credibility"<sup>296</sup> and that the officer's actions in searching the vehicle "can only be described as brazen and flagrant."<sup>297</sup> But the trial judge refused to suppress the cocaine under section 24(2) because the judge felt that the Charter breaches against Harrison were not among the most serious Charter violations, and he reasoned that the exclusion of such a significant amount of contraband would have a greater negative effect on the repute of justice than its admission.<sup>298</sup> When the case reached the Canadian Supreme Court, it reversed the trial judge and ordered the drugs suppressed.<sup>299</sup> The Court reasoned that the trial court (and court of appeal) had misapplied

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288. *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494 (Can.).

289. *Id.* para. 5.

290. *Id.*

291. *Id.* paras. 5–8.

292. *Id.* paras. 8–9.

293. *Id.* para. 3.

294. *Id.*

295. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, §§ 8–9 (U.K.). Section 8 of the Charter states: "Everyone has the right to be secure against unreasonable search or seizure." *Id.* § 8. Section 9 of the Charter states: "Everyone has the right not to be arbitrarily detained or imprisoned." *Id.* § 9.

296. *Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, para. 12.

297. *Id.*

298. *See id.* para. 13.

299. *Id.* para. 42.



the balancing of the three factors outlined in *R. v. Grant*<sup>300</sup>: (1) the seriousness of the Charter-infringing state conduct, (2) the impact of the breach on the Charter-protected interests of the accused, and (3) society's interest in a fair adjudication of the case on the merits.<sup>301</sup>

With respect to the first factor, violations of the Charter, the Court noted that there had been no evidence of "systemic or institutional abuse" of the rights of citizens.<sup>302</sup> At the same time, the Court concluded that the violations of Harrison's rights were serious<sup>303</sup> and they evidenced a "blatant disregard" for Charter rights,<sup>304</sup> a disregard that was aggravated by the officer's misleading testimony at trial.<sup>305</sup>

As for the second factor in the balance, the impact of the breach on the accused, the Court found that a person in Harrison's situation has "every expectation of being left alone—subject . . . to valid highway traffic stops."<sup>306</sup> Thus, while nothing in the encounter was demeaning to Harrison, "the deprivation of liberty and privacy represented by the unconstitutional detention and search was therefore a significant, although not egregious, intrusion on [his] *Charter*-protected interests."<sup>307</sup>

When applying the third factor, society's interest in a fair adjudication on the merits, the Court noted that this factor favored admission.<sup>308</sup> But, the Court cautioned, the public also has an interest in a criminal justice system that is beyond reproach.<sup>309</sup> Nonetheless, the Court concluded that the third factor favored admission of the cocaine.<sup>310</sup>

Where the Court strongly differed from the lower courts was in the balancing of the three factors. The Court felt that the trial judge effectively transformed the balancing called for among the three factors "into a simple contest between the degree of the police misconduct and the seriousness of the offence."<sup>311</sup> Such reasoning, the Court worried, would always end up justifying admission whenever the crime was serious

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300. See *supra* text accompanying notes 207–08.

301. *Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, paras. 35–42.

302. *Id.* para. 25.

303. *Id.* para. 24.

304. *Id.* para. 27.

305. *Id.* para. 26.

306. *Id.* para. 31.

307. *Id.* para. 32.

308. *Id.* para. 34.

309. *Id.*

310. *Id.*

311. *Id.* para. 37.

and the evidence reliable.<sup>312</sup> This would be incorrect, the Court reasoned, because Charter provisions “must be construed so as to apply to everyone, even those alleged to have committed the most serious criminal offences.”<sup>313</sup> In this case, “[t]o appear to condone wilful and flagrant Charter breaches that constituted a significant incursion on the appellant’s rights does not enhance the long-term repute of the administration of justice; on the contrary, it undermines it.”<sup>314</sup>

*Harrison* is an important case interpreting the Canadian exclusionary rule and it should prove very helpful to Canadian courts as they struggle with a rather common situation in Western countries with exclusionary rules: whether to suppress a sizable seizure of drugs in a situation where the police violated the rights of the defendant.

