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JUDICIAL INTEGRITY: A CALL FOR ITS RE-EMERGENCE IN THE ADJUDICATION OF CRIMINAL CASES

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I. INTRODUCTION

Justice Rehnquist once said that there may be cases "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction."[1] The conduct of law enforcement in the case of Humberto Alvarez-Machain apparently was not sufficiently outrageous.

As a result of an indictment for crimes in connection with the kidnapping and murder of a United States Drug Agent, individuals acting at the request of the Drug Enforcement Administration forcibly kidnaped Alvarez-Machain from his office in Mexico and flew

* Associate Professor, Boston College Law School. The initial impetus for this article came from a talk delivered by Mark Griffin, a visiting scholar at Boston College Law School in the spring of 1993, on the exclusionary/abuse of process doctrine in Australia. Mark is a graduate of the University of Adelaide Law School and has been practicing criminal law since 1979 in South Australia. In addition to his talk, Mark provided me with much research and information with regard to Australia and New Zealand cases. Without his help this article could not have been written.

Many colleagues provided helpful ideas. I wish to thank in particular Arthur Berney, Mark Brodin, Phyllis Goldfarb, Judy McMorrow, Robert Smith and Aviam Soifer. I also wish to thank my research assistant, Barbara Helm, a second-year student at Boston College Law School. Finally, I wish to thank my wife Christina Jameson for her usual superb editing.

[1] United States v. Russell, 411 U.S. 423, 431-32 (1973); *but see* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (asserting that the unlawfulness of an arrest in the federal system has never affected the court's jurisdiction to proceed with a criminal case). This principle is regarded as the *Ker/Frisbie* rule from Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952). Although a possible exception to this rule was suggested in United States v. Toscanino, 500 F.2d 267, 273-75 (2d Cir. 1974), where the action by a United States government agent shocked the conscience, no federal court has ever found this level of conduct sufficient to dismiss jurisdiction over the defendant. *See* Matta Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir. 1990). *See generally* WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 220-39 (2d ed. 1987).

him by private plane to Texas where D.E.A. agents arrested him.[2] He argued at his trial in the United States District Court that the indictment ought to be dismissed due to outrageous governmental conduct and the fact that his abduction violated the Extradition Treaty between the United States and Mexico. The district court and court of appeals dismissed the case on the grounds that the kidnapping violated the Extradition Treaty.[3] In its reversal of these decisions, the Supreme Court held that the treaty had not been violated.[4] Hence, none of the courts hearing *Alvarez-Machain* accepted or reached the argument that outrageous governmental conduct by itself should deny a court jurisdiction over this defendant.

A different approach to these facts might be found in a case which occurred in New Zealand, where a man named Bennett was charged with murder.[5] He claimed that the court lacked jurisdiction because he was illegally brought back to New Zealand from Australia. Apparently the New Zealand police did not have a warrant for Bennett's extradition and merely asked the Melbourne police over the telephone to put him on a plane destined for New Zealand.[6] The Melbourne police complied with the request by removing Bennett from his bed and putting him on the next flight to New Zealand, where he was met at the airport by New Zealand authorities.[7] This conduct was arguably less outrageous than the conduct in *Alvarez-Machain*. However, the Court of Appeal in New Zealand indicated in dicta that had the issue been properly raised at trial, the trial judge would have been justified in discharging the defendant.[8]

> Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the

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2 *Alvarez-Machain*, 112 S. Ct. at 431-32.

3 United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom.*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992). In dealing with the issue of outrageous conduct, the district court judge indicated that no case departed from the rule in *Ker*, which held that the jurisdiction of the court to try a criminal defendant is not impaired by the method by which he is brought to the court's jurisdiction. Although there might be an exception to this rule when the conduct is so outrageous that it shocks the conscience, the conduct did not meet that standard. *Caro-Quintero*, 745 F. Supp. at 605-06.

4 *Alvarez-Machain*, 112 S. Ct. at 2197.

5 *See* Regina v. Hartley, 2 N.Z.L.R. 199 (C.A. 1977).

6 *See id.* at 214 (a warrant was required for lawful extradition).

7 *Id.*

8 *Id.* at 217.

responsibility for seeing that the process of law is not abused.[9]

These two cases graphically demonstrate different approaches to the problem of governmental conduct that is illegal or otherwise offensive. The New Zealand court could not tolerate this type of conduct. The United States federal courts ultimately could tolerate it. This difference highlights the importance of the concept of judicial integrity.

The concept of judicial integrity may be described as the role of the judiciary in leading by example. A court can invalidate or rectify certain kinds of offensive official action on the grounds of judicial integrity. In this way, judges act as a beacon or a symbol to society for ensuring lawful acts by the forces of government. Thus, a court is wise to be cognizant of how its actions will affect the public perception of the judicial system. A court may not sanction or participate in illegal or unfair acts. There are two underlying goals of judicial integrity. First, on a public relations level, the court wishes to be regarded as a symbol of lawfulness and justice. Second, the court has the closely related concern of not appearing to be allied with bad acts. Stated differently, the judge does not want to appear to be associated with illegal actors.[10]

Our ancestors were sensitive to possible abuses of power by the executive and created three branches of government in part to insulate the court system from the evils they perceived in the English system—a system in which the monarchy could utilize the courts for its own design.

> [T]he highest compliment that has ever been paid to the American bench, is embodied in this simple fact, that if the executive officers of this government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals.[11]

The concept of checks and balances is closely tied to the independence and integrity of the judiciary.[12]

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9 *Id.* at 216 (quoting Lord Devlin's remarks in Connelly v. Director of Pub. Prosecutions, 1964 App. Cas. 1354 (H.L.)).

10 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting); United States v. Calandra, 414 U.S. 338, 357-60 (1973) (Brennan, J., dissenting).

11 *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 65 (1866).

12 "The principle of 'checks and balances' embodies the notion that power can be checked only if it is shared; each branch has the right, if not the affirmative duty, to curb the excesses of the others." Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 443-44 (1982). "[A]rticle III serves as an inseparable element of the constitutional system of checks and balances by preserving the role of the Judicial Branch in our tripartite system of government."

The Federalist Papers[13] expressed the importance of protecting the independence of the judiciary so that it can perform its important function of ensuring that the other branches do not overstep their bounds. "The complete independence of the courts of justice is peculiarly essential in a limited constitution."[14] The symbolic function of the judiciary as a safeguard for a society of laws was also stressed.

> The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget and fortify that temper in the courts; as no man can be sure that he may not be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead, universal distrust and distress.[15]

A leading exposition of the concept of judicial integrity can be found in Justice Brandeis' dissenting opinion in *Olmstead v. United States*.[16] The Government in that case used illegal wiretaps to secure evidence of criminal activity. The majority did not find this activity to be violative of the Fourth Amendment and allowed the evidence to be introduced. Brandeis asked rhetorically, "will this Court by sustaining the judgment below sanction such conduct on the part of the Executive?"[17] Brandeis answered his own question as follows:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the

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Peretz v. United States, 111 S. Ct. 2661, 2676 (1991) (Marshall, J., dissenting) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line, 458 U.S. 50, 58 (1982)).

[13] Briefly, the Federalists were proponents of the Constitution, whereas the Antifederalists were wary of a strong national government and wanted direct government by the people at the local level. The Antifederalists did not like the idea of a federal judicial branch of government because they viewed this as another source of danger to individual liberty and to the autonomy of the states. In order to combat these fears of the Antifederalists, the Federalists wrote the Federalist Papers. Although the role of the Federalist Papers in the construction of the Constitution was to persuade the ambivalent, they are still often consulted as a way to understand the theory underlying the Constitution. They are among the classic works in the theory of democracy and the Constitution. *See Federalists and Antifederalists*, *in* 1 CONSTITUTIONAL HERITAGE SERIES 120-21 (John P. Kaminski & Richard Leffler eds., 1989); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 7 (2d ed. 1991).

[14] Limitation refers to power of the legislative authority. *See* THE FEDERALIST No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[15] *Id.* at 528-29.

[16] 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

[17] *Id.* at 483 (Brandeis, J., dissenting).

> whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[18]

Brandeis' major concern was not the right of the individual defendants; rather, he stressed the symbolic protection of the entire government through preservation of "the purity of its courts."[19]

This Article will focus on the federal criminal justice system through an examination of decisions of the United States Supreme Court. In earlier times, the Supreme Court was more willing to utilize notions of judicial integrity to constrain individuals who act under official license. One finds the concept of judicial integrity being used initially to justify the Fourth Amendment exclusionary remedy,[20] to sanction the Court's use of supervisory powers,[21] and, to a lesser extent, to justify the application of due process.[22] The majority of the current Supreme Court, however, has retreated from the use of the doctrine of judicial integrity, such that judicial integrity is no longer regarded as a justification for the exclusionary rule.[23] In addition, the viability of the judicial integrity doctrine has deteriorated as the Court has limited the use of its supervisory powers.[24] Moreover, there is substantially less flexibility inherent in due process, especially for the investigative stage of the criminal process, due to the selective incorporation of the Bill of Rights.

By way of contrast, examples from Australia and New Zealand[25]

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18 *Id.* at 485 (Brandeis, J., dissenting).

19 Casey v. United States, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting); *see also Olmstead*, 277 U.S. at 471-85 (Brandeis, J., dissenting).

20 Courts may exclude evidence found as a result of illegal police activity. This "exclusionary rule" was first ennunciated in Weeks v. United States, 232 U.S. 383, 398 (1914).

21 Supervisory powers allow the Court to implement some sort of remedy for activity that it finds offensive. United States v. Payner, 447 U.S. 727, 744 (1980) (Marshall, J., dissenting).

22 Judicial integrity as a due process concept was developed in Rochin v. California, 342 U.S. 165 (1952), where the Court refused to sanction "conduct that shocks the conscience." *Id.* at 172.

23 *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347 (1973) (the rule's primary purpose is to deter future unlawful police conduct); United States v. Janis, 428 U.S. 433 (1976) (same).

24 *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

25 Although it is certainly not clear that the ultimate result in Australia and New Zealand of exclusion or other remedies for bad acts by the executive will differ that signifi-

will be utilized to demonstrate that the doctrine of judicial integrity has re-emerged and gained force in these countries as illustrated in the language of their courts which, ironically, sometimes cite United States Supreme Court decisions. Finally, this Article will argue that the pendulum has swung too far toward neglecting concerns inherent in the principles of judicial integrity, and that the doctrine of judicial integrity must be restored in the United States.

II. THE EXCLUSIONARY RULE

Concerns for the idea of judicial integrity played a large role in the development of the Fourth Amendment exclusionary rule. As this Article will demonstrate, more recent decisions have devalued the importance of judicial integrity and have largely eliminated it as a justification for the rule. Two previously mentioned and interconnected concerns with the concept of judicial integrity can be found by looking at the roots of the exclusionary rule. First, the Court should be a symbol to the public as the guarantor of the rights provided by our laws. Second, the Court should not participate in the sanctioning of illegal acts.

