

## REASONABLE REMEDIES AND (OR?) THE EXCLUSIONARY RULE

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This Symposium on the Fourth Amendment posed a variety of questions to a number of contributors: How important is history to resolving Fourth Amendment questions, how good of a job does the Supreme Court do in construing history and what values does the Fourth Amendment serve, among others. Our small contribution focuses on a very practical question—whether the exclusionary rule is an effective way of enforcing Fourth Amendment values, with the key word being “effective.” In other words, and setting aside (for now) the question of *what* values the Fourth Amendment is meant to advance, the question is: How do we vindicate those values and, perhaps more importantly, do we do it well?

The chosen method for vindication, the exclusionary rule, is by design famously under-inclusive.<sup>1</sup> Most obviously, it does not protect the innocent victim—as David Harris noted in an empirical study, 97% of the 30% of suspects who experienced unconstitutional searches were released because no evidence of crime was produced.<sup>2</sup> That is, the innocent are shortchanged.<sup>3</sup> The rule also does not address the concerns about racism,

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1. See *infra* notes 2-5 and accompanying text.

2. David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 150, 160 (2009) (quoting Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 332 (2004)). But see, e.g., Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1266-67 (1983) (“The exclusionary rule protects innocent people by eliminating the incentive to search and seize unreasonably. . . . While there is some evidence that for various reasons the exclusionary rule does not work perfectly, there is no evidence that it does not work at all.”). Of course, reliable statistical evidence on the effects of the exclusionary rule is difficult to obtain. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970) (explaining that quantifying the effects the exclusionary rule has on reforming the behavior of law enforcement is impossible).

3. Oaks, *supra* note 2, at 736 (“In terms of direct corrective effect, the exclusionary rule only benefits a person incriminated by illegally obtained evidence. It does nothing to recompense the injury suffered by the victim of an illegal search that turns up nothing incriminating.”).

targeting, profiling, or racialized law enforcement articulated by other contributors to this symposium.<sup>4</sup> And it is viewed by our international friends as rigid and mechanistic.<sup>5</sup> In his tour of the horizon internationally, Craig Bradley quoted a Netherlands law professor and judge, Hans Lensing, to this effect: “The U.S. system seems the most rigid system insofar as unlawfully obtained evidence must be excluded, and the court does not have discretion whether to admit the evidence.”<sup>6</sup> Discretion—we’ll come back to that.<sup>7</sup> Lensing does not stand alone in his characterization of the exclusionary rule; back home, criticism abounds and echoes Judge Lensing’s sentiment that the rule is not properly calibrated.<sup>8</sup>

The exclusionary rule also has social costs, as captured in Justice Cardozo’s dictum about blundering constables: “There has been no blinking the consequences. The criminal is to go free because the constable has blundered.”<sup>9</sup> This oft-repeated lament has provided fodder for many of the Supreme Court’s decisions limiting the application of the exclusionary rule.<sup>10</sup> And it has some basis in fact: Although statistics indicate that a low percentage of “criminal defendants are being freed as a result of the application of the [e]xclusionary [r]ule,” these conclusions ignore the hidden costs.<sup>11</sup> For example, while all defendants may not “receive the

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4. See, e.g., Andrew E. Taslitz, *Search and Seizure History as Conversation: A Reply to Bruce P. Smith*, 6 OHIO ST. J. CRIM. L. 765, 766 (2009) (Taslitz details “the too oft-ignored history of search-and-seizure practices during the nineteenth century struggle over slavery. These practices were aimed not only at subordinating slaves themselves, but also at silencing and intimidating their white supporters.”); see also Paul Butler, “A Long Step Down the Totalitarian Path”: *Justice Douglas’s Great Dissent in Terry v. Ohio*, 79 MISS. L.J. 9, 31 (2009) (characterizing police practices as “anti-Negro”).

5. See, e.g., Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 376 (2001).

6. *Id.*

7. See *infra* notes 70-116 and accompanying text.

8. See, e.g., *Stone v. Powell*, 428 U.S. 465, 488-91 (1976) (“The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.”); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (“[T]o yield the optimum level of deterrence, the exclusionary rule has no readily apparent mechanism for adjustment. It deters too little or too much; only by accident would it deter optimally.”).

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

10. See, e.g., *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (“In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not ‘pay its way.’ In such a case, the criminal should not ‘go free because the constable has blundered.’” (internal citations omitted)); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates ‘substantial social costs,’ which sometimes include setting the guilty free and the dangerous at large.” (internal citations omitted)).

11. Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50 (1994).

ultimate windfall” from the rule, “many more defendants receive less substantial but still significant benefits”—fewer charges, lighter sentences, or simply no criminal charge at all.<sup>12</sup> Such “hidden costs” may not be accounted for in empirical studies conducted on the effect the exclusionary rule has on the release of criminals.<sup>13</sup>

The criticism of the rule does not end there. A quick look at most courts’ dockets each year leaves no doubt that the rule spawns much litigation.<sup>14</sup> Harvard’s Bill Stuntz notes this in his excellent piece on the virtues and vices of the exclusionary rule:

The exclusionary rule generates a lot of litigation—tens of thousands of contested suppression motions each year. That litigation is displacing something else, and the something else may well have more to do with guilt and innocence. That problem is much more serious than the occasional drug dealer whose Fourth Amendment claim is a ticket out of jail: the point is that the exclusionary rule skews the many cases in which drug dealers *lose*, not just the few that they win. The bottom line is not clear. The literature on this subject (on both sides) tends to assume that this is an easy issue, that suppressing illegally seized evidence is either obviously good or obviously bad. In truth, it is neither.<sup>15</sup>

And thus the conundrum:

The exclusionary rule is, by a wide margin, the best legal tool available for regulating the police. But it distorts the rest of the criminal justice system. Perhaps this argues for keeping the rule, but within fairly narrow bounds—a direction in which the law has been moving for the past two decades.<sup>16</sup>

As Professor Stuntz suggests, various exceptions to the exclusionary rule have grown, which in turn lead to more litigation.<sup>17</sup> The Supreme Court’s

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12. *Id.*

13. *Id.* at 51.