The difference between a proportional exclusionary rule like the Canadian rule and the U.S. exclusionary rule is not between a rule that permits a balancing and one that does not. Many Supreme Court decisions present the *outcome* of a balancing test, but the balancing process itself is hidden. Consider again the United States Supreme Court’s decision in *Herring* where the Court announced that it did not suppress the evidence because “the benefits of exclusion” in that case did not “outweigh the costs” of suppression.<sup>315</sup> The difference between *Harrison* and *Herring* is that one court tries to balance the competing interests in a careful and forthright way in an opinion that provides guidance, while the other court simply announces its balancing conclusion without any attempt to support that conclusion, and, as a result, the opinion provides weak guidance for future cases.<sup>316</sup> Whether one agrees with the outcome in *Harrison*—and there was a dissenting opinion<sup>317</sup>—there is an honesty to the decision that is refreshing,

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312. *Id.* para. 40.

313. *Id.*

314. *Id.* para. 39.

315. *Herring v. United States*, 129 S. Ct. 695, 703 (2009).

316. Simon Mount, in a very thoughtful article comparing exclusionary rules in common law countries, suggests that “in reality, courts almost always balance interests: the only question is whether they do it explicitly in their decisions, or implicitly behind the language of rules.” Mount, *supra* note 213, at 65.

317. *Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, paras. 44–74 (Deschamps, J., dissenting). Justice Deschamps reasoned that the evidence should be admitted because the stop took place on a public highway and was of short duration, and thus it did not outweigh the public interest in an accurate adjudication of the merits of the case. *Id.* paras. 58, 71.

especially in the strong condemnation, even at the trial level, of what the officer did.

## CONCLUSION

Over the last forty years, the United States has distinguished itself sharply from other Western countries in the degree to which its penal sanctions have departed from the principle that punishments should be proportional to the offense in question.<sup>318</sup> The European civil law tradition insists on proportionality in sentencing. Professor James Whitman, in *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, a book that elegantly contrasts the criminal justice system in the United States with those in Europe, explains why statutes visiting harsh sanctions on offenders, such as three-strikes laws or high mandatory minimum sentences, would be “impossible” in European systems: “The European systems all subscribe to some version of the principle of proportionality. This principle holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the offense; the legal profession takes it very seriously; and it means that sentences of American severity are effectively impossible.”<sup>319</sup>

In contrast to the European emphasis on proportionality, Whitman observes that the Supreme Court struck a “grievous blow” to proportionality in *Harmelin v. Michigan*,<sup>320</sup> where the Court found no unconstitutional disproportionality in a life sentence without the possibility of parole imposed on a first-time offender for possession of 672 grams of cocaine.<sup>321</sup> But while *Harmelin* revealed a Court unwilling to insist on proportionality in sentencing, the Court did something worse in *Mapp*—the Court encouraged harsh deterrent sanctions by

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318. The American Law Institute is currently revising the sentencing provisions of the Model Penal Code, and one major change would reshape the provision on the purposes of sentencing to emphasize that sentences must always be in a range “proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of the offenders.” MODEL PENAL CODE § 1.02(2)(i) (Tentative Draft No. 1, 2007) (approved by the American Law Institute in May 2007). The provision also states that other goals of sentencing, such as deterrence, rehabilitation, or incapacitation, must always be pursued only “within the boundaries of proportionality.” MODEL PENAL CODE § 1.02(2)(ii) (Tentative Draft No. 1, 2007) (approved by the American Law Institute in May 2007).

319. See WHITMAN, *supra* note 143, at 57.

320. 501 U.S. 957 (1991).

321. *Id.* at 961, 994–96. See also WHITMAN, *supra* note 143, at 57.

creating its own. In a sense, in *Mapp* the Court approved a template for controlling troubling social behaviors by creating its own tough deterrent sanction, a sanction intended to punish equally actions that are flagrantly unconstitutional and actions that were undertaken in reasonable good faith. Having thus expressed its own faith in the belief that we can deter our way out of undesirable behaviors, the Court, when faced with draconian sentencing statutes, cannot turn around and condemn legislative attempts to do the same thing.

