The Need to Overrule Mapp v. Ohio

William T. Pizzi
THE NEED TO OVERRULE MAPP V. OHIO

William T. Pizzi*

Introduction

Mapp v. Ohio,1 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. Wainwright2 and Miranda v. Arizona3. In Mapp, of course, the Court ruled that “all evidence obtained by searches or seizures in violation of the Constitution is… inadmissible in …court.”4

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”5 – that is obtained as a direct result of the illegal action.6

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

---

* Professor of Law, University of Colorado Law School.


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 (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).
Justice Brandeis famous warning in 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.”7 The majority opinion in *Mapp* then 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.”8

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. Colorado* rejected imposing an exclusionary remedy on the states,9 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.10 They did so, noted the Court, because other remedies to deter police wrongdoing have proven “worthless and futile.”11

The Court, however, quickly shunted aside the judicial integrity rationale as the basis of the exclusionary rule in favor of deterrence.12 In 1976, for example, the Court stated that judicial integrity has only “a limited role [to play]…in the determination whether to apply the

---


8 Id. at 660.


10 367 U.S. at 652.

11 Id. at 651-52.

12 See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN KERR, CRIMINAL PROCEDURE § 3.1 (b) (5th ed. 2009); JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 20.02 (4th ed. 2006).
rule in a particular context.”

Instead, for close to four decades, the Court has returned again and again to the lodestone of deterrence 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. An example of the former is *Calandra v. United States*, where the Court concluded that the deterrent benefit of extending the exclusionary rule to make it applicable prior to a citizen’s appearance before a grand jury 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.”

Similarly, in *Leon v. United States*, the Court created an exception to the exclusionary rule for situations in which an officer relied in good faith on a search warrant issued by a magistrate where it was later determined that the warrant lacked probable cause. 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.”

While *Calandra* and *Leon* were cases in which the Court did not apply the exclusionary rule, when the rule is applicable – including many on-the-street “stop” or “arrest” situations – the rule is intended to have dramatic effect. Thus, even if a citizen is arrested in good faith and treated politely, and even if strong confirming evidence is developed within a few hours, if the

---


16 Id. at 351.


18 Id. at 921.
arrest was not supported by probable cause, any evidence seized as the direct result of the arrest whether it is a murder weapon or a confession, must be suppressed. The Court’s theory has been that deterrence requires a strong sanction if it is to keep the police mindful of the Constitution in their treatment of citizens.

But despite Mapp’s iconic stature in constitutional criminal procedure two Supreme Court decisions handed down in recent years have raised concerns about the direction the Court might be going with the exclusionary rule. The first is a 2006 opinion, Hudson v. Michigan,\(^{19}\) where the Court refused to suppress evidence despite the failure of the police to knock and announce their entry before going into Hudson’s home. The requirement that police “knock and announce” before entering someone’s home – subject to exceptions for officer safety or to prevent the destruction of evidence – has a long history stretching back to the common law. 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.”\(^{20}\)

The issue in Hudson thus seemed straightforward because Michigan conceded that the officers had violated the knock and announce principle. Nonetheless, the Court refused to apply the rule to the drugs and weapon seized from Hudson, reasoning that the benefits of deterrence did not outweigh the “substantial social costs” of exclusion.\(^{21}\)

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

\(^{19}\text{547 U.S. 586 (2006).}\)

\(^{20}\text{Id. at 589.}\)

\(^{21}\text{Id. at 596. The Court began discussing the “substantial social costs” of exclusion in United States v. Leon, 468 U.S. 897, 907 (1984).}\)
hinted that further limitations to the exclusionary rule might be afoot when 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.”\textsuperscript{22} The opinion noted “the increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.”\textsuperscript{23} 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.”\textsuperscript{24}

To many, this comparison of policing at the time of \textit{Mapp} with modern policing in which the Court suggested that there is greater internal discipline in departments as well as expanded civil rights remedies for police misconduct that does occur, suggest a Court that was clearly rethinking the exclusionary rule.

The second decision that alarmed academics is \textit{Herring v. United States},\textsuperscript{25} decided in 2009. In that case, the Court found a way to avoid applying the 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. In \textit{Herring}, the officer who had stopped his vehicle to make the arrest was acting on information that there was an outstanding warrant for the defendant in a neighboring county.\textsuperscript{26} But it turned out there was no longer an outstanding warrant for Herring – the warrant having been recalled five months earlier – but the computer database had not been corrected by the police officer responsible for updating the database.\textsuperscript{27} By the time the error was detected and

\begin{itemize}
  \item \textsuperscript{22} \textit{Id.} at 597.
  \item \textsuperscript{23} \textit{Id.} at 599.
  \item \textsuperscript{24} \textit{Id.} at 597.
  \item \textsuperscript{25} ___ U.S. ___ (2009)
  \item \textsuperscript{26} ___ U.S. at
  \item \textsuperscript{27} ___ U.S. at
\end{itemize}
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).\textsuperscript{28}

As was true in \textit{Hudson}, the language of the majority opinion seemed to suggest a
frustration with the exclusionary rule. Chief Justice Robert’s opinion stressed prominently that
the exclusionary rule “is not an individual right” and that “the benefits of exclusion must
outweigh the costs.”\textsuperscript{29} 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.”\textsuperscript{30}

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, Justice Roberts’
majority 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. Justice Roberts’ opinion noted that many of the early Supreme Court
exclusionary rule cases, such as \textit{Weeks v. United States},\textsuperscript{31} \textit{Silverthorne Lumber v. United States},\textsuperscript{32}
and even \textit{Mapp} itself, involved “intentional conduct” by police that was “patently
unconstitutional.”\textsuperscript{33} 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

\begin{flushright}
\textsuperscript{28} ___ U.S. at \\
\textsuperscript{29} ___ U.S. at \\
\textsuperscript{30} ___ U.S. at \\
\textsuperscript{31} 232 U.S. 383 (1914). \\
\textsuperscript{32} 251 U.S. 385 (1920). \\
\textsuperscript{33} ___ U.S. at
\end{flushright}
argued that “the 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.”

The holdings of Hudson and Herring – rather obvious errors by police officials that did not result in exclusion – when combined 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 “assault” on the exclusionary rule, a decision in which the Court “inched closer to the destroying the constitutional protection of the exclusionary rule,” and a decision in which four members of the Court are “busily laying the groundwork for abandoning the exclusionary rule.”

This Article argues, against the tide it would seem, that the Court needs to overrule 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 assumptions, some of which seem dated and anachronistic today and some of which have been very harmful to the way law has developed over the last few decades. The Article contends, in particular, that the exclusionary rule – especially, its deterrent premise that assumes that harsh punishments deter - has had serious


36 Craig M. Bradley, 45 TRIAL 52 (April 2009).

negative consequences for the system and we need to face up to those consequences and abandon our exclusionary rule.

The previous paragraph calls for abandoning “our exclusionary rule,” because, while this Article is strongly opposed to the *Mapp* and its progeny, it is not anti-exclusionary rule per se. An exclusionary rule, such as one finds in some other common law countries,\(^{38}\) which allows proportionality to be considered in deciding whether to exclude evidence and which bases exclusion not on deterrence, but on the integrity and fairness of the system in its treatment of suspects would be a worthy substitute for the U.S. rule. It is thus not exclusion in shocking cases of police wrongdoing 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, that is the concern of this Article.

The Article consists of four sections. Section I contends that some of the assumptions on which *Mapp* was based are questionable today. One of them is the assumption that criminal cases are two-sided contests between the defendant and the State. A powerful deterrent remedy fits comfortably into a two-sided world where errors by the State that infringed the rights of the defendant are punished to rectify the wrong. It is much less appropriate today when there is growing recognition that victims have a stake in criminal cases that differs from that of the general public, a difference that is widely acknowledged today in rules, statutes, and state constitutional provisions.