14. *See id.*

15. William J. Stuntz, *The Virtues and Vices of The Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 444 (1997).

16. *Id.*

17. *See, e.g.*, *Herring v. United States*, 129 S. Ct. 695 (2009) (holding that the rule does not apply to negligent violations of the Fourth Amendment); *Hudson v. Michigan*, 547 U.S. 586 (2006); *United States v. Leon*, 468 U.S. 897 (1984) (establishing the good faith exception); *Nix v. Williams*, 467 U.S. 431 (1984) (establishing the inevitable discovery doctrine); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that the rule does not apply in civil deportation proceedings); *United States v. Havens*, 446 U.S. 620 (1980) (holding that the rule cannot be invoked when evidence is being used to impeach the defendant); *United States v. Payner*, 447 U.S. 727 (1980) (holding that the rule can only be invoked if the defendant had a legitimate privacy interest in the place searched and a property interest in the items seized); *United States v. Janis*, 428 U.S. 433 (1976) (holding that the rule does not apply to civil proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that the rule does not apply to

5-4 decision in *Herring v. United States*—a case criticized as overreaching by some, heralded by few, and again criticized by yet others for not reaching far enough—is a more recent example of such litigation and demonstrates that harmony in the Court will continue to be elusive.<sup>18</sup>

The exclusionary rule's varied track record does not, however, answer the question we pose. Perhaps these costs are worth the benefit if the rule is truly the most effective way of enforcing Fourth Amendment values.<sup>19</sup> And, though we set aside the above question of what those values are, the rule's effectiveness cannot be determined without first understanding the values that the rule—and its overarching constitutional principle—is meant to serve.

### *What Value(s) Does the Exclusionary Rule Serve?*

Our starting point with this inquiry is *Mapp v. Ohio*—the 5-4 decision that ignited (or at least reignited) the nationwide battle over the exclusionary rule.<sup>20</sup> Let us pause for just a moment to remember the staggeringly flagrant violation at issue in that case: a warrantless entry into a private home; a sweeping search; physical abuse of Dollree Mapp; and a seizure of what was not anticipated and thus not even targeted by the Cleveland police officers—pornographic materials.<sup>21</sup> This result was a far cry from the stated focus of the officers' visit and subsequent search: inquiry into a recent bombing.<sup>22</sup> And it was the basis for the Court's condemnation of the officers' behavior as “official lawlessness,” “flagrant abuse,” and a “brutish means of coercing evidence.”<sup>23</sup>

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grand jury proceedings); *Katz v. United States*, 389 U.S. 347 (1967) (holding that the rule does not apply to information or items a person knowingly exposes to the public).

18. *Herring*, 129 S. Ct. at 695; see, e.g., Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 413, 416-17 (2009) (“The Court concluded, for the first time ever, that the exclusionary rule does not apply if the Fourth Amendment is violated by good faith—or even negligent—police actions. The Court could have reached the same result in a far narrower, more minimalist opinion. . . . The Court could have simply ruled that the same exception applies when the police rely on erroneous information about a warrant from another jurisdiction. Instead, the Court issued a sweeping rule that the exclusionary rule never applies if the police violate the Fourth Amendment in good faith or through negligence.”).

19. See *supra* notes 9-11 and accompanying text.

20. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

21. *Id.* at 644-45.

22. *Id.* at 644; see also Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1366-67 (“In mid-May, three police officers appeared at her home and demanded entrance, explaining that they were searching for a man in connection with a recent bombing. . . . After handcuffing Mapp, the officers searched the house. No bombing suspect was ever found and no search warrant was ever produced. The officers did, however, find four books—*Affairs of a Troubadour*, *Little Darlings*, *London Stage Affairs*, and *Memories of a Hotel Man*—as well as a hand-drawn picture described in the state’s brief as being ‘of a very obscene nature.’”).

23. *Mapp*, 367 U.S. at 655.

On these egregious facts, the Court adopted what sounds as a categorical rule: “We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”<sup>24</sup> After this broad statement that facially admits of *no* exceptions, the Court returned to its theme of outrageousness—the value at stake is protecting what the *Mapp* majority called “the freedom from unconscionable invasions of privacy.”<sup>25</sup> There are no graduations and there is no sliding scale.<sup>26</sup> Once a violation occurs, then the remedy of exclusion follows.<sup>27</sup> In the view of the *Mapp* majority, all other remedies fail.<sup>28</sup>

The Court, over four dissenters, painted with a broad brush, announcing a one-size-fits-all-violations remedy.<sup>29</sup> But there is in the opinion a subtle juxtaposition in the Justices’ conversation—the remedy is categorical, but the violation is graded.<sup>30</sup> Present factually was what Justice Douglas called in his concurrence “the casual arrogance of those who have the untrammelled [sic] power to invade one’s home and to seize one’s person.”<sup>31</sup> In other words, the violation was flagrant, radical, and egregious.<sup>32</sup> Had the violation been less egregious, would the resulting rule have been any less extreme?