For many years, the U.S. criminal justice system has become harsher and harsher to the point that even popular publications decry a system that puts too many people away for too long.<sup>322</sup> The *New York Times*, in an article reporting that the U.S. prison population “dwarfs” that of other countries, reported that as of 2008, the United States had 751 prisoners for every 100,000 of its citizens.<sup>323</sup> This compares to only 151 per 100,000 in England, 88 per 100,000 in Germany, and 63 per 100,000 in Japan.<sup>324</sup> More disturbing is the fact that the incarceration rate in the United States was fairly stable, hovering around 110 citizens incarcerated per 100,000 in the period from 1925 to 1975.<sup>325</sup> But in the late 1970s, the incarceration rate began to climb sharply until it reached its present extremely high rate.<sup>326</sup>

The tendency has been to see this increasing harshness as coming from outside the criminal justice system as timid politicians cave to public pressure for harsher and harsher sentences, often in response to particularly terrible crimes.<sup>327</sup> But this explanation is incomplete and a bit unfair because it fails to see that the system itself encourages disproportional punishments. Part of that encouragement comes from the Supreme Court and its commitment to a powerful exclusionary sanction intended to deter violations of the Fourth Amend-

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322. See, e.g., *A Nation of Jailbirds: Far Too Many Americans Are Behind Bars*, *ECONOMIST*, Apr. 2, 2009, available at <http://www.economist.com/node/13415267>.

323. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, *N.Y. TIMES*, Apr. 23, 2008, available at <http://www.nytimes.com/2008/04/23/us/23prison.html>.

324. *Id.*

325. *Id.*

326. *Id.*

327. For an account of the way California’s “three-strikes” habitual offender law swept through the California legislature with politicians of both parties leery and afraid to raise obvious questions about the law’s effects, see FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* 159–80 (2001).

ment. Once it is accepted that powerful deterrent sanctions that punish offenders disproportionately for what they have done are permissible, it becomes very difficult to resist the pressure to enact such sanctions elsewhere. In a world where it cannot be shown that a harsh punishment will *not* deter, given public pressure to do something about crime, it is logical that legislators would take a contemporary version of Pascal's Wager,<sup>328</sup> namely, the deterrence wager. Thus, if it is *possible* that enacting a high mandatory minimum sentence will lessen the spread of the sexual exploitation of children, carjacking, drugs, or whatever crime has ignited public anger, legislators are likely to opt for high minimum sentences even if those sentences would be too harsh for many who might commit the crime in question.

Unfortunately, like an invasive species, harsh deterrent sanctions have taken root in the United States and they are actually undercutting the constitutional protections of citizens. As legislatures continue to pass laws mandating tough deterrent sentences, fewer and fewer defendants—even those with colorable defenses<sup>329</sup>—can afford the risk of asserting their rights and going to trial.<sup>330</sup>

Thus, the cost of the U.S. exclusionary rule is not that it hamstring the police in fighting crime or that too many se-

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328. Pascal's Wager is named after the philosopher Blaise Pascal, who is credited with offering the argument that it makes sense to wager on God's existence and act on that wager because the possible gain of infinite happiness outweighs the finite inconvenience of acting on that belief. See Alan Hájek, *Pascal's Wager*, STAN. ENCYCLOPEDIA OF PHIL. (June 4, 2008), <http://plato.stanford.edu/entries/pascal-wager>.

329. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005); see also Frank O. Bowman III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 56 U. PA. L. REV. PENNUMBRA 226 (2007).

330. In some jurisdictions, the absolute number of criminal trials is less than it was thirty or forty years ago. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 492–95 (2004).

The penalties can be extremely harsh on those defendants who refuse a plea bargain and go to trial. The classic case of this type is *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), where a prosecutor offered to recommend a five-year sentence for Hayes, who had been charged with issuing a forged check, if Hayes would plead guilty and “save the court the inconvenience and necessity of a trial.” *Id.* at 358 (internal alterations omitted). But he threatened to indict Hayes as a habitual offender if he refused the offer, which would result in a life sentence. *Id.* at 358–59. Hayes went to trial and was convicted of the forgery and of being a habitual offender, with the result that he was sentenced to life in prison. *Id.* at 359. This is a tremendous price for daring to refuse to spare the trial court “the inconvenience and necessity of a trial.”

rious criminals go free as a result, but it is the rule's acceptance and endorsement of the principle that tough deterrent sanctions are effective and permissible weapons with which to deter undesirable social behaviors. This is a distortion of classic deterrence theory and it needs to be repudiated—not for the sake of police, but for the sake of defendants.