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# CRIMINAL PROCEDURE IN THE "LAND OF OZ": LESSONS FOR AMERICA

CRAIG M. BRADLEY\*

## I. INTRODUCTION

Imagine a land lolling in the warm embrace of a benevolent sun, where the people are happy and prosperous and everyone lives near pristine, uncrowded beaches. Such a country is the Land of Oz—Australia,<sup>1</sup> a vast English speaking former British colony currently populated by people of diverse ethnic and racial origins. Australia's legal system, like America's, is drawn from the British common law, and it has a federal system much like our own. It seems especially likely that Australians would be concerned about police illegality since, in such areas as child care and environmental concerns, Australia seems more "liberal" than America. Moreover, Australia has a lower crime rate than America,<sup>2</sup> and Australians typically display an antipathy for police—perhaps stemming from the country's origins as a penal colony—that is at least the equal of Americans'.<sup>3</sup> Consequently, a study of the Australian criminal pro-

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<sup>1</sup> The Australian pronunciation of "Aussie" sounds like "Ozzie," which is probably why Australians frequently refer to their country as "the land of Oz." Cf. A. LAUDER, *LET STALK STRINE* (1965).

<sup>2</sup> From July 1, 1987, to June 30, 1988, there were 1.93 murders, 88.93 serious assaults, 16.03 rapes, and 48.3 robberies per 100,000 population in Australia. Telephone Interview with the Australian Institute of Criminology (June 17, 1989). By contrast, in 1988 in the United States there were 8.4 murders and non-negligent manslaughters, 370.2 aggravated assaults, 37.6 forcible rapes, and 220.9 robberies per 100,000 population. FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES 47 (1988).

<sup>3</sup> "The ambivalent attitude of the Australian community toward the police, who are often regarded as a necessary evil, can engender in the police an isolated and fortress mentality . . . ." P. SALLMAN & J. WILLIS, *CRIMINAL JUSTICE IN AUSTRALIA* 3 (1984).

cedure system would seem to be an ideal source for constructive approaches to problems that might be useful in America.

Alas, current Australian criminal procedure does not bear out this expectation. In most respects, it is where America's was in the mid-1950s. The "voluntariness" test as to confessions is the only basis for mandatory evidentiary exclusion, there is little federal control over state procedures, and police generally "exercise personal power undisturbed by thoughts that there will ever be an accounting for its use."<sup>4</sup> Moreover, "[i]n a sphere of activity involving issues of fundamental human liberty the governing rules are unclear, uncertain, out of date, difficult to find and understand and thus quite unsuitable for the age in which we live."<sup>5</sup>

But while the current Australian law of criminal procedure provides nothing to emulate, it is worth studying for two reasons. First, because of Australia's similarity to the United States, it may be seen as a laboratory where a "discretionary" or balancing approach to evidentiary exclusion, often put forward as an alternative by critics of the American approach,<sup>6</sup> is being tested. This Article discusses the failure of that "test."<sup>7</sup>

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<sup>4</sup> REPORT OF THE BOARD OF INQUIRY INTO THE ENFORCEMENT OF CRIMINAL LAW IN QUEENSLAND 91 (1977) [hereinafter LUCAS REPORT].

<sup>5</sup> P. SALLMAN AND J. WILLIS, *supra* note 3, at 20.

<sup>6</sup> A good discussion of the balancing approach, whereby evidence is only excluded if the "societal costs of imposing the rule do not exceed the benefits of the enforcement of the rule," is found in *State v. Bolt*, 142 Ariz. 260, 270, 689 P.2d 519, 529 (1982) (Cameron, J., concurring); Cameron & Lustiger, *The Exclusionary Rule: A Cost Benefit Analysis*, 101 F.R.D. 109, 142-52 (1984); see also Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (proposing the abandonment of exclusionary rules in certain specified "serious" cases such as murder and kidnapping); Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 744 (1972) (the rule should only apply in cases of "outrageous" police misconduct). The balancing approach is generally used in West Germany and other European countries. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1033 n.5, 1035 (1983). But see Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987) (criticizing balancing approach).

<sup>7</sup> In Australia, as in Great Britain and other Commonwealth countries, "this discretion [vested in the trial judge to exclude evidence as he sees fit] is very rarely acted on." NEW SOUTH WALES LAW REFORM COMMISSION, WORKING PAPER ON ILLEGALLY AND IMPROPERLY OBTAINED EVIDENCE 15 (1979).