In the early case of *Weeks v. United States*,[26] which barred the use of evidence in federal prosecution if obtained by federal officers in violation of the Fourth Amendment, the Court indicated the symbolic importance of failing to sanction government misdeeds. "The tendency of those who execute the criminal laws of the courts to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgment of the courts."[27]

In *Elkins v. United States*,[28] the Court went on to suppress evidence illegally obtained by a state officer when the prosecution sought to introduce the evidence at a federal criminal trial.[29] This practice is known as the "silver platter" doctrine because a state official delivered illegally obtained evidence, on a so-called silver platter, for a federal prosecution and thereby avoided the exclusion remedy which, prior to *Elkins*, only barred evidence obtained by federal officials.[30] In *Elkins*, the Court spoke of "the imperative of judicial integrity" and decried a situation in which the judge was in any

cantly from the United States, the Australian and New Zealand courts at least consider judicial integrity in their analyses whereas the United States does not.

26 232 U.S. 383 (1914).

27 *Id.* at 392.

28 364 U.S. 206 (1960).

29 *Id.* at 223.

30 *Id.* at 208.

way a participant in the willful disobedience of the law.[31] To support this position, the Court cited the dissenting opinion of Justice Holmes in *Olmstead v. United States* for the proposition that the government was still the same government whether it was acting as a prosecutor or as a judge.[32]

With *Weeks* and *Elkins* as precedent, the Court in *Mapp v. Ohio*[33] applied the exclusionary remedy for Fourth Amendment violations to state prosecutions. *Mapp* reiterated the language about judicial integrity in *Elkins* and in *Weeks* to support its holding.

> But as was said in *Elkins*, 'there is another consideration—the imperative of judicial integrity.' The criminal goes free if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.[34]

The majority in *Mapp* concluded:

> Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and to the courts, that judicial integrity so necessary in the true administration of justice.[35]

In addition to judicial integrity, the Court relied on deterrence as a seperate and distinct justification for the exclusionary rule. The *Mapp* Court, quoting *Elkins*, stated that, "only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.' "[36]

The judicial integrity justification for the exclusionary rule was short-lived. In *Linkletter v. Walker*,[37] decided a mere four years after *Mapp*, the Court refused to give retroactive effect to cases decided prior to *Mapp*. The Court announced the prime justification for *Mapp* to be that the exclusionary rule was the only effective way to

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31 *Id.* at 222.

32 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).

33 367 U.S. 643 (1961).

34 *Id.* at 659 (quoting *Elkins*, 364 U.S. at 222).

35 *Id.* at 660.

36 *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217).

37 381 U.S. 618 (1965). It should be pointed out that we are limiting our analysis to Supreme Court decisions. As the Supreme Court has retreated from the exclusionary rule, there has been a movement in some states through the interpretation of their own constitutions to maintain the exclusionary rule as well as the concept of judicial integrity. *See* Daniel P. O'Brien, *Recent Decision*, 65 TEMP. L. REV. 733 (1992); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability*, 64 WASH. L. REV. 19 (1989).

deter lawless police action.[38] Because the misconduct had already occurred and would not be corrected by releasing the prisoners, the Court refused to apply *Mapp* retroactively. To the extent that the Court bothered to mention judicial integrity, it did so only in the context of the administrative nightmare that would occur if there were to be a rehearing on the exclusion of evidence when the evidence no longer existed and when witnesses were no longer available.[39]

Subsequent decisions further demonstrated that the Supreme Court discounted judicial integrity as a viable justification for the exclusionary rule. In *United States v. Calandra*,[40] for example, the Court explicitly stated "the rule's prime purpose is to deter future unlawful police conduct."[41] Significantly, Justice Brennan's dissent classified this explanation of the exclusionary rule as a "downgrading" of the rule and as inconsistent with the intent of the Framers of the Constitution.[42] He pointed out that, in adopting the Fourth Amendment, the Framers sought to curtail the government from evil conduct, and it followed, Justice Brennan said, that the Framers recognized the need for an enforcement mechanism.[43] This mechanism had to be "capable of administration by judges."[44] This led him to articulate the dual purposes of the concept of judicial integrity discussed above. He viewed these goals as "uppermost in the minds of the framers," namely, to have the Court serve as a symbol to maintain fundamental rights[45] and to avoid any complicity in illegal government conduct.[46]

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38 *Linkletter*, 381 U.S. at 637.

39 *Id.*

40 414 U.S. 338 (1973) (involving the applicability of the Fourth Amendment exclusionary rule at grand jury proceedings).

41 *Id.* at 347.

42 *Id.* at 355-67 (Brennan, J., dissenting).

43 *Id.* at 356-57 (Brennan, J., dissenting).

44 *Id.* at 357 (Brennan, J., dissenting).

45 *Id.* at 357-58 (Brennan, J., dissenting) (citing Weeks v. United States, 232 U.S. 383, 391-92, 394 (1914) and Olmstead v. United States, 277 U.S. 438, 485 (1928)).

46 *Id.* at 360 (Brennan, J., dissenting). Justice Brennan continued:

> For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal governmental conduct. This rejection of 'the imperative of judicial integrity,' openly invites '[t]he conviction that all government is staffed by . . . hypocrites, [a conviction] easy to instill and difficult to erase.' When judges appear to become 'accomplices in the willful disobedience of a Constitution they are sworn to uphold,' we imperil the very foundation of our people's trust in their Government on which our democracy rests.

Id. (Brennan, J., dissenting) (alterations in original) (quoting Elkins v. United States, 364 U.S. 206, 222-23 (1960)). *See also* Lee v. United States, 343 U.S. 747, 758-59 (1952) (Frankfurter, J., dissenting); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 258 (1961).

The next step in the demise of judicial integrity was to redefine it. In *United States v. Janis*,[47] the Court refused to apply the Fourth Amendment exclusionary rule to civil proceedings and lumped judicial integrity concerns with the deterrent rationale. The Court justified this approach by characterizing judicial integrity in the following limited fashion: "the courts must not commit or encourage violations."[48] Because violations already had occurred, there could be no encouragement at the time the evidence was presented to the Court.

Even more forceful criticism of judicial integrity as a justification for the exclusionary rule appeared in *Stone v. Powell*.[49] The *Stone* Court pointed out that if one were to extend the rationale of judicial integrity to its logical conclusion, the court would have to exclude anything illegally obtained even if the defendant did not object.[50] If one were concerned with preventing illegality, why should there be a "standing" restriction on the exclusionary rule?[51] Justice Powell, speaking for the majority, pointed out another way to approach the symbolic or public perception aspect of judicial integrity. Not only could one view judicial integrity as a means to prevent illegality; one also could look at it as a means to prevent the truth from being served (by excluding reliable evidence) with the result of freeing a guilty person.[52] "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence."[53]

The final step in the Court's retreat from utilizing judicial integrity as a justification for the exclusionary rule can be found in *United States v. Leon*.[54] For the first time, the Court refused to exclude evidence in the prosecution's case in chief obtained by police who acted in good faith.[55] Following the lead of *Janis*, the majority merged

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47 428 U.S. 433 (1976).

48 *Id.* at 458 n.35.

49 428 U.S. 465 (1976).

50 *Id.* at 485.

51 *Id.* at 485. As the Court pointed out, the concern for preventing illegality would affect the standing requirement developed in Aldeman v. United States, 394 U.S. 165 (1969), as well as the *Ker/Frisbie* requirement. In addition, the Court noted that the exclusionary rule was applicable for impeachment purposes, Walder v. United States, 347 U.S. 62 (1954), or in grand jury proceedings, United States v. Calandra, 414 U.S. 338 (1974).

52 *Stone*, 428 U.S. at 490.

53 *Id.* at 485 (citation omitted).

54 468 U.S. 897 (1984).

55 *Id.* at 900-05. Officers obtained a search warrant which was later found to be lacking probable cause. *Id.*

the deterrence and judicial integrity concerns and reasoned that, when there was no deterrent effect, there was not really any judicial participation. Thus, the integrity of the Court was not offended.[56] The Court also redefined the symbolic effect associated with judicial integrity. It asserted that if probative evidence is excluded and thereby a guilty defendant goes free, especially when the police violation is minor or not deliberate, this use of exclusion may well "generate disrespect for the law and administration of justice."[57]

In a separate opinion, Justice Stevens expressed frustration over the diminution of the power asserted by the Court.

> Today for the first time,[58] the Court holds that although the Constitution has been violated, no Court should do anything about it at any time and in any proceeding. . . . Courts simply cannot escape their responsibility for redressing constitutional violations if they admit evidence obtained through unreasonable searches and seizures. . . . If such evidence is admitted, then the Court becomes not merely the final and necessary link in an unconstitutional claim of evidence but its actual motivating force.[59]

In sum, use of the judicial integrity concept to support the exclusionary rule has, as of the present day, been totally discounted and supplanted entirely by the deterrence rationale. It has been recharacterized from a proposition that courts should act as a symbol for lawful conduct to a concern that the courts should not become a symbol for guilty people going free as the result of suppression of probative evidence.

III. Supervisory Powers

The use of supervisory powers is a way in which the federal courts can monitor the administration of criminal justice in the federal courts themselves without reliance on constitutional or statutory authority. The justification for the use of these powers appears to be closely tied to the idea of judicial integrity. A majority of the current Court has decreased the opportunities for federal courts to use supervisory powers and has thereby demonstrated its disenchantment with the concept of judicial integrity.

To date, the federal courts have utilized supervisory powers in two general contexts. First, these powers have been used to exclude evidence obtained in connection with a bad act by law enforcement

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56 *Id.* at 921 n.22 (citing United States v. Janis, 428 U.S. 433, 458 n.35 (1976)).

57 *Id.* at 908 (citing Stone v. Powell, 428 U.S. 465, 491 (1976)).

58 *Id.* at 977 (Stevens, J., dissenting). The reference to "first time" was to the disallowance of the exclusionary rule during the prosecution's case in chief even though there had been a violation.

59 *Id.* at 977-78 (Stevens, J., dissenting) (citation omitted).

officials.[60] Such conduct is regarded as having occurred *outside* the court system. This judicial practice is not dissimilar to the Fourth Amendment exclusionary rule.[61] The federal courts have also utilized their supervisory powers to ensure that proper procedures are utilized by the court system. The conduct examined in the latter type of cases is that which has occurred *within* the court system.[62]

McNabb v. United States,[63] which dealt with the action of a police official, is generally regarded as the first decision to invoke supervisory powers. In *McNabb*, federal officers obtained statements by interrogating defendants during a detention in violation of a statute that required an arrested individual to be brought immediately before a magistrate.[64] Since Congress did not provide a remedy for violation of the statute, the Supreme Court determined that it had the inherent power to exclude the evidence.[65] The Court avoided the constitutional issue that Congress had not explicitly forbidden the use of evidence procured in violation of the statute by simply indicating that it had power to review action occurring within the federal court system.[66] "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."[67] In formulating this approach, the Court was somewhat vague as to the source of the power. The Court did refer to its flexible power to formulate rules of evidence. "[I]n formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons

60 *See, e.g.*, McNabb v. United States, 318 U.S. 332 (1943).