The answer, probably, is that it depends. What is notable is that the violation in this case appeared to drive the Court’s choice of which values the exclusionary rule is intended to uphold.<sup>33</sup> And what was the Court’s choice? By the time of *Mapp*, the Court—over the years—articulated a number of justifications for the exclusionary rule: deterrence of police misconduct, preservation of property rights, protection against self-incrimination, and vindication of one’s right to be free from unreasonable searches and seizures, either through the discretionary exercise of the Court’s supervisory power or because of an unalterable constitutional

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24. *Id.*; see also *Michigan v. Hudson*, 547 U.S. 586, 591 (2006) (citing *Mapp*, 367 U.S. at 655) (“We did not always speak so guardedly. Expansive dicta in *Mapp*, for example, suggested a wide scope for the exclusionary rule.”).

25. *Mapp*, 367 U.S. at 657 (emphasis added) (citation omitted).

26. *See id.* at 655-56.

27. *See id.* at 655-57.

28. *See id.* at 652 (“The experience of California [articulated in *People v. Cahan*] that such other remedies have been worthless and futile is buttressed by the experience of other States.”) (referring to *People v. Cahan*, 282 P.2d 905 (1955)); see also *Wolf v. Colorado*, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting) (“The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.”).

29. *See Mapp*, 367 U.S. at 655-57.

30. *See id.* at 656-57.

31. *Id.* at 671 (Douglas, J., concurring).

32. *See id.* at 644-46 (majority op.).

33. *See id.* at 654-57.

mandate.<sup>34</sup> In fact, the *Mapp* Court expressly acknowledged the Court's history of changing justifications for the exclusionary rule.<sup>35</sup> But the noted

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34. See *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."); see also *Mapp*, 367 U.S. at 656 ("Only last year [in *Elkins*] the Court itself recognized 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.'") (citation omitted); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense . . ."). But see *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."). See also *Rochin v. United States*, 342 U.S. 165, 167 (1952) ("[A] conviction which rests upon evidence of incriminating objects obtained from the body of the accused by physical abuse is as invalid as a conviction which rests upon a verbal confession extracted from him by such abuse."); *Agnello v. United States*, 269 U.S. 20, 34-35 (1925) (citation omitted) ("Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated, and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. 'A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.'"); *Boyd*, 116 U.S. at 631-32 ("[A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American.").

Whether the exclusionary rule was an exercise of the Court's supervisory power or a constitutional mandate is a question that has since been resolved, but a half century ago it was a very live question. See *Wolf v. Colorado*, 338 U.S. 25, 29-31 (1949). *Wolf* avoided the question, noting that:

[T]his Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. This ruling . . . was not derived from the explicit requirements of the Fourth Amendment. . . . The decision was a matter of judicial implication. Since then it has been frequently applied and we stoutly adhere to it.

*Wolf*, 338 U.S. at 28, 31-32. When the Court was confronted with the same question a decade later in *Elkins*, it found itself, as it often does, divided. See *Elkins*, 364 U.S. at 214-17. Justice Stewart, the author of the *Elkins* opinion, later explained:

By a 5-4 vote, the Court overruled the silver platter doctrine. The majority was divided, however, on whether the Constitution itself required this result or whether this holding was merely an evidentiary ruling issued by the Court under its supervisory powers. . . . In my first draft of the opinion, I expressly stated that the exclusionary rule was not constitutionally required and, therefore, that the decision to overrule the silver platter doctrine was grounded in the Court's supervisory power. This position bothered both Justice Douglas and Justice Brennan, each of whom separately wrote to me urging that the Court leave open the question. Justice Black, on the other hand, expressed agreement with what I had written. So, in later drafts of the opinion, the question as to the doctrinal basis for the exclusionary rule was left unresolved.

Stewart, *supra* note 22, at 1379. This question was ultimately answered in *Mapp*:

Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in

(and since widely adopted) *raison d'être* went almost wholly ignored—the Court's opinion in *Mapp* was not about deterring police misconduct, but rather focused on the targeted individual's rights.<sup>36</sup> This, of course, worked with a sympathetic defendant.<sup>37</sup> The Court's rationale, however, is much less palatable when the defendant is instead an unrepentant drug dealer or a child molester.<sup>38</sup> This may be why, post-*Mapp*, the deterrence rationale ultimately won out and is the proffered justification in the vast majority of modern cases.<sup>39</sup>

And so we continue in the post-*Mapp* world, with the stated purpose of the exclusionary rule as deterrence of police misconduct.<sup>40</sup> We return to our original inquiry, with a modification—is the exclusionary rule the most effective method of deterring police misconduct?<sup>41</sup> The debate rages on. In one camp are the critics, who question whether (at least in most situations)

violation of the Constitution is, *by that same authority*, inadmissible in a state court.

*Mapp*, 367 U.S. at 654-55 (emphasis added); *see also id.* at 662 (Black, J., concurring) (“[W]hen the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.”).