The Australian Law Reform Commission similarly found that "the weaknesses of [the current] remedies [for police misconduct] are such that if continued in their present form they render irrelevant, in terms of their practical effect [any reform of the rules of criminal procedure]." LAW REFORM COMMISSION, REPORT NO. 2 (INTERIM), CRIMINAL INVESTIGATION 98 (1975) [hereinafter LRC CRIMINAL INVESTIGATION] (referring to civil suits and police disciplinary procedures as well as judicial exclusion).

In addition to the LUCAS REPORT, *supra* note 4, see REPORT OF THE BOARD OF INQUIRY INTO ALLEGATIONS AGAINST MEMBERS OF THE VICTORIA POLICE FORCE (1978) [hereinafter BEACH REPORT]; THE LAW REFORM COMMISSION, REPORT NO. 38, EVIDENCE (1987) [hereinafter LRC EVIDENCE].

The second aspect of Australian law that is of interest is the Australian Law Reform Commission's proposals.<sup>8</sup> The most compelling of these to an American is generally taken for granted by Australians: criminal procedure rules should be declared by *statute*, not case law.<sup>9</sup> Already, rules of criminal procedure in Australia are partly statutory at the state level. The Law Reform Commission proposes to make them so at the federal level and to provide a comprehensive model for reform of state statutes. This Article discusses the current Australian rules of criminal procedure, and the Australians' unsuccessful endeavor to enforce these rules through a "balancing" or discretionary approach to evidentiary exclusion. Second, it discusses the statutory reforms currently being considered in Australia and provides a critique of these proposals.

Finally, drawing on the Australian experience, the Article concludes that while a balancing approach is not the appropriate remedy for criminal procedure violations by the police, the Australians are correct in utilizing statutory, as opposed to court-made, rules of criminal procedure. In Australia these rules must necessarily be enacted by each state. In America, by contrast, I argue that Congress can and should enact such a statutory scheme applicable to all the states pursuant to section five of the fourteenth amendment.<sup>10</sup>

## II. AUSTRALIAN RULES OF CRIMINAL PROCEDURE

Since Australia's rules of criminal procedure do not differ greatly from the United States's and, in any event, can usually be

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<sup>8</sup> Thus far the Law Reform Commission has succeeded in having two bills introduced into Parliament—the Criminal Investigation Bills of 1976 and 1981—only to have them defeated by police opposition.

In response to the Criminal Investigation Bill of 1981, the President of the Police Federation of Australia and New Zealand threatened a police strike if implementation of the act would result in the sanctioning of police officers. 26 REFORM 63 (Apr. 1982). Senator Evans (then Attorney General) "suggested that the police response to the Bill demonstrated 'a profound indifference to the constraints of existing law.'" *Id.*

However, there is reason to believe that currently pending efforts may be more successful. Telephone interview with Stephen Mason, Secretary and Director of Research, Law Reform Commission (March 2, 1989). In part, this optimism is based on the fact that Victoria, a state noted for a particularly obdurate police union in the past, P. SALLMAN & J. WILLIS, *supra* note 3, at 18, has recently enacted a bill calling for 1) the tape (or video) recording of all statements made by defendants in custody and 2) the warning of such defendants as to their rights to counsel and silence. Crimes Custody and Investigation Act, Vict. Acts §§ 464A(3), 464C(1)(b), 464G, 464H (1988). See *infra* notes 23-25 and accompanying text.

<sup>9</sup> "It is generally accepted that what is needed is a comprehensive code setting out with as much particularity as possible the rights and duties of police, suspects and others concerned in the criminal investigation process." LRC CRIMINAL INVESTIGATION, *supra* note 7, at 23.

<sup>10</sup> See *infra* note 197 and accompanying text.

freely ignored by the police, the Article will not devote extended discussion to them. It will instead focus on the statutes of New South Wales and Victoria, where over half of Australia's population lives.<sup>11</sup> At the outset, it must be noted that these rules have no constitutional foundation, as in America, because Australia has no equivalent to our Bill of Rights. The rules of criminal procedure are declared by the various state parliaments, by state courts drawing on the common law, or by the High Court of Australia in its capacity as the highest court of each state.