61 It is interesting to note that the exclusionary rule and the supervisory powers of the court have had the parallel rationales of deterrence and judicial integrity. Justice Marshall, speaking of supervisory powers in United States v. Payner, 447 U.S. 727 (1980) (Marshall, J., dissenting), said, "[t]he rationale for such suppression of evidence is twofold: to deter illegal conduct by government officials, and to protect the integrity of the federal courts." Supervisory powers have generally been utilized when there have been deliberate improper acts by government officials; otherwise the court "places its imprimatur upon such lawlessness and thereby taints its own integrity." *Id.* at 746 (Marshall, J., dissenting).

62 *See, e.g.*, United States v. Williams, 112 S. Ct. 1735 (1992) (prosecutor failed to present exculpatory evidence to grand jury); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (prosecutorial misconduct in grand jury proceeding); Ballard v. United States, 329 U.S. 187 (1946) (exclusion of women from the jury pool).

63 318 U.S. 332 (1943).

64 The defendants were put into a barren cell and kept there for 14 hours instead of being brought before the magistrate. They were subjected to constant questioning by several officers for two days. One confession was obtained by unlawful detention and questioning for five or six consecutive hours. *Id.* at 345.

65 *Id.*

66 *Id.*

67 *Id.* at 340.

of evidentiary relevance."[68]

Yet the justification for the *McNabb* decision appears to be similar to Brandeis' formulation in *Olmstead*, namely, that the courts should not participate in the wrongdoing by law enforcement and that the courts ought to be monitors of justice.

> We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.[69]

In subsequent supervisory cases the Court elaborated upon notions of judicial integrity that appeared in *McNabb*. In *Elkins*, which utilized supervisory power to eliminate the previously mentioned silver platter doctrine, judicial integrity was an important consideration.

> This basic principle was accepted by the Court in *McNabb v. United States*. There it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without the courts themselves accomplices in willful disobedience of the law."[70]

The close relationship between judicial integrity and supervisory powers can be found in cases which have sought to ensure proper court procedure. In *Ballard v. United States*,[71] the Court dealt with the issue of systematic and intentional exclusion of women from the jury pool.[72] The Court refused to consider whether this exclusion would affect an individual case but did look at the injury to the judicial system and social community. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large and to the democratic ideal reflected in the processes of our Courts."[73] With this language, the

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[68] *Id.* at 341.

[69] *Id.* at 347. *See also* James E. Hogan & Joseph M. Snee, *The* McNabb-Mallory *Rule: Its Rise, Rationale, and Rescue*, 47 GEO. L.J. 1 (1958):

> The court is charged with the solemn duty of maintaining the machinery of justice free from corrosive influences—influences which will become apparent only when it is much too late to do much about them. The admission into evidence during the course of a federal criminal prosecution of the "fruits of wrongdoing by the police" propagating as it does the vicious doctrine that the end justifies the means, can only serve to cheapen the entire criminal proceeding.

Id. at 30-31 (quoting Upshaw v. United States, 333 U.S. 410, 413 (1948)).

[70] Elkins v. United States, 364 U.S. 206, 223 (1960) (quoting *McNabb*, 318 U.S. at 345).

[71] 329 U.S. 187 (1946).

[72] It should be pointed out that this case was decided prior to the equal protection analysis adopted in Taylor v. Louisiana, 419 U.S. 522 (1975).

[73] *Ballard*, 329 U.S. at 195. *See also* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1657 (1963) ("So long as the 'error' violates the court's standards

Court was striving to maintain the judiciary as a symbol for the rest of society as a just institution with high ideals.

> Whether designed to do justice in a particular fact situation or to establish general standards, these supervisory-power decisions reflect concern about the degree of fairness in the judicial process. The courts' increased activity in this field well may emanate, at least in part, from the availability of a named doctrine on which to ground decisions, and from the new-found freedom to ignore whether particular litigants were harmed by the asserted error.[74]

Even though there has not been a clear formulation of the rationale behind cases involving supervisory powers,[75] such powers have been utilized to decide a large number of cases.[76]

In analyzing the most recent of such cases, one finds that the

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for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or nonexistent.").

[74] *The Supervisory Power*, *supra* note 73, at 1659.

[75] *See* Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984) (Professor Beale argues forcefully and convincingly that there actually is no legal basis for the use of supervisory powers). *See also* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53 (1989):

> Commentators have been unable to justify satisfactorily the Court's action in these cases. Defense of the Court was probably most honestly and effectively provided by one who offered that regardless of the absence of an "identifiable source" for the power, it is a *fait accompli* "and deserves to be judged on its merits rather than its ancestry." Convinced that federal criminal justice needed a flexible judicial doctrine permitting the courts to remedy wrongs not specifically anticipated by legislation and constitutional provisions, he found development of the supervisory power "beneficial."

Id. at 84 (quoting Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050, 1077-78 (1965); citing *The Supervisory Power*, *supra* note 73, at 1656 (supervisory power exclusionary decisions are appropriate exercise of court's legitimate function of maintaining their own integrity, and impact upon police is incidental)).

[76] *See* Rosales-Lopez v. United States, 451 U.S. 182 (1981); United States v. Hale, 422 U.S. 171, 181 (1975); Marshall v. United States, 360 U.S. 310 (1959); La Buy v. Howes Leather Co., 352 U.S. 249, 259-60 (1957); Offut v. United States, 348 U.S. 11 (1954); Burton v. United States, 483 F.2d 1182, 1187 (9th Cir.), *aff'd on reh'g*, 483 F.2d 1190 (9th Cir. 1973); Guam v. Camacho, 470 F.2d 919 (9th Cir. 1972); United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); *In re* Ellsberg, 446 F.2d 954 (1st Cir. 1971); United States v. Jones, 433 F.2d 1176 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); Dellinger v. Mitchell, 442 F.2d 782 (D.C. Cir. 1971); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc); United States v. Dooling, 406 F.2d 192 (2d Cir.), *cert. denied sub nom.*, Persisco v. United States, 395 U.S. 911 (1969); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968); Pea v. United States, 397 F.2d 627, 637 (D.C. Cir. 1968) (rehearing en banc); ACF Indus., Inc. v. Guinn, 384 F.2d 15 (5th Cir. 1967), *cert. denied*, 396 U.S. 949 (1968); Government of Virgin Islands v. Lovell, 378 F.2d 799 (3d Cir. 1967); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966); Tate v. United States, 359 F.2d 245 (D.C. Cir. 1966); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Black v. United States, 355 F.2d 104 (D.C. Cir.

present Supreme Court has clearly indicated that the use of supervisory powers should be curtailed. The Court has refused to utilize supervisory powers to expand on existing limitations to constitutional power. The rationale for this approach has been the Court's reluctance to suppress reliable evidence.[77] It should be pointed out that this concern for the probative value of the evidence did not exist in *United States v. McNabb*, where there was no indication that the confession was involuntary and therefore unreliable.[78] Thus, the confession in *McNabb* had considerable probative value.[79]

United States v. Payner[80] is a case which illustrates the Court's refusal to utilize supervisory powers even when the conduct by law enforcement officials was outrageous, because to have done so would have stretched beyond previously decided constitutional limitations.[81] In *Payner*, the IRS illegally broke into a banker's briefcase and copied documents implicating the defendant. Because the defendant did not have standing for Fourth Amendment purposes, the district court utilized its supervisory powers to monitor police power and suppressed a document found in the briefcase.[82] In rejecting the exercise of supervisory powers in this instance, the Supreme Court felt that the societal interest in allowing for the use of probative evidence outweighed the importance of preserving judicial integrity.[83] In addition, the Court was concerned about the use of supervisory powers to circumvent the Fourth Amendment

1965); United States v. Inman, 352 F.2d 954 (4th Cir. 1965); Ford v. United States, 352 F.2d 927 (D.C. Cir. 1965) (en banc).

77 *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980).

78 *McNabb*, 318 U.S. at 339.

79 Even the Warren Court seemed reluctant to utilize supervisory powers when to do so might result in the exclusion of relevant evidence. In Lopez v. United States, 373 U.S. 427 (1963), the Court refused to utilize supervisory powers to suppress a wire recording which at that time did not violate the Fourth Amendment. The Court indicated that where relevant competent evidence is sought to be introduced, supervisory powers should be used sparingly. *Id.* at 440. It should be pointed out, however, that in this case the Court did not find the conduct of the police to be manifestly improper.

80 447 U.S. 727 (1980).

81 *Id.* at 731-33 (the Court had developed various standing requirements which limited the availability of a Fourth Amendment violation claim).

82 Since the specific violation was directed at the bank official, the defendant was not the direct victim of the Fourth Amendment infringement and therefore did not have standing. He did not have an expectation of privacy vis-a-vis the banker's briefcase and the documents contained therein. Without this expectation of privacy one cannot claim a Fourth Amendment violation. United States v. Payner, 434 F. Supp. 113, 126 (N.D. Ohio 1977).

83 "In this case, where the illegal conduct did not violate the respondent's rights, the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact." *Payner*, 447 U.S. at 736 n.8.

standing requirements. These constitutional limitations had previously been created by the Supreme Court.[84] In dissent, Justice Marshall cited Brandeis' famous words in *Olmstead*,[85] and pointed out the grossness and the deliberateness of the government's misconduct in the case and argued that the utilization of supervisory power *was* required to protect the judicial integrity of the court.[86] "The court," Justice Marshall reasoned, "should use its supervisory powers in federal criminal cases 'to see that the waters of justice are not polluted.' "[87]

For improprieties occurring within the court system, the use of supervisory powers has also been curtailed by the present Supreme Court. As previously indicated, the *Ballard* decision was more concerned with the symbolic importance of maintaining a just system than in ensuring individual rights.[88] In other words, the court was concerned about the impact that a particular procedure would have on the court system and sought to prevent any institutional harm. This concern, however, is no longer predominant. The present Court has tied the use of supervisory powers to the impact that its utilization would have on a particular individual by instituting the "harmless error" standard.[89] In *Bank of Nova Scotia v. United States*,[90] the defendant sought to utilize the supervisory powers of the Court to dismiss an indictment for prosecutorial misconduct occurring

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84 *Id.* at 731.

85 The famous words are:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker; it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *quoted in Payner*, 447 U.S. at 745 (Marshall, J., dissenting).

86 *Payner*, 447 U.S. at 745 (Marshall, J., dissenting) (citing *Olmstead*, 277 U.S. at 485).

87 *Id.* at 744 (Marshall, J., dissenting) (quoting Mesarosh v. United States, 352 U.S. 1, 14 (1956)).

88 Ballard v. United States, 329 U.S. 187 (1946); *see supra* text accompanying notes 71-72.

89 Basically, a harmless error is one that does not affect a substantial right. If the same verdict would have been reached with or without the error, then a harmless error has occurred and the verdict can stand. This rule was developed in Chapman v. California, 386 U.S. 18 (1967), where the Supreme Court held that a conviction need not be overturned because of a constitutional error if no prejudice resulted from the mistake. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 39-41 (1991).