35. *See Mapp*, 367 U.S. at 654 (citing *Elkins*); Stewart, *supra* note 22, at 1372.

36. *Compare Mapp*, 367 U.S. at 656 (“Only last year [in *Elkins*] the Court itself recognized 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.’” (citation omitted)), *with id.* at 654-55 (“Today we once again examine Wolf’s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct.”).

37. *See, e.g., Mapp*, 367 U.S. at 673 n.4 (Douglas, J., concurring) (stating that the defendant had been convicted “for circumstances which she herself did not put in motion”).

38. *See supra* note 15 and accompanying text.

39. *See, e.g., United States v. Leon*, 460 U.S. 897, 916 (1984) (“To the extent that proponents of exclusion rely on its behavioral effects on judges and magistrates in these areas, their reliance is misplaced. First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.”); *United States v. Janis*, 428 U.S. 433, 446 (1976) (“The debate within the Court on the exclusionary rule has always been a warm one. It has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule. The Court, however, has established that the ‘prime purpose’ of the rule, if not the sole one, ‘is to deter future unlawful police conduct.’” (internal citations omitted)); *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. . . .”). For a different view and a criticism of the Court’s current justification for the exclusionary rule, consider Justice Brennan’s dissent in *Calandra*:

This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule. . . . [C]urtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formation.

*Calandra*, 414 U.S. at 356 (Brennan, J., dissenting).

40. *See Leon*, 468 U.S. at 916.

41. *See supra* text accompanying notes 16-20.

the exclusionary rule does anything at all to deter police misconduct.<sup>42</sup> Included in this group are intellectual heavyweights Justice Antonin Scalia (and presumably his colleagues who joined in the plurality opinion in *Hudson*), Professor Akhil Amar, and Professor and Judge Richard Posner, to name a few.<sup>43</sup> Those in this group generally seek to abandon the exclusionary rule, though there is a strong contingent that has instead argued for a much more limited application of the rule.<sup>44</sup> But the other side—the team in favor of the rule—boasts an equally powerful all-star cast: Justices Breyer and Ginsburg, Professor Erwin Chemerinsky, and others.<sup>45</sup> These folks generally recognize that the exclusionary rule has its weaknesses but contend that there is no better remedy.<sup>46</sup> The two sides continue to duke it out in cases and in the law reviews—as they have done for over 40 years—sometimes without perceptible progress on either side.<sup>47</sup>

Now five decades old and showing no signs of abatement, are we destined to see this seesaw battle continue? In short, is the Fifty Years War destined to become the divisive Hundred Years War—especially since Professor Erwin Chemerinsky informs us that Chief Justice Roberts will

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42. See *Hudson v. Michigan*, 547 U.S. 586, 596-99 (2006) (discussing various situations in which exclusion would probably not deter police misconduct).

43. See, e.g., *id.* at 596, 598 (refusing to apply the exclusionary rule to evidence seized after a knock-and-announce violation, implying that the rule has a deterrent effect in knock-and-announce situations but concluding that it “is not worth a lot” and suggesting that equally effective remedies exist: “As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 796 (1994) (“Government must be deterred from violating the people’s Fourth Amendment rights. But the exclusionary rule is a bad way to go about this.”); see also, e.g., L. Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond The Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 673 (1998) (arguing that the rule has failed to deter police misconduct); Dallin H. Oaks, *supra* note 2, at 755 (“As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure.”).

44. See, e.g., Charles Alan Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 744 (1972) (arguing that the rule should only apply in cases of outrageous police misconduct); Judge Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965), cited in *Herring v. United States*, 129 S. Ct. 695, 706-07 (2009) (Ginsburg, J., dissenting) (“Judge Friendly suggested that deterrence of police improprieties could be ‘sufficiently accomplished’ by confining the rule to ‘evidence obtained by flagrant or deliberate violation of rights.’”).

45. See *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (“The exclusionary rule is ‘a remedy necessary to ensure that the Fourth Amendment’s prohibitions ‘are observed in fact.’”) (quoting Stewart, *supra* note 22 at 1389); *Hudson*, 547 U.S. at 608 (Breyer, J., dissenting) (arguing that according to the Fourth Amendment, an unreasonable search is an illegal search or seizure “[a]nd ever since *Weeks* (in respect to federal prosecutions) and *Mapp* (in respect to state prosecutions), ‘the use of evidence secured through an illegal search and seizure’ is ‘barred’ in criminal trials”) (internal citations omitted); see also Carol S. Steiker, *Response, Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-48 (1994) (recognizing the weaknesses of the exclusionary rule but arguing that the “exclusionary rule is . . . the best we can realistically do.”).

46. See *supra* note 45 and accompanying text.

47. See *supra* notes 39, 43-45 and accompanying text.



predictably serve until the year 2045?<sup>48</sup> The answer is probably yes. Let's just keep fighting (or litigating) and see who wins, battle by battle. Overall, the trend lines seem to suggest that the anti-exclusionary rule camp will be in the ascendancy for some years to come.<sup>49</sup>

This Symposium provides an appropriate moment for inquiry: Would it be helpful to re-examine the exclusionary rule in light of the textually enumerated values of reasonableness? That is, should the remedy itself also be the subject of a reasonableness inquiry? Of course, we have to view the reasonableness of the remedy in light of the value the rule is meant to serve. As the matter stands—and as illustrated by *Herring*—deterrence of police misconduct is the leading rationale, but others disagree.<sup>50</sup> The warring camps are thus aligned under different banners, with the current majority considering the value served to be deterrence of bad police behavior; the minority believes the rule is meant to vindicate values of judicial integrity.<sup>51</sup> The bipolar positions seem, however, simply to clash.<sup>52</sup> Stare decisis values do not seem to be triggered. We are, essentially, deadlocked. And thus a wrinkle is added to our original question: is the exclusionary rule an effective *and reasonable* means to [deter police misconduct/vindicate values of judicial integrity]? Let us consider both.