#### A. STOP AND SEARCH

The New South Wales Crimes Act of 1900 provides for the stop and search of persons or vehicles reasonably suspected of "having or conveying any thing stolen or otherwise unlawfully obtained or any thing used or intended to be used in the commission of an indictable offence."<sup>12</sup> Police may enter a house to arrest without a warrant on reasonable suspicion<sup>13</sup> and may search the person and the premises incident to the arrest.<sup>14</sup>

The Search Warrant Act of 1985 provides that 1) search warrants may be issued if there are reasonable grounds for believing that on any premises there is "a thing connected with a particular [specified] offence," and 2) the warrant must specify the things for which the search is conducted.<sup>15</sup> It further provides for 1) the seizure of other evidence found on the premises on "reasonable

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<sup>11</sup> However, since the Australian High(est) Court functions as the highest court of each state rather than as a court of limited jurisdiction like the United States Supreme Court, there is no jurisdictional bar to its declaring rules of procedure based on "common law." In theory these rules are only applicable to the state involved in the case before the Court, but in practice the states follow such pronouncements by the High Court.

<sup>12</sup> Crimes Act of 1900, N.S.W. Stat. § 357E(a) (Supp. 1979). "Reasonable suspicion" in Australia seems to mean the same thing as "probable cause" in America. See J. OXLEY-OXLAND, N.S.W. POLICE LAW HANDBOOK 1001 (1988). [hereinafter N.S.W. HANDBOOK].

For an interesting historical discussion of the development of these terms in the law of search and seizure, see Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 478-495 (1984). "Three hundred years after Hale, English judges still use such terms as 'reasonable suspicion,' 'reasonable and probable cause' and 'reasonable and probable cause for suspicion' interchangeably." *Id.* at 488.

<sup>13</sup> J. BISHOP, CRIMINAL PROCEDURE 50 (1983); Crimes Act of 1900, N.S.W. Stat. § 352 (Supp. 1979); Crimes Act, Vict. Acts § 459(b) (1958).

<sup>14</sup> P. GILLIES, THE LAW OF CRIMINAL INVESTIGATION 212 (1982). Cf. *Chimel v. California*, 395 U.S. 752 (1969) (restricting this common law rule in America).

<sup>15</sup> Search Warrant Act of 1985, N.S.W. Stat. §§ 5, 6; see also Crimes Act, Vict. Acts § 465 (1958).

grounds for believing it is connected with any offence,"<sup>16</sup> 2) the search, on reasonable suspicion, of people found on the premises,<sup>17</sup> and 3) telephonic warrants "in case of urgent need."<sup>18</sup>

South Australia stands in contrast to the particularity requirements of Victoria and New South Wales:

In South Australia the Commissioner of Police may issue general search warrants to members of the police force as he thinks fit. The member of the police force named in the warrant may at any time of the day or night, with such assistants as he thinks necessary, break open and search any premises where he has reasonable grounds to suspect: that a felony or misdemeanor has been recently committed or is about to be committed; that the premises contain stolen goods; that there is anything which may afford evidence of the commission of a felony or misdemeanor; or that there is anything which may be intended to be used to commit these offences. Any goods or things satisfying these criteria may be seized. The warrant may be granted for a period of up to six months and revoked at any point of time within that period. Similar powers exist in Tasmania and the Australian Capital Territory but only in respect of stolen goods.<sup>19</sup>

## B. INTERROGATION

Unlike the law of search, which is largely statutory in all Australian states, the law of interrogation has been developed through case law throughout Australia and is less clear. In general,

A person who has been charged with an offence does not have to answer a question put to him by a police officer. He still has a right to remain silent.

The police officer should advise him of his right in words similar to those laid down in the original Judges' Rules: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."<sup>20</sup>

While this is what the police are supposed to do, the High Court has made it clear that "the [British Judges'] rules may be regarded in a general way as prescribing a standard of propriety"<sup>21</sup> rather than a rigid requirement, and failure to follow them will not

<sup>16</sup> Search Warrant Act of 1985, N.S.W. Stat. § 7.

<sup>17</sup> Search Warrant Act of 1985, N.S.W. Stat. § 8.

<sup>18</sup> Search Warrant Act of 1985, N.S.W. Stat. § 12. Victoria, apparently, does not allow telephonic warrants. See Crimes Act, Vict. Acts § 465.

<sup>19</sup> J. BISHOP, *supra* note 13, at 75 (citations omitted). Bishop, joined by the Australian Law Reform Commission, condemns these general warrants. *Id.* at 75-76.

<sup>20</sup> N.S.W. HANDBOOK, *supra* note 12, at 301.