90 487 U.S. 250 (1988).

during a grand jury investigation. The Court refused to consider the argument unless the defendant actually could demonstrate that he had been prejudiced by the wrongful acts. In order for the Court to utilize supervisory powers, the action had to meet the "harmless error" standard.[91] In quickly discounting the effect this might have on judicial integrity, the Court stated, "[w]e also recognize that where the error is harmless, concerns about the 'integrity of the [judicial] process' will carry less weight."[92]

The above approach to limiting the use of supervisory power had been criticized by Justice Brennan, who argued in an earlier dissenting opinion that an important public interest in preserving judicial integrity exists and that it outweighs the upholding of the conviction of a particular criminal defendant.

> Admittedly, using the supervisory powers to reverse a conviction under these circumstances appears to conflict with the public's interest in upholding otherwise valid convictions that are tainted only by harmless error. But it is certainly arguable that the public's interests in preserving judicial integrity and in insuring that Government prosecutors, as its agents, refrain from intentionally violating defendants' rights are stronger than its interest in upholding the conviction of a particular criminal defendant. Convictions are important, but they should not be protected at any cost.[93]

The most recent statement on supervisory powers by the Court is found in *United States v. Williams*.[94] Justice Scalia, writing for the Court, suggested that there is not much leeway for the Court to utilize its supervisory powers, especially when doing so would create rules not otherwise expressly provided for in the Constitution or by Congress.[95] In *Williams*, the defendant moved to dismiss an indictment because the prosecution had failed to present exculpatory evidence before the grand jury. The Tenth Circuit had instituted such a disclosure rule pursuant to its supervisory powers.[96] According to Justice Scalia, grand jury procedures have historically enjoyed great independence and consequently judges have generally been reluctant to exercise supervisory powers over them. Justice Scalia suggested that the only time supervisory powers would be appropriate to dismiss an indictment would be when specific statutory provisions exist, or when " 'clear rules . . . [are] carefully drafted and approved

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91 *Id.* at 254. This standard is prescribed by FED. R. CRIM. P. 52(a).

92 *Bank of Nova Scotia*, 487 U.S. at 255 (alteration in original) (citation omitted).

93 United States v. Hasting, 461 U.S. 499, 527 (1982) (Brennan, J., dissenting).

94 112 S. Ct. 1735 (1992).

95 *Id.* at 1741.

96 *See* United States v. Page, 808 F.2d 723, 728 (10th Cir. 1987) (when exculpatory evidence is discovered in the course of an investigation it must be revealed to the grand jury).

by this Court and by Congress to ensure the integrity of the grand jury's functions.' "[97] This reasoning did not convince Justice Stevens, who argued in dissent that the Court has an obligation to exercise its supervisory powers to redress misconduct, even if the misconduct was not specifically prohibited by a statute or by the Constitution.

> Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury—simply because they are not proscribed by Rule 6 of the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings.[98]

Supervisory powers give judges considerable leeway within the federal court system to rectify procedures or executive actions that they find inherently wrong even though such procedures and actions may not violate constitutional or statutory provisions. This leeway to do the right thing is closely tied to the concept of judicial integrity. As just demonstrated, the Supreme Court has recently shown an inclination to curtail sharply the use of supervisory powers. This decline in the use of supervisory powers appears to be closely aligned with the Court's attitude toward the doctrine of judicial integrity.

IV. Due Process

Due process, as found in the Fourteenth Amendment, presents a somewhat ironic situation with regard to our discussion of judicial integrity. Initially, the standard for the exercise of due process was based on a somewhat amorphous standard of fundamental fairness. Although this standard was consistent with the idea of judicial integrity, judges rarely exercised their discretion to utilize it for a criminal defendant's prosecution.[99] As various amendments became incorporated to the states through the Fourteenth Amendment, a more restrictive standard ironically provided greater protection to the defendant. In recent years, however, the Supreme Court has cut back on the substantive protections provided by the Fourth, Fifth, and Sixth Amendments.[100] The restrictions on the use of due pro-

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97 *Williams*, 112 S. Ct. at 1741 (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986)).

98 *Id.* at 1753 (Stevens, J., dissenting).

99 *See infra* note 209 and accompanying text.

100 *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982 (1991); Arizona v. Fulminante, 111 S. Ct. 1246 (1991); McNeil v. Wisconsin, 111 S. Ct. 2204 (1991).

cess have negatively impacted on the principle of judicial integrity and have reduced individual protection.

Most criminal prosecutions occur in the state judicial systems. The first eight amendments of the Bill of Rights deal with the protections afforded to the individual against the central (federal) government. The Fourteenth Amendment, ratified in 1868, deals with restrictions on the powers of the states. This amendment has become the vehicle to curb the abuse of power by the states in criminal matters. The initial standard for determining whether a particular criminal proceeding violated due process[101] under the Fourteenth Amendment was left to the discretion of the judge, who determined whether the proceeding offended notions of justice implicit in canons of decency and fairness.[102] This approach allowed for a great deal of discretion by the trial judge and implicitly allowed him or her to exercise judicial integrity. One can see from Justice Frankfurter's language in *Rochin v. California*[103] the important symbolic role of judicial integrity discussed previously. "So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."[104]

Justice Black did not like the Frankfurter contextual approach to the Due Process Clause of the Fourteenth Amendment. He argued that the specific guarantees of the Bill of Rights should be made applicable to the states through the due process clause of the Fourteenth Amendment.[105] This approach came to be known as total incorporation. Justice Black believed that through total incorporation the Court could avoid the vague and subjective standard of "decency and fundamental justice."[106] Although Justice Black's approach did not attract a majority of the Court, as time went by the Court selectively incorporated particular provisions of the Bill of Rights and thereby automatically embraced the entire body of law with regard to those provisions. Once a particular amendment had

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101 It should be noted that the Due Process Clause has been broken down into two subsidiary concepts. One is "substantive due process," represented by *Rochin v. California*, 342 U.S. 165 (1952), which prevents the government from engaging in conduct that "shocks the conscience." The other is "procedural due process." When the government action is consistent with substantive due process, it still must comply with procedural due process in depriving an individual of life, liberty or property in a fair and just manner.

102 *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947).

103 342 U.S. at 165.

104 *Id.* at 173-74.

105 This approach is sometimes referred to as a "natural law" approach.

106 *Adamson*, 332 U.S. at 89 (Black, J., dissenting).

been incorporated, judges had to follow the existing body of law with regard to that amendment.[107] Thus, through selective incorporation, Justice Black's position ultimately won out in practice.[108] Ironically, however, this restriction of an individual judge's flexibility also limits the judge's ability to consider the principle of judicial integrity in his or her interpretation of due process.

As a result of incorporation, the Court has limited the meaning of due process as an independent provision of the Bill of Rights. For example, in *Moran v. Burbine*,[109] the police did not inform a suspect who was being interrogated of his attorney's efforts to reach him and at the same time falsely assured the attorney that the suspect would not be questioned. The Court was content to analyze the case under Fifth and Sixth Amendment principles. In briefly considering due process, the Court found that the conduct fell short of the kind of "misbehavior that so shocks the sensibilities of civilized society."[110]

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107 For example, in Strickland v. Washington, 466 U.S. 668 (1984), a case in which the competence of counsel was raised, the Court recognized that the notion of a fair trial is inherent in due process. The Court then turned to the Sixth Amendment to determine the meaning of that term in the particular instance. *Id.* at 685. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Id.* at 684-85. *See also* Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963) (through the Fourteenth Amendment, "the Court has made obligatory on the states the Fifth Amendment's command that private property shall not be taken for public use without just compensation, the Fourth Amendment's prohibition of unreasonable searches and seizures, and the Eighth's ban on cruel and unusual punishment").

108 *See* William Cohen, *Justices Black and Douglas and the "Natural-Law-Due-Process Formula": Some Fragments of Intellectual History*, 20 U.C. DAVIS L. REV. 381, 382 (1987) ("Forty years ago, four dissenters in *Adamson v. California* debated among themselves an issue now central in constitutional law.").

109 475 U.S. 412 (1986).

110 *Id.* at 433-34. The type of conduct that "shocks the conscience" has rarely been found since Rochin v. California, 342 U.S. 165 (1952). Although the *Rochin* decision was initially thought to be the basis for a broader concept of due process, it has largely been limited to its facts. *Rochin* involved the use of a stomach pump to retrieve evidence. *Id.* at 166. Thus, actions which violate due process because they shock the conscience generally involve bodily intrusions. For example, in United States v. Townsend, 151 F. Supp. 378 (D.D.C. 1957), the defendant was taken to police headquarters in the middle of the night, beaten, denied the right to consult an attorney, then restrained by a detective while another man removed his pants and underwear and swabbed his penis for evidence of blood in a rape case. The court concluded that this was a violation of the defendant's due process rights and stated, "[n]o matter how great its relevance the court could not permit the admission of evidence secured as a result of so flagrant an abuse of basic rights and liberties." *Id.* at 382-83. In Winston v. Lee, 470 U.S. 753 (1985), the Court held that the state could not compel the respondent to undergo surgery to retrieve a bullet lodged in his chest to be used as evidence against him because it constituted an unreasonable search and would violate the respondent's Fourth Amendment right to be secure in his person. *Id.* at 755. Finally, in United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974), a pregnant woman was forced to painfully

Justice Stevens, in dissent, pointed out the dispatch with which the Court dismissed the due process argument.[111] He argued for a "standard of fairness, integrity, and honor" as opposed to a "shock the conscience" test, and he would have considered the conduct in this case to have violated due process.[112] In language reminiscent of the principle of judicial integrity expressing the symbolic importance of lawful actions by the Court, Stevens said, "[i]n my judgment, police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits."[113]

Herrera v. Collins[114] probably best represents the current state of the judicial integrity debate within a due process context.[115] This case involved a convicted murderer's petition for habeas corpus on the grounds that new evidence discovered eight years after his conviction suggested his innocence. The petitioner argued that an execution without a hearing under the circumstances would violate his Fourteenth Amendment due process rights.[116] Surely the execution of an innocent man would at least violate due process, and the allowance of such a deplorable event by a court system would clearly implicate notions of judicial integrity. This opinion, however, was not necessarily shared by Justices Scalia and Thomas, who in concurrence found no right under due process not to be executed if newly discovered evidence indicated innocence.[117] They took issue with the dissenting argument, which looked at the situation from a broad substantive due process view and found that the execution of

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bend over to submit to visual cavity searches by a policewoman subsequent to her arrest. The district court found that this action violated the Due Process Clause. In contrast, in Breithaupt v. Abram, 352 U.S. 432 (1957), the Court found that it was not a violation of petitioner's due process rights for a physician to take a blood sample while the petitioner was unconscious in order to test the alcohol level. *Id.* at 434. The Court stated, "[t]o be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate." *Id.* at 435-36. For a similar decision, see Schmerber v. California, 384 U.S. 757 (1967).

111 "The Court devotes precisely five sentences to its conclusion that the police interference . . . did not violate the Due Process Clause." *Moran*, 475 U.S. at 466 (Stevens, J., dissenting).

112 *Id.* at 466-67 (Stevens, J., dissenting).