Section II contends that a strong deterrent remedy is inappropriate for what we are asking police to do. It is unfair to put police on the street and ask them to make forcible stops and

\(^{38}\) See text at note *infra*.  

8
custodial arrests consistent with the Fourth Amendment but insist they will be punished harshly for their mistakes when the standards for concepts such as “reasonable suspicion” or “probable cause” must always be uncertain. Decisions such as these will always be individual fact-specific decisions on which reasonable police officers as well as reasonable judges will differ. To ask officers to make these sorts of decisions under the pressure of a strong deterrent sanction is unfair and, like all harsh results, takes a toll of the system’s integrity.

Section II also contends that one of the main epistemological premises of Fourth Amendment law – that police observe situations and then they “reason” from what they see to a conclusion suggesting someone is a threat – has been undercut by scientific research suggesting that this is not the way we decide that situations or individuals are dangerous. Sometimes our perceptions of danger are matters of “feel,” “hunch,” or “intuition” that cannot be explained and, indeed, may even be perceived at a subconscious level. In short, the Court’s distrust of “hunches” and its demand for “articulable suspicion” is dated and simplistic in its view of the way humans have evolved to sense dangerous situations.

Section III of the Article is strong attack on the deterrence rationale on which the Court based 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. We have learned a lot about deterrence over the decades since Mapp was decided and it has become clearer that powerful deterrent sanctions not only do an injustice to those on whom they are visited, but they do so in exchange for a benefit that will always be speculative and unknowable. This blind faith in the principle that we can “deter” our way out of undesirable behaviors has been a disaster for our criminal justice system. It has turned the United States into a “deterrent nation” that is unique among western countries in its commitment to deterrent
sanctions. This faith in the appropriateness of harsh deterrent sanctions and their efficacy starts with *Mapp* and its progeny.

Finally, Section IV shows how other countries have avoided the terrible toll that harsh deterrence penalties have exacted in the United States by refusing to allow harsh deterrent penalties to gain a foothold in their systems. Instead, deterrence in those countries must always be secondary to the requirement that sentences be proportional to the offense and the offender. This is not a new vision of deterrence, but the classic understanding of deterrence.

Section IV warns that, like an invasive species, harsh deterrent sanctions once introduced into a criminal justice system will soon take over and distort the entire system. This is already happening in the United States and helps explain why the U.S. incarceration rate has climbed precipitously over the last four decades.

**Section 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. Victims are not “the State,” 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 bargains.\textsuperscript{39} 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 life.\textsuperscript{40}

This has not been an easy solution as there is considerable question about the relevance of this information to the issue of punishment. This tension over the relevance of victim impact evidence at sentencing is reflected in the Supreme Court’s amazing flip-flop on the issue, ruling in 1987\textsuperscript{41} and 1989\textsuperscript{42} that victim impact evidence in capital cases was inadmissible as violative of the Eight Amendment and then deciding, in 1991, in \textit{Payne v. Tennessee}\textsuperscript{43} that victim impact evidence was perfectly admissible and relevant to a jury’s sentencing decision in a capital case.


\textsuperscript{41} Booth v. Maryland, 482 U.S. 496 (1987).


Allowing victims to offer impact statements at sentencing is controversial.\textsuperscript{44} But 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 victims are seen today to have a legitimate interest in the criminal process. One indication of this shift is the fact that certain of the federal rules of criminal procedure have been amended recently to conform to provisions of the Crime Victims Rights Act of 2004.\textsuperscript{45} Among the changes are provisions that require notice to victims of court proceedings;\textsuperscript{46} that give victims a right to be heard not just at sentencing, but also on bail and plea decisions;\textsuperscript{47} and that make it much more difficult for defendants to sequester victims – as compared to other witnesses – prior to their testifying at trial.\textsuperscript{48}

\textsuperscript{44} See, e.g., Vivian Berger, \textit{Payne and Suffering – A Personal Reflection and a Victim-Centered Critique}, 20 Fla. St. U. L. Rev. 21, 59 (1992) (\textquotedblleft The system is not equipped to nurture victims or their representatives.\textquotedblright)


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, \textit{Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure}, 2007 Utah L. Rev. 861.

\textsuperscript{46} See Rule 60(a)(1), Federal Rules of Criminal Procedure.

\textsuperscript{47} See Rule 60(a)(3), Federal Rules of Criminal Procedure.

\textsuperscript{48} 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 the testimony of the victim would be materially altered were the victim to remain in the courtroom and hear other testimony at the proceeding. See 18 U.S.C. § 3771 (a)(3) (2004). Rule 60(a)(2) now requires a clear and convincing threshold for sequestration of a victim and, in addition, requires that a trial court “must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion.” Federal Rules of Criminal Procedure Rule 60(a)(2).
Many countries that have trial systems not based on the adversary model have gone much farther than the United States and give victims, usually victims of serious crimes, a right to participate in criminal trials, sometimes on a rather equal basis with the defense.49

Recently, the International Criminal Court, as well, adopted procedures granting a right to victims of genocide and crimes against humanity to participate in trials of these horrific crimes.50 The International Criminal Court is designed for cases that, even with adequate resources, present enormous logistical difficulties to which victim participation will add another layer of complexity. But the recognition that victims of horrific crimes should have a right to some level of participation – a right not granted victims at previous international criminal 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 internationally recognizing 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

49 See, e.g., William T. Pizzi & Walter Perron, Crime Victims in German Courtrooms: A Comparative Perspective on American Problems 32 Stan. J. Int. L. 37 (1996)(explaining that in Germany crime victims of serious crimes such as rape have the right to be present and to participate fully at trial through counsel).

50 See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/ (“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.”)
suppressed without consideration of the seriousness of the crime balanced against the nature of
the violation becomes very difficult to defend.

In short, the legal landscape has changed dramatically since *Mapp* was decided. In 1961,
there was no National Organization for Victim Assistance, an organization that was not founded
until 1975, and today often files amicus briefs in courts in support of better treatment for victims
of crime in the criminal justice system.\(^{51}\) Nor in 1961 was there a separate office set up in the
Justice Department – the Office for Victims of Crime\(^{52}\) – that is directed to improving the way
victims are treated in the system.

*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.\(^ {53}\) The Fourth Amendment issue was never pressed by *Mapp*'s counsel either in
their brief or in oral argument.\(^ {54}\)

Obviously, the Court felt confident enough to decide *Mapp* without a full set of briefs
directed to the Fourth Amendment issue. One can be certain today that there would be strong

---

\(^{51}\) The history of NOVA is available at: http://www.trynova.org/about/

\(^{52}\) 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 http://www.ojp.usdoj.gov/ovc/welcovc/voca.html

\(^{53}\) The dissent of 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. 367 U.S. 672-75.

\(^{54}\) Justice Harlan noted in his dissent that appellant’s brief did not even cite *Wolf v. Colorado*, 367 U.S. 673
n. 5 and that appellant’s counsel at oral argument had stated that he was not asking the Court to overrule *Wolf*, 367
U.S. 673 n.6.
opposition to a Fourth Amendment exclusionary rule from victims’ rights organizations and, at a minimum, the Court would have to speak to the impact of exclusion on victims in its opinion.

Although defenders of the exclusionary rule are likely to insist that Mapp would and should be decided the same way if it were argued today, this seems extremely unlikely for another reason: other common law countries that have adopted exclusionary rules over the last few decades have not opted for exclusionary rules based on deterrence.