*If the Goals Are to Deter Police Misconduct and Vindicate Values of  
Judicial Integrity, Is the Exclusionary Rule an Effective Tool?*

The majority of commentators seem to say no.<sup>53</sup> The rule is too rigid, crude, awkward, embarrassing, imbalanced, and backward in its rewards.<sup>54</sup>

48. Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13 (2010).

49. See, e.g., *Herring*, 129 S. Ct. at 698-99; *Hudson*, 547 U.S. at 587-89.

50. See *infra* note 51 and accompanying text.

51. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (“Beyond a doubt, a main objective of the rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” In addition, however, the rule “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and assures “that the government would not profit from its lawless behavior. . . .” (citations omitted)). But see *Hudson*, 547 U.S. at 608 (Breyer, J., dissenting) (recognizing that “the driving legal purpose underlying the exclusionary rule” is “the deterrence of unlawful government behavior”).

52. See, e.g., *Herring*, 129 S. Ct. at 704-10 (Ginsburg, J., dissenting); *Hudson*, 547 U.S. at 608 (Breyer, J., dissenting).

53. See, e.g., Posner, *supra* note 8, at 54.

54. See Posner, *supra* note 8, at 54 (“No one actually knows how effective the exclusionary rule is as a deterrent. . . . If the exclusionary rule is not an effective deterrent, that is reason enough to abandon it since, as mentioned earlier, deterrence is the *raison d’etre* of the rule. If it is a more powerful deterrent than the tort remedy, an anomaly is produced: an innocent person who is injured as the result of an unreasonable search or seizure has only the lesser, the tort remedy; only the criminal gets the benefit of the greater remedy. . . . [T]he exclusionary rule is an exceptionally crude deterrent device.”); Amar, *supra* note 43, at 757 (“The Fourth Amendment today is an embarrassment.”); see also Stone v. Powell, 428 U.S. 465, 490-91 (1976) (“The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the

So what is the solution? Do we ditch the rule entirely and adopt the tort-based civil remedy system proposed by some?<sup>55</sup> Do we calibrate the sentencing guidelines to account for Fourth Amendment violations?<sup>56</sup> Or do we just throw our hands up in frustration? And, what sources do we consider when evaluating the rule and possibly remodeling it?

Perhaps we should step out of our own calcified legal culture and look beyond our borders—yes, look to international norms. We should set aside, at least for the purposes of this discussion, the lively conversation on the modern Supreme Court about the legitimacy and wisdom of referencing transnational sources.<sup>57</sup> Interestingly, in the case that *Mapp v. Ohio* overruled, *Wolf v. Colorado*, the Court did exactly that.<sup>58</sup> The year was 1949.<sup>59</sup> Earl Warren's arrival was four years away, and *Mapp* was a decade removed.<sup>60</sup> And though *Mapp* and *Wolf* ultimately addressed the same question, the two cases could not read more differently.<sup>61</sup> Unlike the facts in *Mapp*, the facts presented in *Wolf* did not incense the justices; indeed, they were so unremarkable that they barely earned mention at all.<sup>62</sup> Instead of focusing on “flagrant abuse” and “official lawlessness,” the *Wolf* Court focused only on the question before it: Does the exclusionary rule apply to the states?<sup>63</sup>

The majority of the Court held no and expressed a reluctance to impose a categorical, constitutionally mandated remedy for Fourth Amendment violations.<sup>64</sup> Justice Frankfurter, writing for a six-member

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idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.”); *Irvine v. California*, 347 U.S. 128, 136 (1954) (“Rejection of the evidence does nothing to punish the wrong-do[er] . . .”).

55. See, e.g., Amar, *supra* note 43, at 800-19; see also *Hudson*, 555 U.S. at 598 (“As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”).

56. See Caldwell & Chase, *supra* note 11, at 70-71.

57. See generally Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CAL. L. REV. 1335 (2007) (discussing the Supreme Court's use of foreign authority).

58. See *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949).

59. *Id.* at 25.

60. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

61. Compare *Mapp*, 367 U.S. at 655 (“[E]vidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.”), with *Wolf*, 338 U.S. at 26 (“[T]he Fourteenth Amendment did not subject criminal justice in the States to specific limitations.”).

62. See *Wolf*, 338 U.S. at 25-33. Justice Frankfurter, the author of the majority opinion, does not even allude to the facts of the case. See *id.* Nor do Justices Douglas, Murphy, and Rutledge, all writing separately in dissent. See *id.* at 40-48 (dissenting opinions). Indeed, Justice Black was the only contributor to mention the facts, and even he did so in an abstract manner. See *id.* at 39 (“In this case petitioner was convicted of a crime in a state court on evidence obtained by a search and seizure conducted in a manner that this Court has held ‘unreasonable’ and therefore in violation of the Fourth Amendment.”).