113 *Id.* at 467 (Stevens, J., dissenting).

114 113 S. Ct. 853 (1993).

115 While recognizing that *Herrera* also dealt with federalism and finality concerns, I use the case to emphasize the judicial integrity aspect.

116 *Id.* at 856-57. He also argued that the execution would constitute a violation of the Eighth Amendment's cruel and unusual punishment provision. *Id.* at 859.

117 *Id.* at 874 (Scalia, J., concurring).

an innocent man is exactly the type of conduct which "shocks the conscience."[118] Justices Scalia and Thomas, finding no historical basis for judicial review of newly discovered evidence, suggested that the dissenting judges were applying nothing but their personal opinions in finding that executing an innocent man shocks the conscience. "If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience shocking' as a legal test."[119]

Although Justice Rehnquist,[120] writing for the majority, adopted the Scalia/Thomas approach and found that a request for a new trial was not fundamental because it was not historically required and therefore did not violate due process,[121] he did concede that if a petitioner could meet an "extraordinarily high" standard and show actual innocence, and that there was no adequate state avenue to raise a claim, then the execution might be unconstitutional.[122]

This most recent decision by the Supreme Court graphically demonstrates that a majority of the Court is inclined to restrict the scope of due process. Such a restriction of due process limits the leeway afforded to judges and therefore reduces their opportunities to exercise judicial integrity.

In analyzing the habeas corpus area, it appears that the Court is concerned with the public perception of the court system, especially when dealing with capital cases. The public is concerned with the

118 "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Id.* at 876 (Blackmun, Stevens, and Souter, J.J., dissenting) (citations omitted). While discussing the defendant's substantive due process claim, the dissent compared this case with *Rochin* and said that "[t]he lethal injection that petitioner faces as an allegedly innocent person is certainly closer to the rack and the screw than the stomach pump condemned in *Rochin*. Execution of an innocent person is the ultimate 'arbitrary impositio[n].'" *Id.* at 879 (alteration in original) (citation omitted).

119 *Id.* at 875 (Scalia, J., concurring).

120 Chief Justice Rehnquist, in writing the majority opinion, was joined by Justices O'Conner, Scalia, and Thomas.

121 Historically, new trials were granted only during the term of court in which the final judgment was entered. *Id.* at 865. Today, to obtain a new trial in Texas on newly discovered evidence the defendant must file a motion within thirty days after imposition or suspension of sentence. *Id.* at 860.

122 *Id.* at 869. The Court also showed that the defendant could file a request for executive clemency, so there was a state course of action he could take. "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 869.

amount of time it takes to carry out a death sentence.[123] This sentiment has been characterized by the majority of the Court as concern for the finality of state judgments.[124] As a result of this concern, the Court has developed various doctrines to restrict the use of habeas corpus petitions.[125] The *Herrera* decision was certainly consistent with this trend.

V. AUSTRALIA AND NEW ZEALAND

A. INTRODUCTION

In Australia, the concept of judicial integrity can be found intertwined with the doctrine of the abuse of process. An area of legal theory sometimes regarded as related to this doctrine is the discretion to exclude evidence obtained by illegal or improper means (which we refer to in the United States as the exclusionary rule).[126] Because the exclusionary rule has its own foundations and development, it will be discussed separately. The doctrine of abuse of process is best described as the inherent power of a court to prevent its own process from being used as an instrument of unfairness or oppression. The cases discussed below illustrate that the two-fold objectives of the doctrine of abuse of process are to prevent unfairness and oppression and to maintain public confidence in the administration of justice.

Australia and New Zealand do not have a Bill of Rights with the accepted and enforceable powers contained in the United States Constitution.[127] Consequently, the protections afforded to an indi-

123 *See, e.g.*, Andrew H. Malcolm, *The Wait on Death Row, Legal Delays Thwart Death Penalty*, N.Y. TIMES, July 23, 1990, at A1, *cited in* Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993) (describing the capital appeals process as a "legal game" designed to cause "delay, delay, delay").

124 *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992); McCleskey v. Zant, 499 U.S. 467, 491 (1991).

125 *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

126 *See* Matthew Goode, Comment, 12 CRIM. L. J. 114, 114-21 (1988).

127 *See* Interview with Justice J.E.J. Spender, *An Overview of the Australian Federal Court System*, 16 BROOKLYN J. INT'L. L. 453 (1990); Roger S. Clark, *Introduction* to A.H. Angelo & Catherine Inder, *New Zealand*, *in* XII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD xvii (Albert P. Blaustein & Gisbert H. Flanz eds., 1992). Clark states that "[t]here are no fundamental human rights formally guaranteed in any New Zealand Constitutional document." *Id.* at xviii. These rights are dealt with through common law, customary practices and legislation. There is, however, a New Zealand Bill of Rights Act of 1990 which affirms, promotes and protects fundamental freedoms and human rights. *Id.* This act is neither an entrenched law (it can be repealed at any time), "nor does it enable the courts or any other body to decline to apply any provisions of any other enactment by reason of it being inconsistent with any provision of the New Zealand Bill of Rights Act of 1990." *Id.* at xviii-xix.

vidual in these criminal justice systems from police abuse or unfair practices within the court system are largely creations of the judiciary itself.[128] Thus, judges in both systems inherently possess a greater degree of judicial discretion. This permissiveness toward discretion is recognized at the appellate and trial levels. Appellate review of a trial judge's discretionary decisions is necessarily rare, and only occurs when "either that discretion possessed by the court below was exercised on wrong principle, or . . . was exercised in a way which it could not reasonably have been exercised if the right principles had been applied."[129] Justice Spender, commenting on the amount of discretion afforded a trial judge, explained that "discretion will be reviewed with a large amount of deference to the first judge. The exercise of judicial discretion will only be reversed if the appeal court is convinced it was wrong."[130] Thus, the doctrine of abuse of process in Australia has a great allowance for and tolerance of judicial discretion.

B. ABUSE OF PROCESS—AUSTRALIA

Australia has seen a cautious but steady development of the doctrine of abuse of process.[131] In comparing this doctrine with that in the United States, it has elements of both the supervisory powers and due process cases previously discussed. It should also be pointed out again that the abuse of process doctrine allows for the exclusionary remedy but is not limited to it.

The origins of the doctrine are found in the 1964 English case of *Connelly v. Director of Public Prosecutions*.[132] In *Connelly*, the defendant was charged, tried, and convicted of murder. He appealed successfully and the conviction was quashed.[133] The prosecution then charged him with robbery, arising out of the same facts.[134] For technical reasons this re-charging was lawful. The defendant argued that, even though the laying of the second indictment was lawful, it was nonetheless oppressive. The prosecution, he claimed,

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128 Some, however, are legislative in origin.

129 Walker v. Marklew, 14 S.A. St. R. 463, 469 (1976).

130 Interview with Justice J.E.J. Spender, *supra* note 127, at 475.

131 *See* Goode, *supra* note 126, at 115 (this doctrine is highly discretionary and is checked by the "cautious application principle: That is, it is only to be applied in rare and exceptional cases where the abuse has been clearly demonstrated"); Editorial, *The High Court and Criminal Law*, 11 CRIM. L. J. 1, 1 (1987) ("The court has over the past decade consistently applied liberal policies in respect of criminal law and has generally favoured individual rights.").

132 1964 App. Cas. 1254 (H.L.).

133 *Id.* at 1295 (Lord Reid).

134 *Id.* at 1281.

was abusing the processes of the court by bringing this second prosecution.[135]

The House of Lords, in considering the important public policy considerations involved, recognized that "it is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public."[136] This is the symbolic aspect of judicial integrity we discussed with reference to the United States.[137] The prosecution argued that it may be trusted not to abuse its powers, but the response from Lord Devlin demonstrated the clear rejection of a passive role by the courts.

> Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.[138]

The court's exercise of judicial integrity through the use of its inherent discretionary power to control its own processes resulted in the quashing of the second indictment. The court determined that the defendant was being oppressed by the procedure employed by the prosecution and intervened to prevent its own processes from being abused.[139] By allowing each branch (prosecution and court) to assess independently the indictment, the court creates a functional system of checks and balances.[140]

In Australia, there has been a complete acceptance of *Connelly*, and a cautious, but undeniable, development of the doctrine of abuse of process.[141] One of the guiding principles is the desire of the courts to maintain judicial integrity—in other words, to conduct their proceedings fairly and in a manner which will maintain public confidence in the proper administration of justice. The case of *Barton v. The Queen*[142] is an example of abuse of the court procedures by

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135 *Id.*

136 *Id.* at 1353 (Lord Devlin).

137 *See supra* notes 71-74 and accompanying text.

138 *Connelly*, 1964 App. Cas. at 1360 (Lord Devlin).

139 *Id.* at 1354 (Lord Devlin).

140 *See supra* note 12 and accompanying text for a check and balance discussion with regard to judicial integrity in the United States.

141 *See, e.g.*, Jago v. District Court of N.S.W., 168 C.L.R. 23 (Austl. 1989) (holding that the right to a speedy trial is inseperable from the right to a fair trial); Regina v. Vuckov, 40 S.A. St. R. 498 (1986) (discussing whether entrapment is an "abuse of the process of Court," or whether it is a separate defence); Barton v. The Queen, 147 C.L.R. 75 (Austl. 1980) (discussing the court's power to stay the proceedings in order to ensure a fair trial).

142 *Barton*, 147 C.L.R. at 75.

a party. The defendant, Barton, was directly indicted in a criminal prosecution without first being given the benefit of the usual preliminary hearing.[143] Although the method of direct indictment was unorthodox, it was nevertheless a valid procedure. Barton sought a stay of the proceedings, because he claimed the denial of a preliminary hearing was oppressive conduct by the prosecution utilized to circumvent the usual procedures.[144] The High Court agreed that it was oppressive and granted a temporary stay of the indictment until a preliminary hearing had been conducted.[145] This was a sufficient remedy in the circumstances because it rectified the harm to the defendant.

It is important to note that the conduct of the prosecution in *Barton* was not illegal.[146] Yet the court indicated that any conduct serious enough to produce oppression is amenable to judicial supervision under the courts' inherent jurisdiction to prevent misuse of procedures or to prevent outright misuse of the court system itself. The court noted that "it is quite another thing to say the courts are powerless to prevent an abuse of process or the prosecution of a criminal proceeding in a manner which will result in a trial which is unfair when judged by reference to accepted standards of justice."[147] The Australian High Court's intervention in *Barton*, despite the lack of illegal prosecutorial conduct stands in sharp contrast with the trend in the United States. The United States Supreme Court has refused to utilize its supervisory powers where the conduct is facially legal.[148]

As stated earlier, since Australia does not have a Bill of Rights and consequently has no constitutionally delineated safeguards, the doctrine of abuse of process has been utilized to provide rights not otherwise granted. The right to a speedy trial presents an illustration of this approach.