Consider, for example, Canada, which adopted its Charter of Rights and Freedoms in 1982. Section 8 of the Charter guarantees “everyone…the right to be secure from unreasonable search or seizure.” The Charter also contains an exclusionary provision set out in section 24(2) that states that evidence found by a court to have been obtained in violation of a right in 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.”

The leading case interpreting section 24(2) remains the Canadian Supreme Court’s decision in 1987, Collins v. The Queen, where the Court instructed 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) 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. In reaching this conclusion, the Court emphasized that “[section] 24(2) is not a remedy for police misconduct” but rather is intended to

55 Section 8, CHARTER OF RIGHTS AND FREEDOMS (1982).
56 Section 24(2) CHARTER OF RIGHTS AND FREEDOMS (1982).
58 Id. at para. 35.
protect the administration of justice from being tarnished by the admission of improperly seized evidence. 59

Similarly, New Zealand 60 and England 61 base their exclusionary rules, not on deterrence, but on the effect on the judicial process of the admission of evidence that has been improperly seized. Like, Canada, they balance a range of factors to see if exclusion is an appropriate and proportional remedy including the extent of the breach, the good faith or not of the officer involved, the seriousness of the crime, the importance of the evidence, and the reliability and probative value of the evidence.

When one considers the emergence of victims’ rights here and abroad as well as the range of other options from other national systems that would be available were the Court deciding *Mapp* today as an initial matter, one suspects the Court would take a different path.

**Section II: The Court’s Failures in Providing Workable Standards for Fourth Amendment Decisions**

59 Id. at para. 31.


61 See § 78, Police and Criminal Justice Act (“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given in court if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”)
A. Deterring Crime v. Deterring Fourth Amendment Violations

One of the main arguments of this Article is that, due in part to *Mapp*, the United States has become the “deterrent nation.” We pass guns laws, drug laws, child molestation laws, etc., with high minimum sentences or tough mandatory sentences with the goal of deterring these crimes. Section III will argue against this faith in deterrence. But even if one has faith in deterrence, there is a big difference between deterring crime and deterring Fourth Amendment violations.

When we pass criminal laws intended to deter a certain crime, we hope that potential criminals will stay far away from such criminal conduct. Thus, for example, we don’t want shady characters perusing the fraud statutes in order to find a scheme that might fall just short of 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 that might violate the law.

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 study after study shows that the sooner that police are able to make an arrest after the crime, the greater the likelihood of conviction. 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 seized – no matter how reliable – will be excluded from use at trial because the
officer was judged to have violated the suspect’s constitutional rights. This puts tremendous pressure on the issue of where an officer should draw the line in a particular situation and, unfortunately, the Court has had a difficult time explaining what the line is.

The heart of Fourth Amendment jurisprudence centers on two concepts that have proven problematic for the Court: probable cause and reasonable suspicion. Attempts to clarify these concepts are of limited usefulness because decisions are inevitably fact-bound and tell officers little about the next situation they will face, except the obvious: it is a close case.

B. Probable Cause

To illustrate the problem with probable cause, consider the leading Supreme Court case on probable cause for warrants, *Illinois v. Gates*,\(^62\) which was decided in 1983. The case began with an anonymous letter to the Bloomingdale Police Department reporting that Sue and Lance Gates were selling drugs out of their condominium and giving their address. The letter also said that they bought their drugs in Florida and, when they made their buys, Sue drove their car to Florida, left it to be loaded with drugs, and then Lance flew down and drove the car back to Illinois. The letter reported that Sue 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.\(^63\)


\(^{63}\) *Id.* at 225.
After receiving the letter, the police were able to corroborate some details consistent with the letter, including the Gates’ 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.\footnote{Id. at 225-26.}

Arrangements were made with drug agents in Florida and when Lance Gates arrived in Florida, the agents followed him and observed him going to a room at a Holiday Inn rented by a “Susan Gates.”\footnote{Id. at 226.} Early the following day, Lance Gates was seen heading north on a highway with a woman in a car with Illinois plates.\footnote{Id. at 226-27.} The police then confirmed through the car’s registration that it belonged to the Gates.\footnote{Id.}

All of this information was put in an affidavit for a search warrant with the anonymous letter attached. Now the question for the judge was whether there was probable cause to search the car and the Gates’ home. The judge decided that there was probable cause and issued the warrant. The upshot was that when the Gates arrived at their home, police were waiting and a search of the car turned up 350 pounds of marijuana.\footnote{Id. at 227.} (The police found more marijuana, weapons and other contraband in the home.\footnote{Id.})

The evidence was suppressed at the trial level and the case went up on appeal. There are, unfortunately, very few guidelines for judges on probable cause. Law professors love to debate
even such a basic issue as how “probable” probable cause needs to be.\textsuperscript{70} The Supreme Court has said that probable does not mean “more likely than not,”\textsuperscript{71} but what if the odds are only one out of five or even one out of ten? Or is probable cause maybe to be determined using a sliding scale in which the nature of the items sought – bomb making materials versus a small amount of drugs - might allow the probability of their being found to vary along the scale?\textsuperscript{72}

We don’t know the answer to many of these questions. But there was one decision that the Court had handed down to help judges with warrants involving anonymous informants, like the warrant in \textit{Gates}. That case is \textit{Spinelli v. United States},\textsuperscript{73} which required such warrants to satisfy a “two-pronged test.” The first prong required that the warrant must 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.\textsuperscript{74}

So was the Gates’ warrant okay under the two-pronged test in \textit{Spinelli}? Well, the Illinois Supreme Court split on the issue with the majority saying that it didn’t satisfy the two-pronged test.\textsuperscript{75} But two justices said this warrant was fine under the test in \textit{Spinelli}.\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{71} See Texas v. Brown, 460 U.S. 730 (1983)(probable cause standard does not demand that likelihood of evidence being present be “more likely than not.”)
  \item \textsuperscript{74} \textit{Id.} at 412-13.
\end{itemize}
The case then went to the United States Supreme Court and again we have a badly split court on probable cause. 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 Gates and hence showed both that the informer was credible and that the informant had gathered the information in the letter in a reliable manner.\(^77\)

The majority suggested disagreement 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 letter writer’s ‘basis of knowledge.’”\(^78\) 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 circumstances” and whether, looking at the warrant, there is “a fair probability that contraband will be found in a particular place.”\(^79\) Using this standard, the majority concluded that the warrant passes with flying colors.\(^80\)

But the saga doesn’t end there, because there were two dissenters on the probable cause issue: Justices Stevens and Brennan.\(^81\) They dissected the warrant very differently from the majority and came to the opposite conclusion. Even under the totality of circumstances test, they concluded that the warrant didn’t show probable cause because there were important discrepancies between the letter and subsequent events. In particular, they noted that the letter

---

\(^76\) 423 N.E.2d 893 (Moran, J., dissenting).


\(^78\) Id. at 246.

\(^79\) Id. at 238-39.

\(^80\) Id. at 246.

\(^81\) Id. at 291 (Stevens, J., dissenting).
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.”

This litany of state and Supreme Court opinions is 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 after the shambles of Gates, the Court tried to withdraw somewhat from the world of probable cause determinations by announcing a year later 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. This is rather ironic. Warrants present the best case for close appellate review of probable cause as the reviewing court has in front of it the exact same information presented to the authorizing magistrate. When it comes to probable cause or reasonable suspicion determinations on the street, a reviewing court will usually have much less information than the officer had when she decided to arrest or stop a suspect whom she suspected of committing a crime.