<sup>21</sup> Van der Meer v. R., 62 A.L.J.R. 656, 666 (Austl. 1988) (quoting R. v. Lee, 82 C.L.R. 133, 154 (Austl. 1950)).

necessarily lead to evidentiary exclusion.<sup>22</sup> Victoria recently clarified the law in this area by enacting a comprehensive statute governing interrogations. This statute *requires* police to inform suspects "in custody" of their rights to both silence and counsel<sup>23</sup> and to tape record the statements of any person who "was suspected or ought reasonably to have been suspected of having committed an offence."<sup>24</sup> The statute prescribes no remedy for violation of the warnings requirements but provides that untaped statements are "inadmissible."<sup>25</sup> This is designed to counteract police "verbalizing" (fabrication of oral confessions) which, as the Australian High Court has recognized, is a significant problem in Australia.<sup>26</sup> No other state has yet adopted a similar preventative measure.<sup>27</sup>

### C. SPEEDY TRIAL AND COUNSEL

Two other aspects of the Australian system of criminal procedure deserve brief mention: the absence of an unequivocal right either to a speedy trial or to counsel.

As to counsel, in the High Court case of *McInnis v. R.*<sup>28</sup> the defendant was convicted of rape even though his counsel did not ap-

<sup>22</sup> *Id.*; LRC EVIDENCE, *supra* note 7, at 91. In the Australian Capital Territory, however, the prosecution will not offer a defendant's statements into evidence unless the caution has been given. *Id.*

<sup>23</sup> Crimes Act, Vict. Acts §§ 464A(3), 464C(1)(b) (1988). Further, the police "must defer the questioning and investigation for a time that is reasonable . . . to enable the person to make or attempt to make, the communication" (with counsel) subject to an exigent circumstances exception. Vict. Acts § 464C(1). However, "custody" is defined as people "under lawful arrest" or as to whom "there is sufficient information . . . to justify the arrest," Vict. Acts § 464(1), allowing the provisions to be avoided in the early stages of an investigation. There is a limit, however, since "neither at common law nor generally speaking under statute is a policeman empowered to detain a person for the purpose of interrogation." P. GILLIES, *supra* note 14, at 10.

<sup>24</sup> Crimes Act, Vict. Acts § 464H(1). This section does not only apply to people "in custody."

<sup>25</sup> *Id.* This rule is subject to certain exceptions: statements made prior to questioning can be used if the suspect confirms them on tape, Crimes Act, Vict. Acts § 464H(1)(c), or under "exceptional circumstances" which "justify the admission of the evidence," Crimes Act, Vict. Acts § 464H(2). Alaska is, apparently, the only American state to have such a requirement. Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 506 (7th ed. 1989). See *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (providing for mandatory exclusion of statements that are not electronically recorded).

<sup>26</sup> "[T]here has been a significant number of occasions when unsigned records of interview have been proved to be false." *Carr v. R.*, 165 C.L.R. 314, 321 (Austl. 1988) (Wilson & Dawson, J.J.). The High Court accordingly requires trial judges to exercise caution before convicting on the basis of disputed confessional evidence. *Id.* at 321-22.

<sup>27</sup> The Law Reform Commission has proposed that such a requirement be adopted as to federal police. LRC EVIDENCE, *supra* note 7, at 169-70 (Draft Legislation § 74).

<sup>28</sup> 143 C.L.R. 575 (Austl. 1979). Counsel had withdrawn at the last minute when he learned that he would not be paid because the defendant's application for legal aid had been denied. The defendant's motion for a continuance was denied. *Id.* at 578.

pear for trial (through no fault of the defendant's) and despite his request that the trial be postponed. The High Court, affirming the conviction, recognized that a defendant generally should be afforded counsel but held that "an accused does not have a right to be provided with counsel at public expense," and that because of the strong case against the defendant, there was no "miscarriage of justice."<sup>29</sup> Therefore, while there is no absolute right to counsel, counsel is usually provided.

A speedy trial, by contrast, is regularly denied. Recently, a Supreme Court Justice in New South Wales resigned in protest over the "scandalous" and "obscene" delays in criminal trials, which have regularly led to people being incarcerated for over a year pending trial.<sup>30</sup> The Chief Justice of Australia has similarly decried these delays,<sup>31</sup> and the High Court has a case pending before it in which the defendant's attorneys are asking for a permanent stay of proceedings, on speedy trial grounds, in a case that was delayed for over five years between the arraignment and the trial.<sup>32</sup>

Beyond these examples, in a country which has no written Bill of Rights, even the most well established common law rights—such as the privilege against self-incrimination—are always subject to parliamentary overruling, as the High Court recently held.<sup>33</sup>

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<sup>29</sup> *Id.* at 579-80. This result is not unique to Australia. In numerous cases in England and those following the English tradition, courts have declined to set aside the conviction of an accused who was "unrepresented without his fault." *Id.* at 589 (Murphy, J.). In America, by contrast, "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The "harmless error" approach was used in the United States until *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Betts v. Brady*, 316 U.S. 455 (1942).