In *Jago v. District Court of N.S.W.*,[149] the High Court of Australia held that even though there was no common law right to a speedy trial, the right of an accused person to receive a fair trial was one of the entrenched rights of the Australian legal system.[150] If circum-

143 *Id.* at 81.
144 *Id.* at 87 (Gibbs & Mason, J.J.).
145 *Id.* at 87-88 (Gibbs & Mason, J.J.).
146 *Id.* at 103 (Gibbs & Mason, J.J.). There is a procedure for the prosecution to bring about an indictment like this. However, in this case, it was argued that it was brought for an unlawful purpose, capriciously and arbitrarily. *Id.* at 87-88 (Gibbs & Mason, J.J.).
147 *Id.* at 95-96 (Gibbs & Mason, J.J.).
148 *See supra* notes 79-83 and accompanying text.
149 168 C.L.R. 23 (Austl. 1989).
150 *Id.* at 31-35 (Mason, J.).

stances, including unreasonable delay, had the effect of irretrievably robbing the trial of fairness, then a permanent stay of the proceedings was warranted. This remedy was not granted lightly, and extreme circumstances would have to be demonstrated.[151] The public policy served by this doctrine is that no public interest is served by convicting a person by any means other than a fair trial.

The symbolic aspect of judicial integrity can be found in the language of the *Jago* court: "[it is] the responsibility of the courts to see that justice is done to the parties and to the wider community, ensuring that the appropriate remedy is applied in the particular case."[152]

> The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law.[153]

The High Court of Australia has refused to define the scope of its supervisory powers doctrine in absolute terms; thus, it has allowed for flexible application.[154] This lack of restrictive definition also appears in the context of due process fairness principles. How is the court to deal with the numerous types of abuse of process that can be imagined? In the words of Justice Deane in *Jago*:

> The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one . . . . [T]he identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience.[155]

This flexible and very fluid concept of fairness stands in sharp contrast with the United States' approach to due process fairness. As previously indicated, through incorporation, the due process concept has largely merged with rights protected by various amendments to the Constitution. Due process has an independent application in the United States but it has been limited to that activity that

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151 *Id.* (holding that the circumstances in *Jago* do not merit a stay).

152 *Id.* at 71 (Toohey, J.).

153 *Id.* at 56 (Deane, J.).

154 *See* Barton v. The Queen, 147 C.L.R. 75, 96-97 (Austl. 1980).

155 *Jago*, 168 C.L.R. 57 (Deane, J.).

"shocks the conscience."[156] Surely Justice Stevens—who argued for a "standard of fairness, integrity, and honor," as opposed to a "shocks the conscience" approach—would be happier with the language of the *Jago* decision.[157]

The defense of entrapment presents a good example of the use of the abuse of process doctrine in dealing with serious police misconduct. In the Australian legal system, a defense of entrapment akin to what is known in the United States[158] is not recognized. In discussing the symbolic objective of utilizing the entrapment defense, the South Australian Supreme Court stated that prosecution may be stayed as an abuse of process if "to allow the courts to be used to pursue a prosecution founded on official incitement would bring the administration of justice into disrepute."[159]

Without resorting to a complex set of rules and exemptions to cover official incitement to commit crime, at least one Australian state supreme court preferred to say:

> [I]n a case where the police or their informer have acted improperly in attempting to trap a defendant, it will be a matter in the end of applying the test laid down in *Bunning v. Cross*—of looking at all the circumstances of the case, with the competing requirements of public policy in mind, and deciding whether the defendant has made out his claim that the prosecution should be stopped because it would be an abuse of the process of the court to allow it to proceed.[160]

This approach to entrapment gives the courts leeway to grant the appropriate remedy, which may be either the suppression of evidence, a permanent stay of the proceedings, or some other remedy, depending upon the particular circumstances. This reasoning is consistent with later High Court judgments about the doctrine of abuse of process, and consequently there is every reason to believe that the High Court would confirm this approach if it were ever

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156 Rochin v. California, 342 U.S. 165 (1952); *see supra* note 110 and accompanying text.

157 Moran v. Burbine,, 475 U.S. 412, 466-67 (Stevens, J., dissenting); *see supra* notes 109-113 and accompanying text.

158 Entrapment is a criminal defense in the United States. The defendant has the burden of proof and must produce evidence to support a plea of entrapment. If believed, the defendant will be acquitted. Although entrapment is not a constitutional defense, it is currently recognized as a defense in all 50 states and the federal courts. Although the definition of entrapment varies in each jurisdiction, it usually requires proof that: (1) the defendant was induced to commit a crime by a government agent (usually undercover); (2) the defendant or any reasonable person would not have committed the crime but for the inducement, and (3) the government agent acted as he did in order to obtain evidence to prosecute the defendant. *See* DRESSLER, *supra* note 89, at 357.

159 Regina v. Vuckov, 40 S.A. St. R. 498, 518 (1986) (Cox, J.).

160 *Id.* at 523 (footnote omitted).

called upon to do so.[161]

The South Australia State Supreme Court was emphasizing the fundamental virtue of judicial integrity when it said that it has the power to stay permanently a prosecution on public policy grounds "where the evidence shows that it would be unfair to the defendant or an affront to the public conscience to permit the prosecution to proceed."[162] This is the court acting for society as a symbol of lawfulness and justice.

The "affront to the public conscience" or the "public confidence in the administration of justice" referred to by the Australian judges should not be confused with notions of popularity. The courts are talking about what is right and proper and in the community's best long-term interests. Decisions based on sound principles may often be unpopular, especially where the accused appears to be guilty of a crime.

The scope of the abuse of process doctrine is still unknown. It continues to develop case by case as the need for special remedies arises. In various Australian state supreme courts, the power to grant a remedy, including a permanent stay or quashing of an indictment, has been recognized as applicable (in appropriate cases) to the misuse of extradition powers,[163] to delay in commencing a prosecution and bringing it to trial,[164] and even to prejudicial pretrial publicity.[165]

C. ABUSE OF PROCESS—NEW ZEALAND

In New Zealand, one can find indications that the doctrine of abuse of process has also been accepted. Based on the earlier English authorities,[166] the New Zealand courts clearly affirmed the existence of the doctrine within their own jurisdiction in *Regina v. Hartley*.[167] This is the case referred to in the introduction of this Article in which a man was illegally extradited from Australia to New Zealand.[168] The New Zealand authorities telephoned the Australian Police, told them that they wanted the man back in New Zealand, and asked that he be put on the next plane to New Zealand. The

161 *See* Editorial, *supra* note 131, at 1.

162 *Vuckov*, 40 S.A. St. R. at 522 (Cox, J.).

163 *See* Perry v. Lean, 39 S.A. St. R. 515 (1985).

164 *See* Clayton v. Ralphs, 45 S.A. St. R. 347 (1987); Kintominas v. Attorney General, 24 A. Crim. R. 456 (1987); Herron v. McGregor, 6 N.S.W.L.R. 246 (1986).

165 *See* Regina v. Von Einem, 55 S.A. St. R. 199 (1990).

166 Director of Pub. Prosecutions v. Humphreys, 1977 App. Cas. 1 (H.L.); Connelly v. Director of Pub. Prosecutions, 1964 App. Cas. 1254 (H.L.).

167 2 N.Z.L.R. 199 (C.A. 1978).

168 *See supra* notes 5-9 and accompanying text.

Australian Police complied with this request without any formal extradition proceeding.[169] Upon his arrival in New Zealand, the man was arrested and subsequently put on trial. The defendant was tried and convicted, after which he appealed.[170] One of the grounds of appeal was that, even if lawfully arrested in New Zealand, the method by which he was returned to New Zealand was oppressive. He contended that the proceedings constituted an abuse of process and that his conviction should be quashed.[171] The conviction was quashed on a related ground, but the court said:

> Some may say that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: [sic] that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society.[172]

The same concerns for sanctioning illegality are evident in the later case of *Moevao v. Department of Labour*.[173] Moevao complied with the Department of Labour and was told that his permit for permanent residence was to be granted. Shortly thereafter, there was some confusion and an official who had not previously dealt with Moevao charged him with overstaying his temporary entry permit.[174] Even though both Moevao and the officials at the department with whom he had originally dealt relied on the fact that Moevao's permanent permit was to be granted, the court convicted him anyway for overstaying his temporary permit.[175] The court, while recognizing an inherent power to stay proceedings which constitute an abuse of the court's process, did not rule that this case presented such an abuse.[176] The court, however, did focus on the public perception of the court as a symbol of lawful and just procedure as opposed to an instrument to set the guilty free.

> It is not the purpose of the criminal law to punish the guilty at all costs. It is not that the end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. . . . This leads on to

169 *Id.* at 213.
170 *Id.* at 200.
171 *Id.* at 215-19.
172 *Id.* at 216-17 (Woodhouse, J.).
173 1 N.Z.L.R. 464 (C.A. 1980).
174 *Id.* at 471.
175 *Id.*
176 *Id.* at 477-83 (Richardson, J.).

> the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.[177]
>
> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil[sic] its function as a Court of law. As [Justice Frankfurter said in *Sherman v. United States*, "p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."[178]

There is a stated desire by the courts in New Zealand to consider the concept of judicial integrity. However, there are fewer reported cases to be found in New Zealand dealing with abuse of process. Thus, the development of the abuse of process doctrine cannot be traced as thoroughly in New Zealand as in the case of Australian case law.[179]

D. EXCLUSIONARY RULE—AUSTRALIA

The roots of the exclusionary rule in Australia can be traced to the decision of *Regina v. Ireland*,[180] which dealt with the admission of illegally obtained evidence. In this decision, the court suggested a standard for an exclusionary rule that first recognized the importance of judicial discretion and then suggested a balancing formula which weighed the public interest in convicting the guilty against the public interest in ensuring fair treatment of individuals.

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. . . . In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offenses. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.[181]

Justice Spender characterized these ideas as due process as practiced in Australia.[182]

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177 *Id.* at 481 (citation omitted).

178 *Id.* at 482 (citation omitted).

179 "In New Zealand, this power of criminal courts has received comparatively little attention." *Id.* at 470 (Richmond, P.).

180 126 C.L.R. 321 (H.C. 1970).

181 *Id.* at 335.

182 Interview with Justice J.E.J. Spender, *supra* note 127, at 475.

Bunning v. Cross,[183] following the lead of *Ireland*, is generally regarded as the leading case on the exclusionary remedy in Australia. In formulating a standard for the exclusion of evidence, the court was obviously influenced by notions of judicial integrity.[184] The decision focused not only on the unfairness to the accused, but also on society's right to insist, especially with increased use of technology by law enforcement, "that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired."[185] In this way, the court should act as a monitor or check on the power of the executive. "Were there to occur wholesale and deliberate disregard of these [legislative] safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm."[186] In addition, the court, citing the Holmes dissent in *Olmstead*,[187] indicated that it did not want to be associated with bad conduct by acquiescing to it. "In appropriate cases it may be 'a less evil that some criminal should escape than that the Government should play an ignoble part.' "[188] To emphasize the point further, the court claimed its goal in the exercise of discretion was "to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law."[189]

The Australian High Court, in discussing the criteria for exclusion of evidence, did not ignore the probative value of the evidence to be suppressed but greatly discounted its importance. "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."[190] The criterion for determining whether exclusion should occur specifically is that the probative value should be considered only where there is a good faith error (understandably mistaken assessment). When there is a deliberate

183 141 C.L.R. 54 (H.C. 1978).