C. Reasonable Suspicion

---

82 Id. at 291-92.

83 The good faith exception for warrants has helped lesson embarrassing disagreements about probable cause, but they still occur. Consider, from the author’s state, People v. Leftwich, 869 P.2d 1260 (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.
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. 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” behavior or something not even “unusual”. 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, 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. The police, 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 Ms. Bayless’ double-parked car with Michigan license plates at 5 a.m. The four men had crossed the street single file to where Bayless’ auto was double-parked; then the first had opened the trunk, the next two men each deposited one of the duffels in the trunk, and the fourth closed the trunk. This was all done without a single word being exchanged between the men and Ms. Bayless.

84 Id. at 269.
85 Id. at 291-92.
87 Id. at 234-35.
88 Id. at 235.
89 Id.
Ms. Bayless then started to drive away, but stopped shortly at a red light. At this point, the officers, who were in an unmarked car, drove up behind Bayless’ auto where they were also next to the four men who had deposited the duffels into the trunk of Bayless’ auto. Two of the men noticed the officers and spoke briefly to the other men. The four men then moved quickly – “at a rapid gait” – away from the police in different directions.

The officers continued to follow Ms. Bayless for two more blocks and then pulled her over just before she would have entered a major traffic artery. She consented to a search of the trunk where the police found and seized 34 kilograms of cocaine and 2 kilograms of heroin with an estimated street value of $4 million in the trunk of Ms. Bayless’ car. Ms. 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.

But the trial judge in the Bayless case suppressed the drugs and the confession reasoning that the police lacked reasonable suspicion to stop Ms. Bayless as she headed out of New York.

90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id. at 235-36.
96 Id. at 237 n. 10.
97 This is the value that new accounts of the case placed on the drugs. See, e.g., Patricia Hurtado, Judge Changes Mind, NEWSDAY A2 (April 2, 1996).
98 913 F.Supp. at 236.
City on her way back to Detroit. 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. 99

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. 100 A delivery of luggage to a car with out of state plates? New York City is a city of tourists. 101 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. 102 That four men were needed to put two pieces of luggage into a car trunk at 5 a.m.? Completely innocuous. 103 And so on.

It is easy to dismiss the Bayless case as a terrible ruling by an arrogant judge, but the case – suppression or not – shows the problems with the exclusionary rule which requires subtle after-the-fact assessments under a test like reasonable suspicion that has not edges to it. The most obvious problem is the harshness of the rule. Maybe the officers didn’t 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? This makes as much sense as mandating that a drug mule receive ten years in prison irrespective of what her specific involvement was in the drug trade or what pressures may have under to participate. Or


100 913 F.Supp. at 240.

101 Id.

102 Id. at 242.

103 Id.
sentencing a teenager to life without parole without any consideration given to the offender’s age or to what such a sentence means to someone who is so young.\textsuperscript{104} Section III will contend that sentences such as these are unfair for the same reason that the exclusionary rule is unfair – the lack of any sense of proportion between the punishment and the offense.

Besides the obvious fact that “reasonable suspicion” is not a standard, but a judgment call on which reasonable people will often differ, there is today another problem with the law of stop and frisk. According to Court’s template in \textit{Terry v. Ohio}\textsuperscript{105} an officer deciding to make a forcible stop or a decision to frisk someone must be able to articulate to herself the \textit{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. More specifically, the Court noted in \textit{Terry} that a lower court in 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.”\textsuperscript{106}

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

\textsuperscript{104} The issue of whether a life sentence without parole for teens – one of whom committed a rape when he was only 13 – violates the Eighth Amendment’s cruel and unusual punishment provision was argued in the Supreme Court on November 9, 2009 and is presently pending decision. See Graham v. Florida (08-7412) and Sullivan v. Florida (08-7621). There are presently 77 teenagers serving life without parole in Florida and 33 in other states. See Adam Liptak, \textit{Weighing Life Without Parole for Youths Who Didn’t Kill}, \textsc{New York Times}, November 2, 2009, available at: http://www.nytimes.com/2009/11/08/us/08juveniles.html

\textsuperscript{105} 392 U.S. 1 (1996).

\textsuperscript{106} 392 U.S. at 27.
there is something amiss is being challenged on many fronts today. Neuroscience suggests that many of important decisions – in fact, some of our basic moral judgments – are based on intuitions or feelings that we may not be able to explain.¹⁰⁷

This is especially the case with perceptions of dangerousness. An article in the New York Times, entitled 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 can’t explain what has triggered this sensation.¹⁰⁸ The article explains that this ability to sense or feel something is wrong, without always being able to explain it, sometimes saves lives when soldiers are on patrol.¹⁰⁹

One scientist, Dr. Antonio Damasio of the University of Southern California, explained in the Times article how research has changed our view of decision-making:

Not long ago people thought of emotions as old stuff, 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.¹¹⁰


¹⁰⁹ Id.

¹¹⁰ Id.
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. Some of this research on the way we “think without thinking,” is discussed in Malcolm Gladwell’s bestseller, BLINK: THE POWER OF THINKING WITHOUT THINKING.

What this research suggests for reasonable suspicion is 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 can’t do better by way of explanation. It also explains why, in a quickly developing situations like the drug drop in Bayless, there will likely be layers of information that the officers had available to them at a subconscious level that they may not be able to articulate.


113 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 this patient would have trouble surviving the night. Yet, she states, that nothing in the charts of the patient supported her intuition. See http://community.nytimes.com/comments/www.nytimes.com/2009/07/28/health/research/28brain.html.

Malcolm Gladwell’s book is full of similar cases of someone who can see something will happen, but cannot explain why. One of them is the famous tennis coach, Vic Braden, who could watch a match 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. See MALCOLM GLADWELL, supra note at 48-51.
Obviously, this does not mean that officers don’t act on improper motives in making stops or in deciding to frisk someone. Nor does it mean that the Court should give officers carte blanche in investigating crime. But a powerful deterrence-based exclusionary rule that puts very heavy emphasis on an after-the-fact review of “reasons” for stops and frisks assumes an epistemological premise that runs counter to research suggesting that we sometimes sense danger before we can reason to it and, even when we are proven correct, we may not be able to explain after the fact why we sensed danger.

Section III: Deterrence and Injustice

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.\textsuperscript{114} In Chapter XII on The Purpose of Punishment, Beccaria wrote:

\begin{quote}
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
\end{quote}

\footnote{\textsuperscript{114} See Cesare Beccaria, On Crimes and Punishments, and Other Writings, translated by Aaron Thomas and Jeremy Parzan (2008)(Translation of Dei delitti e delle pena, published 1764).}
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.\textsuperscript{115}

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. But notice that Beccaria is not endorsing deterrence through the imposition of \textit{harsh} penalties. (Beccaria actually believed in mild penalties and was a strong opponent of the death penalty.\textsuperscript{116}) Rather, Beccaria declares that punishments must be chosen such that “\textit{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. In the drug area, we have seen many states pass laws with high mandatory minimum sentences. Some of the best known are the New York’s “Rockefeller drugs laws” (passed when Nelson Rockefeller was the governor) which imposed sentences ranging from a minimum of 15 years to life up to 25 years to life on

\begin{flushright}
\textsuperscript{115} \textit{Id.} at 28 (Chapter XII).
\end{flushright}

\begin{flushright}
\textsuperscript{116} \textit{See JAMES WHITMAN, HARSH JUSTICE 50 003)(“…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.” )}
\end{flushright}

Beccaria in his essay aligns himself with Montesquieu in declaring that “every punishment that does not derive from absolute necessity is tyrannical.” \textit{See CESARE BECCARIA, supra note at 11 (Chapter II).}
those selling two ounces of heroin or cocaine or possessing 4 ounces of these drugs. 117 (This put the punishment level for these drug crimes at the same level as murder.)