63. See *Mapp*, 367 U.S. at 655; see generally *Wolf*, 338 U.S. at 25 (discussing extensively the applicability of the exclusionary rule to state courts).

64. See *Wolf*, 338 U.S. at 26.

majority, explained that there were a number of “varying solutions” by which the right to be free from unreasonable searches and seizures may be made effective.<sup>65</sup> In doing so, he wrote:

When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.<sup>66</sup>

More specifically, Justice Frankfurter looked to the practices of the several states and of *other countries*, explaining: “As of today 31 States reject the *Weeks* doctrine, 16 States are in agreement with it . . . . Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible.”<sup>67</sup>

And Justice Frankfurter acknowledged that the states and countries that did not follow *Weeks* were still able to provide a remedy.<sup>68</sup> In other words, the *Wolf* majority looked to the practices of others before coming to a conclusion about the use of the exclusionary rule in this country.<sup>69</sup> Can we apply this method today? That is, in light of our increased awareness of international norms and the explosion of constitutions and transnational legal institutions, can we learn from other systems? Let us turn briefly to international practice post-*Mapp*.

While all developed countries continue, categorically, to exclude coerced confessions, the exclusion of evidence obtained as a result of an illegal search is generally subject to the court’s guided, informed discretion.<sup>70</sup> That is, the exclusionary rule is by no means an American institution, but its administration outside the United States seems more supple.<sup>71</sup> Let us begin by pointing to two examples. The first results from the Supreme Court of Canada’s holding in *R. v. Grant*, where officers seized a gun from a defendant after cornering him on the sidewalk absent

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65. *See id.* at 28.

66. *Id.* at 29.

67. *Id.* at 29-30.

68. *Id.* at 30-31 n.1 (“The common law provides actions for damages against the searching officer . . . . Statutory sanctions in the main provide for the punishment of one maliciously procuring a search warrant or willfully exceeding his authority in exercising it. . . . A few states have provided statutory civil remedies.”).

69. *See supra* notes 67-68 and accompanying text.

70. Bradley, *supra* note 5, at 376 (“On one point, all countries are in agreement, at least in theory: involuntary confessions must be excluded.”).

71. *See id.* Bradley has noted, however, that the exclusionary rule did not truly take root in other countries until after the U.S. Supreme Court’s decision in *Mapp*. *See generally id.* (discussing the influence of *Mapp* on other countries and their interpretation of the exclusionary rule).

reasonable suspicion.<sup>72</sup> Under the Canadian Charter of Rights and Freedoms—the Canadian counterpart to the much older U.S. Constitution—“[e]veryone has the right not to be arbitrarily detained or imprisoned,” and evidence “obtained in a manner that infringed or denied any rights or freedoms guaranteed by 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>73</sup>

The court recognized that the “evidence of the firearm was obtained in a manner that breached the accused’s rights under §§ 9 and 10(b) of the Charter.”<sup>74</sup> To determine if exclusion was appropriate, the court then utilized a three-part test:

- 1) “[T]he 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 the adjudication of the case on its merits.” The Court stressed that this does not refer to any adverse reaction to the exclusion of evidence in this particular case, but rather whether “the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence.”<sup>75</sup>

After “[t]aking these factors into account, and noting that ‘the gun is highly reliable evidence,’ the Court upheld the trial court’s refusal to exclude the evidence.”<sup>76</sup>

What is immediately striking about *Grant* is the court’s basis for not excluding the evidence—that is, the value served by exclusion or non-exclusion.<sup>77</sup> The Canadian Charter pronounces (much like the Fourth Amendment) that “[e]veryone has a right to be secure against unreasonable search and seizure” and specifically states that exclusion is necessary when admission of the unlawfully obtained evidence “would bring the administration of justice into disrepute.”<sup>78</sup> But it says nothing about deterrence or police misconduct.<sup>79</sup> Instead, it sets forth a discretionary standard, allowing for exclusion after the court considers “all the

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72. *R. v. Grant*, [2009] 2 S.C.R. 353 (Can.).

73. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.), paras. 9, 24(2). Craig Bradley characterizes the Canadian exclusionary law as “the most fully developed” of any country outside of the United States. Bradley, *supra* note 5, at 382. This may be in part because the rule is addressed in some detail in the Canadian Charter. See Canadian Charter, *supra*, para. 9.

74. *Grant*, [2009] 2 S.C.R. 353 para. 11.

75. Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 85 CHI.-KENT L. REV. 315 (2010); Indiana Legal Studies Research Paper No. 143 (citations omitted), available at <http://ssrn.com/abstract=1540686> (quoting *Grant*, 2 S.C.R. 353, at para. 68); *R. v. Harrison*, 309 D.C.R. 4th 87, [2009] S.C.C. 354, para. 2 (Can.).

76. Bradley, *supra* note 75.

77. *Grant*, [2009] 2 S.C.R. 353.