184 *Id.* at 65 (Barwick, C.J.); *id.* at 68-81 (Stephen & Aikin, J.J.).

185 *Id.* at 75.

186 *Id.* at 77-78. The New Zealand High Court has demonstrated a similar concern for judicial integrity. "Another way of expressing the foundation of the second discretion is that it relates to the rejection of evidence where its admission would be calculated to bring the administration of justice into disrepute." Regina v. Dally, 2 N.Z.L.R. 184, 192 (H.C. 1990) (citation omitted).

187 Olmstead v. United States, 277 U.S. 438 (1928) (Holmes, J., dissenting).

188 *Bunning*, 141 C.L.R. at 78 (quoting *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting)).

189 *Id.* at 74.

190 *Id.* at 72 (quoting Pearse v. Pearse, 63 Eng. Rep. 950, 957 (H.C. 1946)).

violation by the police, the probative value of the evidence should generally not be considered.[191] Thus, if the previously discussed *United States v. Payner*[192] were being decided in Australia, the deliberate acts by the government would likely preclude consideration of the probative value of the evidence to be excluded.

Among the other factors to be considered in Australia are comparison of the seriousness of the offense with the unlawful conduct of the police, as well as specific legislative intent to restrict and prohibit the particular unlawful conduct.

> Thus, some impropriety by a police officer will not lead to the exclusion of the evidence in every instance. If there was a deliberate and wanton abuse of a person's rights, then clearly the evidence will be excluded. If on the other hand, the impropriety is a technicality or the result of an inadvertent slip, the court will be inclined to allow the resultant evidence to be admitted.[193]

There was conflicting authority on the scope of *Bunning v. Cross*. Was the exclusionary remedy limited to real (tangible) evidence or did it have broader application to intangible evidence, such as a statement? This question was answered by the High Court in *Cleland v. Regina*.[194] This case concerned the admissibility of a confession.[195] The question posed was whether, if a confession was voluntary and it logically would not be unfair to the accused to admit it, the court nonetheless has discretion to exclude it under *Bunning v. Cross*, if the confession was obtained unlawfully or unfairly.[196]

The Court held that the trial judge does have broad discretion, including the discretion described in *Bunning v. Cross*. This represented not only an acceptance of *Bunning v. Cross*, but a clear statement that the discretion had a wide area of operation.

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191 The court mentions an exception when the evidence is vital and perishable so that any delay might result in the loss of the evidence. *Id.* at 79.

192 447 U.S. 727 (1980); *see supra* notes 80-87 and accompanying text.

193 Interview with Justice J.E.J. Spender, *supra* note 127, at 474.

194 151 C.L.R. 1 (H.C. 1982). Cleland was arrested and taken to the police station at 2:00 p.m. where he stayed until midnight. Not once during this time was he taken to a magistrate or justice as required by law. This custody made his detention unlawful after 5:30 p.m. It was during this time that his confession was rendered. *Id.* at 5. At trial, he did not claim that the confession was coerced. Instead, he denied the confession. Since the confession was received during an unlawful detention, its value was questionable. *Id.*

195 According to Chief Justice Gibbs:

> A confession will not be admitted unless it was made voluntarily, that is in the exercise of a free choice to speak or be silent. But even if the statement was voluntary, and therefore admissible, the trial judge has a discretion to reject it if he considers that it was obtained in circumstances that would render it unfair to use it against the accused.

Id. at 5 (Gibbs, C.J.).

196 *Id.*

> There seems no reason in principle why the rule in *Bunning v. Cross* should be confined to real evidence, although that is its "principal area of operation." It should however be made clear that there is no general rule that the court will reject evidence illegally obtained. On the contrary, the rejection of confessional evidence for this reason alone is most exceptional.[197]

This somewhat hesitant view was taken by three members of the Court.[198] The other two justices, Murphy and Deane, held a stronger view about the exclusion of a confession obtained by unlawful or improper conduct. Their view clearly implicated notions of judicial integrity. Justice Murphy said that if a voluntary confession would not have come into existence except for unlawful or improper conduct, the court could exclude evidence on the discretionary ground of public policy.[199]

> Where a confession was obtained by unlawful or improper conduct then, in my opinion, the evidence should generally be excluded. Such a course will tend to preserve observance of law and decency in its administration. A confession or admission resulting from an interrogation whilst in unlawful custody should ordinarily be rejected on public policy grounds. There are very powerful social considerations in deterring police from unlawfully imprisoning persons. The general rule may be departed from if the unlawful or improper conduct was technical or slight.[200]

E. EXCLUSIONARY RULE—NEW ZEALAND

The New Zealand court, rather than relying on the weighing formula found in *Bunning v. Cross*, has formulated an imprecise and broad standard of unfairness to determine whether to exclude evidence as a result of a particular police practice.[201] The court opted for this type of standard so as not to force judges into a more rigid standard. This type of standard, as one would logically conclude,

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197 *Id.* at 9 (Gibbs, C.J.).

198 Gibbs, C.J., Wilson & Dawson, J.J.

199 *Id.* at 16 (Murphy, J.).

200 *Id.* at 16-17 (Murphy, J.) (citing Mapp v. Ohio, 367 U.S. 643 (1961)). Justice Deane also addressed the issue as to what grounds a discretionary decision to exclude confessions should be based:

> The difference of opinion among judges of the Supreme Court of South Australia concerns whether, in a case where the making of a voluntary confession has been procured by unlawful or improper conduct on the part of those whose duty it is to enforce the law, the particular discretion to exclude evidence of a voluntary confessional statement on the grounds of unfairness to the accused and the more general discretion to exclude unlawfully and improperly obtained evidence are both relevant or whether one or the other of those discretions alone is involved. The more common view among judges of the Supreme Court who have been called upon to consider the matter has been that both discretions are relevant.

Id. at 19-20 (Deane, J.).

201 Regina v. Dally, 2 N.Z.L.R. 184 (H.C. 1990) (Eichelbaum, C.J.).

has resulted in a great deal of discretion that may be exercised by individual judges. In describing when the discretion should be exercised, given its broad interpretation of unfairness, the court has stated that it should be used "where there has been some undesirable practice indulged in by the police in obtaining evidence; a type of practice which requires censure by the court."[202]

This type of broad discretion with a standard of unfairness that the court has been reluctant to define could lead to a great deal of subjectivity by individual judges. However, the court in New Zealand has indicated that it is better to trust in the judiciary than to shackle their power.[203] This bold approach is reminiscent of Justice Frankfurter's approach to due process.[204]

VI. COMPARATIVE SUMMARY: UNITED STATES WITH AUSTRALIA AND NEW ZEALAND

The two related objectives supporting judicial integrity, avoiding complicity with wrongful acts and acting as a symbol in maintaining fundamental rights, have been discounted by a majority of the Justices of the United States Supreme Court. With regard to complicity with wrongful acts, the Court has taken a view that equates judicial integrity with deterrence. Thus, the Court has looked only at the specific act of a police officer, an act that has already occurred at the time the government seeks to introduce the evidence.[205] The Court has reasoned that since the past bad act has already been completed, the Court is not associated with it by the introduction of the evidence. This approach ignores the facts that the court is also a governmental actor and that further harm occurs by the introduction of the evidence. This alternative view was expressed by Justice Holmes in his dissent in *Olmstead v. United States*: "no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[206]

United States v. Payner[207] provides a powerful illustration of the Court's position on the symbolic effect of judicial integrity. Judicial

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202 Regina v. Lee, 1 N.Z.L.R. 481, 487 (H.C. 1978).

203 *See* Selvey v. Director of Pub. Prosecutions, 2 W.L.R. 1494, 1523-24 (1968) (Lord Guest); *see also* J.B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP. L.Q. 513 (1982).

204 *See supra* notes 101-104 and accompanying text.

205 *See supra* notes 26-59 and accompanying text.

206 Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

207 447 U.S. 727 (1980).

integrity no longer symbolizes justice for all society, rather, it now symbolizes a concern for the guilty going free because of the exclusion of probative but tainted evidence, because "after all, it is the defendant, and not the constable, who stands trial."[208] Robert Bork captured this sentiment when he commented:

> [One of the reasons] sometimes given [in support of the exclusionary rule] is that courts shouldn't soil their hands by allowing in unconstitutionally acquired evidence. I have never been convinced by that argument because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society."[209]

This concern not to free the guilty defendant would seem to be an abrogation of the Court's responsibility to maintain control of the executive by ensuring that the agents of the executive engage in lawful conduct. This concept of checks and balances was envisioned by our founding fathers.[210] The language of Justice Holmes, who urges us not to focus on the individual criminal going free but to direct our attention to the importance of controlling the power of the police, is illustrative. "[I]t is a less[er] evil that some criminal should escape than that the Government should play an ignoble part."[211] In addition, it is short-sighted to focus on the results of an individual case (the possibility of a guilty person going free).[212] As

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208 *Id.* at 734.

209 Yale Kamisar, *'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule,* 86 MICH. L. REV. 1, 1-2 (1987) (quoting McGuigan, *An Interview with Judge Robert Bork,* JUD. NOTICE, June 1986, at 1, 6). Is it true that society really is less concerned about the Court acting as a beacon for lawful conduct (justice) than, as the Court suggests in *Payner,* about a criminal going free—especially if the error committed by a police officer is minimal? Would a lack of proportionality between the error committed and the release of a criminal look like an injustice? John Kaplan raised this point in talking about the exclusionary rule.

> Moreover, in actual operation, the rule would seem to injure judicial integrity far more than it serves that end. And finally, any moral end that is served in the name of judicial integrity must be balanced against our sense of injustice not only at letting a serious criminal go free, but at letting him go free because of what may be trivial error by the police.

John Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1036 n.53 (1974).

210 *See supra* notes 11-14 and accompanying test.

211 *Olmstead,* 277 U.S. 470 (Holmes, J., dissenting).

212 *See* United States v. Leon, 468 U.S. 897, 951 n.11 (1984) (Brennan, J., dissenting). In his dissent, Justice Brennan stated:

> In another measure of the rule's impact—the number of prosecutions that are dismissed or result in acquittals in cases where evidence has been excluded—the available data again show that the Court's past assessment of the rule's costs has generally been exaggerated. For example, a study based on data from 9 [sic] mid-sized counties in Illinois, Michigan and Pennsylvania reveals that motions to suppress physical evidence were filed in approximately 5% of the 7,500 cases studied, but that such motions were successful in only 0.7% of all these cases."