Nearly as well know 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. 118

The federal system also passed a set of 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. 119 These statutes are notorious not just for their high mandatory minimum sentences, but also for the disparity in their treatment of crack cocaine compared to powder cocaine with possession with intent to distribute of only 50 grams of crack cocaine requiring a ten-year minimum sentence where only those with 5 kilograms of powder cocaine would receive a mandatory ten-year sentence. 120

The exclusionary rule is admittedly a somewhat different situation as no individual goes to prison if a court suppresses evidence. But the theory has the same flaws as harsh deterrent

\footnote{117 See N.Y. Penal Law §§ 220.00-.65 (McKinney 2000). These laws were only recently scaled back. See Jeremy W. Peters, Albany Reaches Deal to Repeal ’70s Drug Laws, N.Y.TIMES March 25, 2009, available at: http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html.}

\footnote{118 See Mich. Comp. Law Ann. § 33.7401 (West 2004). This law – referred to later by the governor who signed it as a “draconian mistake” - was finally modified 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).}

\footnote{119 See 21 U.S.C. §§ 841-865.}

\footnote{120 This sharp disparity in crack versus power cocaine has had an enormous racial impact on incarceration rates for blacks since the amount of crack cocaine required for a ten-year minimum is small and crack cocaine tends to be the form of cocaine most affordable by citizens in poorer urban communities. See David Sklansky, Cocaine, Race, and Equal Protection, 47 STAN. L. REV. 1283 (1995).}
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.”

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 remedy that would allow a court to consider factors such as the pressures the officer was under at the time, the nature of the violation, the seriousness of the crime, and the importance of the evidence in deciding whether to suppress would not have just as strong a deterrent effect?

The answer to questions such as these is that we don’t know the answer. In 1961, the efficacy of strong deterrent punishments may have seemed self-evident. But, fifty years later, we can say after considerable experience attempting to measure the effects of powerful deterrent punishments that deterrence is more complicated than we thought.

The classic case is, of course, the death penalty. The death penalty would seem a perfect instrument against which to determine whether the penalty of death has a strong deterrent effect when compared with the lesser punishment of life imprisonment. There are states that have had the death penalty for many years and some that have never had the death penalty. There are careful statistics on murder rates over the years so we know where the rates are increasing and declining. We also have developed powerful mathematical tools over the last fifty years, such as multivariate regression analysis, that can be applied to the data to help determine whether the
death penalty deters. But what we have observed with the death penalty – an issue that is more straightforward than the exclusionary rule is – that we don’t know if the death penalty deters. Instead, what we see is an ebb and flow 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 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 the period 1933-1969 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. He estimated that for each execution approximately seven or eight murders were deterred.

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. It was claimed that Ehrlich’s data was skewed by the seven-year period from 1963-69 and that Ehrlich had claimed that executions in that period had triggered a decline in homicides during those same years. But the problem was that the decline in homicides in that

---


122 Id.


124 Id.
period had taken place across all states, including those that did not have the death penalty, so that Ehrlich’s model did not show a correlation between executions and murders. 125

Because Ehrlich’s study had caused such an uproar in the academic community, the National Academy of Sciences put together a panel chaired by Nobel Laureate Lawrence Klein to evaluate Ehrlich’s work. The panel concluded that “the available studies provide no useful evidence on the deterrent effect of capital punishment.”126 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.”127

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 20 years of data from 3054 counties to test the effect of county differences on murder rates and estimated that each execution prevents as many as 18 murders. 128 This was followed the same year by a

125 See John Donohue & Justin Wolfers, The Death Penalty: No Evidence for Deterrence, ECONOMISTS’ VOICE, 1, 2 (April 2006) at http://www.bepress.com/cgi/viewcontent.cgi?article=1170&context=ev
127 Id.
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 save five murders.\textsuperscript{129}

Not surprisingly, as was true of the Ehrlich study, other economists quickly followed up claiming that not only that these studies are flawed,\textsuperscript{130} but that it is doubtful any econometric analysis can tell us whether the death penalty has a deterrent effect or not.\textsuperscript{131}

In an article entitled, \textit{Learning from the Limitations of Deterrence Research}, Michael Tonry, a leading criminologist, reviews 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.\textsuperscript{132} He notes that each legislative initiative was claimed to be supported by research showing that the law would have deterrent effects, but in each case, the research findings were “subsequently repudiated,” but the


\textsuperscript{131} After exhaustively reviewing the death penalty studies, Donahue and Wolfers, \textit{supra} n. at 843, summarize their findings as follows:

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.

legislation remained in place nonetheless.\textsuperscript{133} Based on this experience, he cautions that “policy makers should set very high standards when considering evidence about deterrent effectiveness of penalties before adopting policies based on deterrence rationales.”\textsuperscript{134}

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

\textit{C. Does the Exclusionary Rule Deter?}

If we don’t 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 for serious crimes. While certainly not perfect, as some victims may just “disappear,” nonetheless we have a pretty accurate idea how many homicides are committed each year.

But when it comes to violations of the Fourth Amendment, it is difficult to know how many violations of the Fourth Amendment take place on a daily basis in a given jurisdiction for

\textsuperscript{133} Id. at 282-83.

\textsuperscript{134} Id. at 283.
several reasons. First, many such violations – one suspects the vast majority of these violations –
will not be reflected in a statistical database because they will not lead to a formal arrest or
prosecution. If the goal of the officer is simply to harass and humiliate the citizen, then that goal
is achieved by the constitutional violation alone. Secondly, many citizens who are the subject of
unconstitutional actions will be reluctant to report such abuse to police authorities, perhaps
feeling that it will only make them subject to greater abuse in the future (especially if 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.”

Thirdly, 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. The Supreme Court prefers to gloss over that problem by condemning
constitutional violations by “the State.” But there are many different loyalties and
responsibilities lying behind the concept of “the State.” Prosecutors enforce state law, but they
are most often county employees and handle criminal cases for that county. The police may work
for the county, but they may also be employed by a city within the county. 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.

Even in situations where there is a single police agency that works on a daily basis with a
particular prosecutors’ office, the relationship between the two entities will often be
complicated. The two offices may work closely on important cases, but there are often likely to be tensions between the police agency and the prosecutors’ office over some prosecutorial policies and priorities. Or there may be strong differences of opinion over the way certain crimes have been resolved, with the police, perhaps, feeling that certain plea bargains were maybe too generous considering the strength of the evidence and the nature of the crime the defendant committed. In such cases, perhaps the police may feel that their investigative efforts were underutilized and underappreciated.

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 has a strong deterrent effect on police 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 would have very little bearing on the answer.

135 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 Craig Bradley, Red Herring or the death of the exclusionary rule?, 45 TRIAL 52, 53 (April 2009). When reviewing courts are often divided on the issue on which suppression is based, this account of what should happen seems simplistic and naïve.
Another way to understand the problem of police professionalism is to recall that for a period of eight years, ending only on July 20, 2009, the Los Angeles Police Department (LAPD) operated under the direct supervision of the Civil Rights Division of the United States Department of Justice 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.”

Additionally, the Justice Department 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. The failure to investigate adequately complaints of misconduct meant that officers engaging in such conduct were “unlikely to be discovered and disciplined” and were, thus, “not deterred from engaging in misconduct.”

136 See Laura Conway, Justice Frees LAPD from ‘Rampart Scandal’ Consent Decree, at http://www.npr.org/blogs/thetwo-way/2009/07/judge_frees_lapd_from_rampart.html (explaining the ruling by U.S. District Judge Gary Frees lifting the decree under which independent monitors had been imposed over the police department).