78. Canadian Charter, *supra* note 73, at para. 9-24(2).

79. *Id.*

circumstances” and determines that the admission of evidence would reflect poorly on the justice system.<sup>80</sup> If this standard were applied to the facts in *Mapp*, it is more likely than not that the evidence would be excluded.<sup>81</sup> But if applied to, say, the facts in *Herring*, it is much less likely.<sup>82</sup> The same results would occur in both cases, even if different exclusionary rule tests were applied.<sup>83</sup> Of course, the Canadian rule obviates the need for exception upon exception and instead trusts trial judges to make discretionary decisions.<sup>84</sup>

The second example is the United Kingdom and the European Court of Human Rights’ approach as illustrated in *Kahn v. The United Kingdom*.<sup>85</sup> Khan was arrested after a court-authorized recording device picked up a conversation between him and a friend that occurred at the friend’s house.<sup>86</sup> In the conversation, Khan admitted to importing heroin into the country.<sup>87</sup> Khan was arrested and tried for drug offenses; at trial, he challenged the admissibility of the recording.<sup>88</sup> The trial court admitted the evidence; Khan was convicted and appealed.<sup>89</sup> The House of Lords affirmed the conviction, holding:

[T]hat there was no right to privacy in English law and that, even if there was such a right, the common law rule that relevant evidence which was obtained improperly or even unlawfully remained admissible, applied to evidence obtained by the use of surveillance devices which invaded a person’s privacy.<sup>90</sup>

The House of Lords also considered Khan’s claim that the admission of the recording violated Article 8 of the Convention for the Protection of Human

80. *Id.* at para. 24(2).

81. *See* Bradley, *supra* note 5, at 384-86.

82. *Id.* at 384. Indeed, exclusion in Canada is much more likely when “extreme police misbehavior” is involved. *See* Bradley, *supra* note 5, at 383. “[V]iolations’ committed in good faith’ by police do not lead to exclusion.” *Id.* (quoting Kent Roach, *Canada, in* WORLDWIDE STUDY 64 (1999)).

83. *See supra* notes 78-82 and accompanying text.

84. *See supra* note 78 and accompanying text.

85. *See* Khan v. United Kingdom, App. No. 35394/97, 31 Eur. Ct. H.R. 45 (2000).

86. *See id.* at 1019.

87. *See id.*

88. *See id.* at 1019-20.

89. *See id.*

90. *Id.* at 1020. At the time of the decision there was also no statutory framework in England regulating the use of recording devices. *See id.* This changed in 1997. *See id.* at 1022-23 (“At the time of the events in the present case, there existed no statutory system to regulate the use of covert listening devices, although the Police Act [of] 1997 now provides such a statutory framework.”). There was, however, a statutory scheme in place for regulating the admission of evidence. *See id.* Under the Police Criminal Evidence Act of 1984, evidence is excluded when (1) it was obtained by oppression; (2) it is unreliable or unduly prejudicial; or (3) when admission “would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” *See id.* at 1021 (citing Police and Criminal Evidence Act, 1984, ch. 60, § 78 (Eng.)). The judge makes the discretionary decision to exclude. *See id.*

Rights and Fundamental Freedoms.<sup>91</sup> That article provides that “[E]veryone has the right to respect for his private and family life, his home and his correspondence” and explains that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>92</sup>

Like the Fourth Amendment, Article 8 does not provide a remedy for violations.<sup>93</sup> The House of Lords noted that the trial judge exercised discretion in determining “whether the admission of the evidence would render the trial unfair” and concluded that “[o]n the facts, the trial judge had been entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of Article 8 were not such as to require the exclusion of the evidence.”<sup>94</sup>

The case ultimately found its way to the European Court of Human Rights (ECHR).<sup>95</sup> As for the alleged violation of Article 8, the ECHR noted that interference with privacy rights was allowed “in accordance with the law” but determined that, since there was no law in the United Kingdom regulating “covert listening devices,” the recording could not have been made “in accordance with the law” as required by Article 8.<sup>96</sup>

Khan also claimed that the use of the recording at trial violated his rights under Article 6, specifically, his right “to a fair and public hearing.”<sup>97</sup> Like Article 8, Article 6 does not provide a remedy for violations.<sup>98</sup> Khan did not argue that Article 6 required “an automatic rule of exclusion.”<sup>99</sup> Instead, he claimed that evidence could be admitted, despite a breach of Article 6, only when (1) there is “an effective procedure during the trial by which the applicant can challenge the admissibility of evidence,” (2) “the trial court should have regard to the nature of the violation,” and (3) “the conviction [is not] based solely on evidence obtained in consequence of a

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91. *See id.* at 1022-23.

92. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8 Rome 4.XI.1950, Nov. 4, 1950, 213 U.N.T.S. 221.

93. *See id.*

94. *Khan*, 31 Eur. Ct. H.R. at 1020.

95. *Id.* at 1016.

96. *Id.* at 1022. A later parliament report explained that Khan’s Article 8 allegations “had not been seriously contested by the Government.” *Judgments – Regina v. P. and Others*, UK PARLIAMENT, <http://www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd001211/pappl-2.htm> (last visited Dec. 21, 2010).

97. *Khan*, 31 Eur. Ct. H.R. at 1024.

98. *Id.* at 1025. (“While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence. . . .”).