Id. (Brennan, J., dissenting) (citing Peter Nardulli, *The Societal Cost of the Exclusionary Rule:*

the New Zealand High Court said in *Moevao*, "[t]he due administration of justice is a continuous process, not confined to the determination of the particular case."[213]

Another area where the United States Supreme Court has been concerned with the public perception has been in the use of *habeas corpus* petitions.[214] In large measure, restrictions on the use of *habeas corpus* petitions have been the result of finality concerns. The public is upset about the amount of time it takes to effectuate a death sentence.[215] Popular concerns for executing the guilty, however, should have no place in judicial decision making and certainly should not replace the deeply rooted notions that the court is a symbol of lawfulness and justice.[216]

It should also be pointed out that public sentiment is erratic and therefore it is often difficult for the court to have an accurate reading of this sentiment. The Rodney King saga graphically demonstrates the fickleness of public sentiment. Polls taken shortly after the initial verdict acquitting the four police officers of beating Rodney King show that the public was concerned that the court system ignored official misconduct.[217] This public concern existed even though Mr. King was reputed to have an extensive criminal record and the police used the defense that they were just doing their jobs. In addition, unlike the habeas corpus area, finality concerns were ignored by the public, who wanted to see a retrial of the police officers. The republican administration, which largely had been sensitive to finality concerns as well as other law enforcement issues,

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An Empirical Assessment, 1983 AM. B. FOUND. RES. J. 585, 596). Justice Brennan continued: "[t]he study also shows that only 0.6% of all cases resulted in acquittals because evidence had been excluded." *Id.* (Brennan, J., dissenting) (citing Nardulli, *supra*, at 600).

213 Moevao v. Department of Labour, 1 N.Z.L.R. 464, 481 (C.A. 1980) (Richardson, J.).

214 *See supra* notes 123-125 and accompanying text.

215 *See supra* note 123.

216 *See, e.g.*, Lay, *supra* note 123, at 1015; Mercer v. Armontrout, 864 F.2d 1429, 1431 (8th Cir. 1988) ("If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. It should thus be readily apparent that the legal process in a civilized society must not rush to judgment and thereafter to execute a person found guilty of taking the life of another."); Debra Cassens Moss, *Death, Habeas, and Good Lawyers: Balancing Fairness and Finality*, 78 A.B.A. J. 83, 84 (1992) ("To learn about the extent of errors at trial, the ABA studied published habeas decisions by Federal Appeals Courts in capital cases from July 1976 to May 1991. It found that in 40[%] of the cases, the state conviction or death sentence was reversed because of constitutional violations.")

217 *See* Richard Morin, *Polls Uncover Much Common Ground on L.A. Verdict*, WASH. POST, May 11, 1992, at A15 (explaining that "[t]he earliest polls, most conducted within three days of the verdict . . . , [found the majority] of blacks and whites rejected the jury's verdict and demanded federal action against the four police officers").

made the decision to retry the police officers in the federal court. This example demonstrates that public sentiment is variable and difficult to monitor. Courts, in making decisions, should adhere to notions of justice and fairness and not to what might be the latest public sentiment.

The judiciary in America was envisioned by our ancestors as an independent body not subject to outside influences. The fickle whims of the public should not be an influence, as the courts need to rise above the fray and maintain themselves as a symbol of lawfulness. Decisions based upon sound principles may often be unpopular, especially where the accused appears to be guilty of a crime. As stated by Justice Frankfurter, "[p]ublic confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."[218] Thus, it is in the long-term interest of a society based upon the rule of law that its courts should be a symbol of lawfulness. This is the essential value at stake.

The standard for exclusion in Australia and New Zealand is a reflection of the underlying goals of judicial integrity. Where there has been deliberate illegal conduct, the court, in an effort to symbolize lawful acts rather than to sanction or participate in such illegal conduct, ignores the probative value of the excluded evidence. Where the police violation is non-intentional, the concern for sanctioning that which is non-deliberate is less acute. Moreover, symbolically the public will not think less of the courts for not severely penalizing such conduct. New Zealand, by its broad flexible standard, has exhibited considerable trust in the court system *vis-a-vis* individual judges to do what is fair. This trust is an acceptance of the courts' ability to exercise judicial integrity.

Although there appears to be authority to exercise judicial integrity in Australia and New Zealand, there is no guarantee that this discretion is in fact exercised. Professor Bradley recognizes that there is indeed considerable discretion to exclude real as well as confessional evidence due to police misconduct, but he points out that it is rarely used.[219] "Is a discretionary rule, then, the only honest answer? Certainly, the discretionary rule currently in force in Australia, which is often mentioned but rarely acted on can hardly be considered an adequate safeguard for civil liberties."[220] There

218 Sherman v. United States, 356 U.S. 369, 380 (1957) (Frankfurter, J., concurring).

219 Craig M. Bradley, *Criminal Procedure in the "Land of Oz": Lessons for America*, 81 J. CRIM. L. & CRIMINOLOGY 99 (1990); *see also* K. SHROFF & S. CLARKE, ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE 45-54 (1981).

220 Bradley, *supra* note 219, at 122 (footnote omitted).

is, however, some difference of opinion with Professor Bradley's assessment.[221] Furthermore, given the reluctance to review a trial judge's discretionary action, there are likely to be instances when exclusion or other remedies utilizing the abuse of process doctrine will not come to the attention of an appellate court.[222]

What has occurred in the United States Supreme Court is a narrowing of the concept of judicial integrity. In other words, it has chosen to discount improper or even illegal conduct by the executive. On the other hand, in Australia and New Zealand, the courts, through their discretionary power, have evolved into showing (at least by their words as opposed to deeds) a concern for the public perception of the justice system as a watchful monitor of improper executive actions.

VII. SUMMARY: AN ARGUMENT FOR REINSTITUTING JUDICIAL INTEGRITY

> Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply "proper standards for the enforcement of the federal criminal law in the federal courts," an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.[223]

This plea for what some might consider judicial activism is not judicial activism at all. It is grounded in the historical role envisioned for our court system. Professor Dworkin defines a judicial activist as a judge "[who] would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture."[224] In our political culture, society sees the court as a symbol of justice. The court derives this status from its role as part of the separation of powers because it acts as a check on the proper conduct of the executive and legislative branches. In order to accomplish this task,

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221 Mark Griffin, an experienced criminal lawyer in Australia, reports that there are many instances when a trial judge will utilize the abuse of process doctrine. Interviews with Mark Griffin, Visiting Scholar, Boston College Law School (Spring/Summer 1993).

222 Interview with Justice J.E.J. Spender, *supra* note 127, at 469 (stating that review of a trial judge's discretionary decisions by an appellate court is rare).

223 Sherman v. United States, 356 U.S. 369, 380 (1957) (Frankfurter, J., concurring) (quoting McNabb v. United States, 318 U.S. 332, 341 (1943) (citation omitted)).

224 RONALD DWORKIN, LAW'S EMPIRE 378 (1986).

the court must employ judicial discretion. As demonstrated in this Article, there is ample precedent for the exercise of judicial integrity. This can be found in the original justification for the exclusionary rule, the utilization of supervisory powers, and the original concept of due process.

When a judge abides by proper judicial principles and seeks justice, fairness and equality before the law, discretion is more than just a good thing; it is essential to fashion a just decision. It is impossible to delineate in advance all the circumstances which will call for a set standard. Thus, one realizes the importance of a flexible standard requiring discretionary power.

A need for clear, consistent and concise decisions so as to provide guidance and direction to the lower courts is often the argument against too much judicial discretion. On the other hand, given the fact-specific nature of our system, there is a need to respond to certain activities which have not yet arisen in prior cases.

Implicit in the demise of judicial integrity is an inherent distrust in the court system to do the right thing in sanctioning official misconduct.[225] It is assumed to be prudent to limit courts' discretionary power because judges cannot be trusted to exercise that power with restraint. This thinking is unfaithful to the guiding principle that the courts are a separate institution within our governmental system. Furthermore, in recent years the Supreme Court has not exhibited the same desire to limit the discretionary power of the executive (the police). The Court has provided greater leeway to law enforcement to exercise its discretion. For example, with regard to Fourth Amendment jurisprudence, the loosening of the probable cause standard from a rather specific two-pronged test to a more imprecise "totality of the circumstances" standard is an indication that the Court has become less concerned with the exercise of law enforcement discretion.[226] Thus, discretion is being created in the name of law enforcement, but there is great reluctance to create it in the name of individual rights. Possibly the re-emergence of principles of judicial integrity will act as a check, as our founding ances-

225 *See* Charles Fried, *Impudence*, 5 SUP. CT. REV. 55 (1992).

226 *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (stating that "where a careful balancing of governmental and private interests suggest that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard"); New York v. Quarles, 467 U.S. 649, 651 (1984) (concluding that the "overriding considerations of public safety justify the officer's failure to provide Miranda [sic] warnings before he asked questions devoted to locating an abandoned weapon"); Illinois v. Gates, 462 U.S. 213 (1983) (holding that the totality of circumstances standard is more flexible and easier to apply).

tors had envisioned, on the increasing discretionary power of the police.

If one agrees with Justices Frankfurter and Brandeis that the courts should be a symbol of justice for our society, then one has to give judges some discretion so that they can act as this symbol. We are willing to concede that the concept of judicial integrity allows for a great deal of discretion to be exercised pursuant to relatively vague concepts. However, this exercise of discretion is limited to governmental misconduct, an area which the framers entrusted to the judiciary. In addition, historically, the Court has rarely abused this discretion.[227]

Furthermore, if we were to follow the approach implied by Justices Thomas and Scalia in *Herrera v. Collins*[228] and not have the Court intervene (for instance, exercise what we have been calling judicial integrity) when an innocent man is about to be executed, could one dare say that this is the role our founding fathers had in mind for the court system? Surely the courts cannot stand by while the executive executes an innocent man.[229]

Somewhere along the way notions of judicial integrity have been forgotten. These notions have an important role to play and indeed should become more prominent. The court system *should* correct injustices even if those injustices do not necessarily violate specific laws or rules. Government improprieties should not find an oasis within the court system.

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227 For example, in Brown v. Mississippi, 297 U.S. 278 (1936), the defendants were convicted of murder solely on the basis of their confessions, which were extorted through such brutal means as whipping and other torture. The Supreme Court held that using evidence gained in this manner violated the Due Process Clause. *Id.* at 286. In a subsequent decision, where the petitioners were questioned for seven days culminating in an all-night examination and denied access to family, friends, or counsel, the Court held that the extraction of confessions by law enforcement officials in this manner violated the Due Process Clause of the Fourteenth Amendment. Chambers v. Florida, 309 U.S. 227, 238-41 (1940). "The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings." *Id.* at 239. Similarly, in Rochin v. California, 342 U.S. 165 (1951), the defendant was convicted of drug possession based on evidence which was forcibly gained by law enforcement officials who removed the evidence from the defendant's stomach with a pump. The Court held that this conduct violated the Due Process Clause because it shocks the conscience. *Id.* at 172. Finally, in Fikes v. Alabama, 352 U.S. 191, 198 (1957), the Court held that the petitioner who had been questioned for several hours, had not been before a magistrate, and was kept in seclusion from friends, relatives, or counsel was denied due process of law.

228 113 S. Ct. 853 (1993).

229 I recognize that this approach might be inconsistent with the finality concerns expressed by the court when habeas corpus is utilized. *See* Fried, *supra* note 226, at 183. Nevertheless, there has to be some discretion to rectify an egregious fact situation.