138 Id.

139 Id.
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 one does read news accounts suggesting widespread levels of shocking police misconduct in other major U.S. cities140) or even to suggest a large percentage of officers in Los Angeles engaged in such behaviors. But rather, its existence puts the exclusionary rule in perspective. The exclusion of evidence unconstitutionally seized 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 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 and would not be justified on its supposed deterrent effect.

_D. Harsh Punishments and Their Toll on Integrity_

But if the exclusionary rule cannot be shown to be the powerful deterrent its supporters claim or, in fairness, if critics, such as the author, 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 the author to contend that the exclusionary rule hamstrings 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

---

140 For example, the New York Times reported in 2007 that a federal investigation was taking place into what they 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 Department is Widespread_, N.Y. TIMES A18, Apr. 27, 2007.
cases where perpetrators of terrible crimes have gone free as a result of the exclusionary rule.141 But the author doesn’t believe it to be the case that large numbers of defendants charged with serious crimes go free because, in Justice Cardozo’s words, “the constable has blundered.”

Nor does the Article base its critique on empirical research 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.142 While some of the numbers reported in this study are troubling – a 7.7% increase in robberies and a whopping 18% increase in assaults143 – the author 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,144 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 end up eroding the integrity of the system. The system – judges, prosecutors and defense attorneys – tries to find ways around the harshness in various ways. We are, of course, accustomed to that in plea bargaining where well-founded charges get dropped or “reshaped” in a bargain that spares

141 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 AND MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN’T GIVE PEOPLE WHAT THEY DESERVE 120 (2005).


143 Id. at 166.

144 Id.
the defendant the deterrent punishment. Thus, if there is a harsh mandatory punishment for possession of an amount in excess of 500 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 considerable greater than the amount that was bargained. ¹⁴⁵

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 sentencing guidelines regime – now thankfully reduced in importance by a Supreme Court decision making them advisory only¹⁴⁶ – sentencing was supposed to be based on the defendant’s “real offense,” not her offense of conviction. This threatened lots of defendants with very harsh sentences compared to what they would receive for similar crimes in state courts or under the pre-guidelines regime in federal court. To solve this problem, prosecutors and defense attorneys would frequently stipulate as to the “facts” in the case and judges were only to happy to accept these stipulations as to the facts.¹⁴⁷

¹⁴⁵ See Cassia C. Spohn, *Sentencing Options and Sentencing Process*, in *Critical Issues in Crime and Justice* 277, 293 (Allen Roberts ed., 2nd Ed. 2003). (explaining how prosecutors charge a lesser amount of drugs in charging so as to obtain the agreed sentence bargain where a higher penalty would be mandatory if the full amount were charged)


Professor Kate Stith, an expert in sentencing in federal court, reports a study that concluded that prosecutors did not fully apply Guideline enhancement factors, as they were required to do when the Guidelines were in full effect, in approximately one-third of cases.\textsuperscript{148}

This is not surprising as it is often noted that institutional actors routinely circumvent most habitual offender and three-strike laws because the penalties conflict with the prevailing sentencing norm as to what is a fair and just sentence for what the defendant has done.\textsuperscript{149}

The penalty of suppression takes a similar toll on the system’s honesty. 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 referred to in the literature as “testilying.”\textsuperscript{150} We don’t know how often this happens, but we know it happens. In the right case, facing suppression of important evidence, police may 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 skeptical of the officers’ testimony were the crime less serious.

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

\textsuperscript{148} Id. at 1450.

\textsuperscript{149} See Tonry, supra note at 281.

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.\textsuperscript{151} 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.”\textsuperscript{152}

Simon Mount, in an article comparing the proportional approach to exclusion that one finds in Canada, New Zealand, and other common law countries with the theoretically unforgiving deterrent approach to police errors in search and seizure in the United States, suggests that “in reality, courts [in all systems] balance interests: the only question being whether they do it explicitly in their decisions, or implicitly behind the language of rules.”\textsuperscript{153}

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

---

\textsuperscript{151} Donald Dripps gives the following account of the “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, \textit{The Case for the Contingent Exclusionary Rule}, 2001 \textsc{Amer. Crim. L. Rev} 1, 21.


making the application of these sanctions haphazard and inconsistent), the system will try to avoid strict application of the exclusionary rule where the result would be disproportional and unfair.

E. The Infectiousness of Deterrence

Were the only cost of the exclusionary rule the impact on the system’s dishonesty, we could continue to tolerate it. This is especially the case in a system that embraces wide-open plea bargaining where possible violations by the police can sometimes be leveraged by the defense into a more attractive plea bargain that keeps matters out of court.

But the Court’s endorsement of tough deterrent sanctions in *Mapp* and its progeny takes a tremendous toll on the system in a very different way. To understand this harm requires, first, a frank acknowledgement of what has taken place in the criminal justice system over the last forty years. Today, unless you live in a cave, it is common knowledge that the United States has a very large percentage of its citizens in its prisons and jails. The New York Times in an article entitled, *Inmate Count in U.S. Dwarfs Other Nations*, reported that as of 2008, the United States

---

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

had 751 citizens incarcerated for every 100,000 of its citizens.\textsuperscript{156} This compares to only 151 per 100,000 in England, 108 per 100,000 in Canada, and 88 per 100,000 in Germany.\textsuperscript{157} More disturbing is the fact that the incarceration rate in the United States was fairly stable – hovering the range between 150 to 175 citizens incarcerated per 100,000 in the period from 1925 until about 1975.\textsuperscript{158} But in the late 1970s, the incarceration rate began to climb sharply until the United States became the exception that it is today in the extremely high percentage of its citizens who are incarcerated.\textsuperscript{159}

But it is not the number of sentences imposed that distinguishes the United States from other western countries – some European countries have higher per capita rates for citizens sentenced to prison – but rather the sharp increase in the length of sentences over that has come to set the United States over the last four decades. Thus, for example, burglars in the United States serve on average 16 months in prison, while burglars generally only serve 5 months in Canada or 7 months in England.\textsuperscript{160} The sentencing disparities between the convicts in the United States and their European counterparts are greater, often five or ten times more than offenders would receive for the same crime.\textsuperscript{161}


\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} See \textsc{James Whitman, Harsh Justice} 57 (2003)(reporting that sentences in the United States are five or ten times more than a defendant would receive for the same crime in France and the disparity between U.S. sentences and German sentence would likely be even greater).
But what has caused this increasingly punitive approach to criminal sentencing in the United States over a period when the country experienced tremendous prosperity and when crime rates for most crimes, other than homicide, were not materially different from the rates in other western countries? This is a complicated question and certainly there are many factors, such as the U.S. tradition of elected judges and elected prosecutors that make the U.S. more susceptible to movements demanding tougher crime policies and the movement to restrict judicial sentencing authority through determinate sentencing.

Another factor offered for the increase is the so-called “war on drugs” which caused a major increase in the proportion of prisoners incarcerated for drug crimes in the federal system and, to a lesser extent, in state systems.

But sentences have increased for all crimes in the United States, not just from drug crimes, with the result that prison sentences in the United States are much, much harsher than a similarly situated defendant would receive for the same crime in other western countries.

What is underappreciated in the attempts to explain the skyrocketing U.S. incarceration rate is the infectious way in which harsh deterrent penalties – once allowed into a criminal justice system - will tend to push all sentences higher.