99. *Id.* at 1024.

breach of a Convention right.”<sup>100</sup> Khan then attacked his conviction on the first and third grounds, because at trial the Crown had accepted that, without the recording, there was no case against Khan.<sup>101</sup> The ECHR rejected Khan’s proposed test, explaining that:

It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence[—]for example, unlawfully obtained evidence[—]may be admissible or, indeed, whether the applicant is guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the “unlawfulness” in question and, where violation of another Convention right is concerned, the nature of the violation found.<sup>102</sup>

In assessing the “fairness” of Khan’s trial, the ECHR contrasted two factors: on the one hand, “the fixing of the listening device and the recording of the applicant’s conversation were not unlawful in the sense of being contrary to domestic criminal law”; but on the other, “the contested material in the present case was in effect the only evidence against the applicant and . . . the applicant’s plea of guilty was tendered only on the basis of the judge’s ruling that the evidence should be admitted.”<sup>103</sup> The scales ultimately tipped in favor of admission, in part because the recording was “acknowledged to be very strong evidence” and “there was no risk of it being unreliable.”<sup>104</sup> More important, though, was the fact that Khan had the opportunity to challenge the recording at multiple stages in the proceedings.<sup>105</sup> The fact that he was unsuccessful made no difference.<sup>106</sup> Thus, the Court concluded, over a dissenting opinion, that the admission of the recording did not violate Article 6 of the Convention.<sup>107</sup>

Interestingly, the Court did find a violation of Article 13 of the Convention, which provides that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”<sup>108</sup> The ECHR

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100. *Id.*

101. *Id.* at 1022-23.

102. *Id.* at 1025-26. The ECHR noted that this rule was consistent with their earlier holdings, particularly *Schenk v. Switzerland*, where “[t]he Court observed that it could not ‘exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be inadmissible’ and that it had only to ascertain whether the applicant’s trial as a whole was fair.” *Id.* at 1026.

103. *Id.* at 1026.

104. *Id.* at 1027.

105. *Id.*

106. *Id.*

107. *Id.* at 1030-31.

108. *Id.* at 1027 (citing Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 at art. 13).

concluded by “find[ing] that the system of investigation of complaints [(i.e., reporting violations to the Police Complaint Authority)] does not meet the requisite standards of independence needed to constitute sufficient protection against the abuse of authority and thus provide an effective remedy within the meaning of Article 13.”<sup>109</sup> A twist accompanies this finding (as well as the finding that Article 8 had been violated): The ECHR provided no remedy beyond awarding Khan the cost of the appeal, and Khan’s conviction remained intact.<sup>110</sup>

The practice in the United Kingdom following *Khan* is thus the same as it was before the ECHR’s decision—trial judges enjoy discretionary power to exclude evidence based on the effect that evidence will have on the fairness of the trial.<sup>111</sup> This power is like that seen in Canada and other countries.<sup>112</sup> And the rationale for exclusion is likewise similar: in at least Argentina, Canada, England, France, Germany, Italy, and South Africa, the purpose of exclusion is to ensure the fairness of the proceedings and the integrity in the administration of justice.<sup>113</sup> Of the developed nations that have been studied, it appears that Spain and Australia are the only countries to adopt the modern American rationale for the exclusionary rule—to deter police misconduct.<sup>114</sup> But even though the rationale is the same in these two countries, the application of the rule is not absolute; rather, judges there likewise have discretion to exclude or admit wrongfully obtained evidence.<sup>115</sup> In sum, it appears that no other developed country applies the rule in the same manner as the United States.<sup>116</sup>

What can we derive from a more thorough examination of these international sources? Will reflecting with respect and humility usher in a

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109. *Id.* at 1029.

110. *Id.* at 1029-30 (“The Court is of the view that the finding of a violation constitutes in itself sufficient just satisfaction for any damage which the applicant may have suffered.”).

111. *See* Bradley, *supra* note 5 at 385-86. Nonetheless, exclusion, even discretionary-based exclusion, is relatively modern practice. *See id.* at 375-76. “In general, with the exception of coerced confessions, other countries followed the non-exclusion approach prior to *Mapp*.” *Id.* at 375.

112. *Id.* at 382.

113. *Id.* at 377 (“In many of those systems the rationale is not deterrence of [police misconduct]—as it is in the U.S.A.—but fairness of the proceedings, the safeguarding of the integrity in the administration of justice and the like *inter alia* Argentina, Canada, England and Wales, France, Germany, Italy, South Africa and—but less clear—Russia.” (internal quotations omitted)) (quoting Hans Lensing, *General Comments*, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 425, 428 (Craig Bradley ed. 1999)).

114. *See id.* at 380-81, 397.

115. *See id.* at 380-81.

116. *See id.* at 375-76. New Zealand used to require that all illegally obtained evidence be excluded from criminal trials, but changed course in 2002 by adopting a balancing test similar to that found in Australia. *Id.*; *see* Stephen C. Thaman, “Fruits of the Poisonous Tree” in *Comparative Law*, 16 SW. J. INT’L LAW 333, 350-51 (2010). And Argentina recognized the principle that evidence that is improperly obtained should be barred from admission at trial, but ignored it until the 19080s. *See* Bradley, *supra* note 5 at 379. Argentina has since employed exclusion on a discretionary basis, and “appellate court decisions reversing convictions due to failure to suppress evidence must be based on an abuse of discretion standard.” *Id.* at 380.



period of peace? Unlikely, but it is humbling that the spread of the exclusionary rule's embrace in other well-developed countries has been in a broader, more holistic manner—sensitive to a variety of concerns and values. In short, if deterrence and judicial integrity are the overarching values to be served, our American invention may have undergone notable improvements by our international friends, who likewise share a commitment to freedom and human dignity.