The most obvious way is, of course, the pressure that one harsh deterrent sanction puts on legislatures for more such sanctions. Thus, if a jurisdiction chooses to impose a ten-year

---


163 See JAMES WHITMAN, supra note at 53-56 (describing the movement in the 1970s by liberals to protect defendants from arbitrary judicial sentencing authority through a system of determinate sentences which backfired when legislatures enacted increasingly harsh determinate sentences).

164 See Liptak, supra note; MARC MAUER, supra note at 166-69.

165 See text at note supra.
sentence on a defendant who sold a large amount of cocaine, no matter the offender’s background or the circumstances that led the defendant into the crime, why would that jurisdiction choose not to take the same route for much more serious crimes, such as child molestation or rape or armed robbery? In a world where it cannot be shown that a harsh punishment does not deter, and given public pressure to do something about crime, it is logical that legislators would take the contemporary version of Pascal’s wager, 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 or carjacking, legislators are likely to opt for high minimum sentences even if they would be too harsh for many who might commit the crime in question.

High mandatory minimum sentences will also be very likely to increase sentences for other crimes even if judges have considerable discretion in sentencing for these other crimes. One explanation for this stems from the research of Professor Paul Robinson and others who have demonstrated that, even across demographic, gender, and cultural lines, citizens possess broadly share intuitions about the relative blameworthiness of different criminal acts.166 Given these shared intuitions, one should expect that powerful deterrent punishments for even a handful of crimes would eventually have an impact on the sentences for crimes that everyone would consider far more serious. Thus, if five years is the required minimum sentence for possession of cocaine, it will put tremendous pressure on judges to sentence at least close to that level or even higher for the many crimes that all would consider far more serious crimes.

In short, though we may not have a strong societal understanding of the exact sentence that a crime like aggravated assault or menacing or sexual abuse of a minor deserves as “just dessert” for what was done,\textsuperscript{167} we know quite well that these crimes are more serious than possession of cocaine and sentences will tend to reflect our scale of the relative blameworthiness of different criminal acts. Thus, a criminal justice system with only a few statutes mandating high minimum sentences will tend to push other sentences higher.

\section*{Section IV: The Court’s Responsibilities with Respect to the Proportionality of Punishment}

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

\textsuperscript{167} Part of the movement away from discretionary sentencing by judges and toward sentencing controlled by guidelines was the result of studies showing that judges given the exact same sentencing files arrived at very different, sometimes wildly different, sentencing decisions. In one study, 50 federal judges in the Second Circuit were given 20 identical files and asked what sentence they would impose. The results showed a “glaring disparity” where, for example, one judge gave a union official convicted of extortionate credit transactions 20 years imprisonment and a $65,000 fine, where another judge would have sentenced the same defendant to 3 years imprisonment and no fine. This study and others were reported in Alan M. Dershowitz, \textit{Background Paper in FAIR AND CERTAIN SENTENCING}, 67, 102-05 (1976).
punishments should be proportional to the offense in question.\textsuperscript{168} Other countries wisely understand that if you depart from proportionality, the results will not only be unfair to those being punished, but the results will sometimes be tragic for many citizens.

By way of contrast, consider two appellate decisions from Canada, a country with crime rates that track the rise and fall of U.S. crime rates\textsuperscript{169} but with an incarceration rate of only 108 citizens incarcerated per 100,000, which is roughly one-seventh the U.S. rate.\textsuperscript{170} Equally remarkable, Canada’s incarceration rate has remained steady during the period from 1970 to the present day when the U.S. rate shot skyward.\textsuperscript{171}

\textsuperscript{168} 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 in a range “proportionate to the gravity of the crime, the harms done to the victim, and the blameworthiness of the offender.” Section 1.02(2)(i), 2007 Draft, MODEL PENAL CODE (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.” Section 1.02(2)(ii), 2007 Draft, MODEL PENAL CODE (approved by the American Law Institute in May 2007).

\textsuperscript{169} Canadian researchers report that Canada has a crime culture that has been similar to the United States over the last forty years and its crime rates track the rise and fall of those rates in the United States over the same period. See Anthony N. Doob & Cheryl Marie Webster, \textit{Countering Punitiveness: Understanding Stability in Canada’s Imprisonment Rate}, 40 LAW & SOC. REV. 325, 326028 (2006).

\textsuperscript{170} The incarceration rate in the United States is 751 citizens per 100,000 while that in Canada is 108 per 100,000 citizens. See text at note supra.

In the first case, *R. v. Smith*,\(^{172}\) the Supreme Court of Canada struck down a statute imposing a seven-year statutory minimum on anyone importing drugs into Canada as violative of the protection against cruel and unusual punishment in the Charter of Rights and Freedoms.\(^{173}\) In its opinion, the Court had no trouble concluding that the statutory minimum of seven years would be “grossly disproportionate” to some who might run afoul of this law.\(^{174}\) As an example, the Court mentioned the situation of a young person coming back into Canada from the United States, only to be caught entering Canada with a joint of marijuana.\(^{175}\)

The Government did not dispute that the minimum sentence would be grossly disproportionate for some offenders, but it defended the statute based on the need for a strong deterrent sanction against drug traffickers.\(^{176}\) More specifically, the Government argued that the statute in question was constitutional under Section 1 of the Charter that gives the Government the right to place “reasonable limits” on the rights in the Charter “as can be demonstrably justified in a free and democratic society.”\(^{177}\)

The Court agreed with the Government that the fight against importing and trafficking in hard drugs might be an interest sufficient to limit rights in the Charter, but only if the Government could show that a more limited impairment of rights was not possible.\(^{178}\) Here the

---


\(^{173}\) Section 12 of the CANADIAN CHARTER OF RIGHTS AND FREEDOMS states: Everyone has the right not to be subjected to any cruel and unusual punishment.


\(^{177}\) Section 1, CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

Court pointed out some of the other options that might be just as effective in the fight against drug trafficking, such as limiting the mandatory minimum to those importing a certain amount of drugs or to those who are repeat offenders, or to those who fall into both categories.\textsuperscript{179} The Court concluded that the Government had not made the case for sustaining the statute under Section 1 of the Charter.

The second case is even more intriguing because it involves a harsh deterrent sanction imposed not by statute, but by an individual judge in sentencing a particular defendant. It is hard to know how often individual judges in the United States decide to use their sentencing authority to impose longer than normal sentences for deterrent purposes, but one fears it is a common event, hidden from view by the fact that most sentences within a lawful sentencing range are not reviewable on appeal in most U.S. jurisdictions.\textsuperscript{180}

The Canadian case that dealt with this issue is \textit{R. v. Priest}.\textsuperscript{181} \textit{Priest} involved the sentencing of a young offender with no record who had broken into a convenience store and stolen computer games and other items worth about $2700.\textsuperscript{182} When the storeowner discovered

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{179} \textit{R. v. Smith}, [1987] 1 S.C.R. 1045 at 73.
\item\textsuperscript{180} A leading treatise on sentencing in the United States bluntly summarizes appellate review of sentences as follows:

Most jurisdictions do not afford meaningful review of sentences....Even where review is statutorily recognized, it has seldom been zealously practiced.

\item\textsuperscript{182} \textit{Id.} at § 2.
\end{enumerate}
\end{footnotesize}
the theft and confronted Priest, whom he suspected of the theft, Priest admitted that he and a friend had done the burglary and the defendant returned all of the stolen items.\textsuperscript{183}

Priest pled guilty to breaking and entering, and theft.\textsuperscript{184} At sentencing, the Crown Prosecutor recommended a sentence of 30 to 60 days and probation, but the sentencing judge imposed a sentence of one year in prison on the ground that his docket was full of similar break-ins by young people and that general deterrence demanded a sentence that would protect the public by discouraging such behavior.\textsuperscript{185}

The sentence was quickly vacated on appeal and replaced with a sentence of time-served and probation.\textsuperscript{186} But the Ontario Court of Appeal was so shocked by what the trial judge had done that it felt compelled to write an opinion spelling out that general deterrence can never be the paramount factor in sentencing, but rather the paramount question must always be (quoting from an earlier opinion with emphasis in the original): “[\textit{W}hat should this offender receive for his offence, committed in the circumstance under when it was committed]?”\textsuperscript{187} The court went on to state that the trial judge had been “entirely wrong” to state that the prevalence of break-ins justified a sentence based on general deterrence.\textsuperscript{188} This was, said the court, “a serious error in principle and wholly distorted the decision as to the appropriate disposition.”\textsuperscript{189}

\textsuperscript{183} Id.
\textsuperscript{184} Id. at § 1.
\textsuperscript{185} Id. at § 6.
\textsuperscript{186} Id. at § 1.
\textsuperscript{187} Id. at § 12, quoting from R. v. Sears (1978), 39 C.C.C. (2d) 199, 200 (Ont. C.A.)(emphasis in original).
\textsuperscript{188} Id.
\textsuperscript{189} Id.
The European civil law tradition also insists on proportionality in sentencing. Professor James Whitman in HARSH JUSTICE, 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, 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 system takes it very seriously; and it means that sentences of American severity are effectively impossible.\textsuperscript{190}

In contrast to the European emphasis on proportionality, Whitman observes that the Supreme Court struck a “grievous blow” to proportionality in *Harmelin v. Michigan*,\textsuperscript{191} 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.\textsuperscript{192}

But the Court’s “grievous blow” to proportionality was not *Harmelin*, but *Mapp*. 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 creating its own. In a sense, the Court created a model for controlling troubling social behaviors which legislatures were only too happy to follow. Having expressed its own faith in the belief that we can deter our way out of social problems, the Court cannot easily turn around and condemn attempts by legislatures to do the same.

\textsuperscript{190} See JAMES WHITMAN, supra note at 57.


\textsuperscript{192} See JAMES WHITMAN, supra note at 57.
It is easy to predict that, sooner or later, the Court will have to return to the issue of the proportionality of punishment because harsh deterrent punishments undermine the constitutional protections the Court has developed to protect citizens from the power of the state.

The Canadian Supreme Court understood this when it warned, in *R. v. Smith*, that strong deterrent penalties may give the prosecution an unfair advantage in plea bargaining because they put pressure on defendants to plead to less serious offenses to avoid the deterrent sanction.\(^{193}\)

We are long passed that point in the United States. In *Bordenkircher v. Hayes*,\(^{194}\) a prosecutor offered to recommend a five-year sentence for Hayes, who had been charged with uttering a forged check in the amount of $88.30, if he would plead guilty.\(^{195}\) But the prosecutor warned Hayes that if he refused the offer and did not “save the court the inconvenience and necessity of trial,” he would indict Hayes as an habitual offender and Hayes would get life if he were convicted.\(^{196}\) Hayes chose to go to trial, was convicted of forgery and being an habitual offender and received a life sentence.\(^{197}\)

In the end, Hayes received a sentence that was 300 or 400 per cent higher than he would have received otherwise because he refused to spare the trial court “the inconvenience and necessity of trial.”


\(^{194}\) 434 U.S. 357 (1978)

\(^{195}\) Id. at 358.

\(^{196}\) Id. at 358-59.

\(^{197}\) Id. at 359.
As legislatures continue to pass laws mandating tough deterrent sentences, fewer and fewer defendants – even those with colorable defenses\(^{198}\) – can afford the risk of asserting their rights and going to trial. In some jurisdictions, the absolute number of criminal trials is less than it was thirty or forty years ago.\(^{199}\)

Unfortunately, having permitted harsh deterrent sanctions to take root in our criminal justice system, it will be hard to remove them because they offer many institutional advantages. Judges can keep tight control of their criminal dockets as cases plead out. Prosecutors have high conviction rates. And defense attorneys can show their clients the actual years in prison they avoided by pleading guilty. But, in the end, defendants pay a very high price for these sanctions in the United States.

**Conclusion**

This Article urges that the Supreme Court overrule *Mapp v. Ohio* and its commitment to a tough exclusionary rule based on deterrence. The author argues that the rule is somewhat outdated in its structural and epistemological assumptions and that it takes a toll on the integrity of the system. But we have lived with the exclusionary rule for close to fifty years and we can


\(^{199}\) On the decline in the absolute number of criminal trials in the federal system and many state systems, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEG. STUD. 459 (2004).
continue to live with it. The Article contends, however, that the real problem with *Mapp* and its progeny is the Court’s endorsement of a deterrent sanction that doesn’t care about the circumstances of the violation and threatens a sanction that is out of proportion to the officer’s error. What the Court has done with the exclusionary rule is give its imprimatur to tough deterrent punishments and this is a tragic mistake that needs to be remedied by taking a first step that sounds more sweeping than it really is: overruling *Mapp* and rebuilding the exclusionary rule on a proportional basis, such as one finds in many other countries.

In *Herring*, we observe a Court that has a core of justices who seem ready to rethink the exclusionary rule. To the great consternation of scholars, *Herring* held that some negligence by police officers – in *Herring*, the failure of a police employee in a neighboring county to clear a warrant from a computer database – will not support a sufficient deterrent effect to support suppression.

The previous sentence states that “some negligence” will not justify suppression because the scope of *Herring* is unclear. Part of the Court’s opinion seems narrowly focused on the particular error before the Court - an isolated recordkeeping error by a police employee at some distance from the time and place of arrest. Thus, the Court describes the error in *Herring* as “isolated negligence attenuated from the arrest.”

But there are passages in the majority opinion that seem to suggest that the exclusionary rule should not apply to any merely negligent police error.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases,

---

the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.\textsuperscript{201}

While there are early indications that lower courts are tending toward a broad interpretation of \textit{Herring},\textsuperscript{202} one can expect conflicts in the application of \textit{Herring} so that that the Court will have many opportunities to revisit \textit{Herring} to provide better guidance on its intentions.

Obviously, this Article hopes that \textit{Herring} does not end up as yet another loophole – possibly a very large loophole – that courts will employ to avoid application of the exclusionary rule in difficult cases by declaring that the police action under consideration was “only negligent” and not “grossly negligent.” Rather this Article hopes that \textit{Herring}, and \textit{Michigan v. Hudson}, portend a Court dissatisfied with the exclusionary rule and looking for ways to rethink exclusion. This Article would urge the Court to begin by turning its back on harsh deterrent sanctions that are disproportional to the violation and opening itself up to an exclusionary rule that would openly allow a judge to consider a range of factors in deciding whether to suppress evidence, including the seriousness of the violation, the culpability of the officer, and the nature of the crime. The Article makes this argument, however, not because police need to be spared

\textsuperscript{201} 555 U.S. (2009).

\textsuperscript{202} Thus, for example, in United States v. Otero, 563 F.3d 1127 (10th Cir. 2009), where a postal inspector searched a computer search based on a warrant that failed the particularity requirement, the Tenth Circuit, denied suppression reasoning that there had been no “flagrant or deliberate violation of rights.”

Another example of a court reading \textit{Herring} broadly is United States v. Toledo, 615 F.Supp. 2d 453, 461 (S.D.W.Va. 2009), where the court suppressed but only because it found that the actions of the police were “not merely negligent, but rather ‘reckless or grossly negligent.’”
harsh deterrent sanctions that are not proportional to the offense in question, but defendants need to be spared those sanctions. Overruling Mapp is a necessary first step to that goal.