<sup>30</sup> Sydney Morning Herald, Feb. 10, 1989, at 1. The Supreme Court of each state consists of a group of judges who alternate between sitting individually as trial judges to try the most serious cases in the state and in panels of three to hear appeals from those cases. In the latter capacity, they form the highest court of the state, and their decisions are appealable only to the High Court of Australia.

<sup>31</sup> Canberra Times, Mar. 21, 1989, at 10. "Sir Anthony [Mason] was particularly critical of the situation in [New South Wales], where the average length of time spent by an accused in custody between committal . . . and trial in the District Court was 10 months. In the Supreme Court [where more serious cases are tried] that delay was now an average of nine months." *Id.*

<sup>32</sup> Canberra Times, Apr. 12, 1989, at 7. *But see* *Duke v. R.*, 83 A.L.R. 650 (1989) (High Court affirming on other grounds the conviction in South Australia of a defendant who had been imprisoned in New South Wales on another charge, despite a seven year delay between arrest and trial). *Contra* *Smith v. Hooey*, 393 U.S. 374 (1969) (reversing a conviction on speedy trial grounds).

<sup>33</sup> In *Hamilton v. Oades*, 7 A.C.L.C. 381 (Austl. Apr. 12, 1989), the High Court held that § 541(12) of the Companies Code of New South Wales had abrogated the privilege in the investigation of certain corporate improprieties.



### III. ENFORCING THE RULES THROUGH EVIDENTIARY EXCLUSION

In *Mapp v. Ohio*, the United States Supreme Court held that without an exclusionary rule—a requirement that illegally obtained evidence be suppressed—the constitutional prohibition against “unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties.”<sup>34</sup>

Australians have not subscribed to this view, adhering instead to the British common law approach that generally allows the admission of almost any evidence, regardless of how obtained.<sup>35</sup> However, in theory, though rarely in practice, the Australian High Court has diverged somewhat from the British view.<sup>36</sup>

#### A. MANDATORY EXCLUSION

An exception to the non-exclusionary approach is found in the long established, common law rule, based on a concern for reliability, that statements that have not been voluntarily given *must* be suppressed. This rule was summarized in 1948 by Judge Dixon in *McDermott v. R.*:<sup>37</sup>

If he [the accused] speaks because he is overborne his confessional statement cannot be received in evidence and it does not matter by what means he has been overborne. If the statement is the result of duress, intimidation, persistent importunity, or sustained or undue in-

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<sup>34</sup> *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.)). The Australian Law Reform Commission agrees:

Rights without remedies may be no more than rhetoric; duties without sanctions for their breach may as well not be imposed. . . . [T]he great failing of criminal procedure hitherto has not so much been its principles . . . but rather the failure of the law on the ground to conform with the law on the books.

LRC CRIMINAL INVESTIGATION, *supra* note 7, at 136.

<sup>35</sup> “It matters not how you get [evidence]; if you steal it even, it would be admissible in evidence . . . .” *R. v. Leathan*, 121 E.R. 589 (England 1861).

<sup>36</sup> *Bunning v. Cross*, 141 C.L.R. 54, 73 (Austl. 1978) (Stephen & Aickin, J.J., joined by Barwick, C.J.). See *infra* note 48 and accompanying text.

Thus Australia, to a limited extent, further disproves the belief of American conservatives, as expressed by former Chief Justice Burger, that the exclusionary rule is “unique to American jurisprudence.” *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting); see also Bradley, *supra* note 6 (puncturing claim that exclusionary rule is unique to the United States). Unlike Germany, however, Australia does not seem to have different cultural concerns that call for exclusion in some cases where America would not require it, Bradley, *supra* note 6, at 1058, although there are isolated examples of this. See *infra* note 94 and accompanying text. Canada has also adopted a rule of evidentiary exclusion due to police misconduct. Constitution Act, Can. Stat. § 24(2) (1982); see MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608 (1985).

<sup>37</sup> 76 C.L.R. 501, 511 (Austl. 1948).

sistence or pressure, it cannot be voluntary. But it is also a definite rule of the common law that a confessional statement cannot be voluntary if it is preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement was made.

The burden of proof is on the prosecution to show, on the "balance of probability," that the statement was voluntary.<sup>38</sup> Despite frequent mention of this rule in High Court decisions, it has rarely been invoked.<sup>39</sup> There is no other mandatory rule of exclusion generally applicable in Australia.<sup>40</sup>

## B. DISCRETIONARY EXCLUSION

Beyond the "involuntariness" basis for exclusion, there are three other possible grounds, all of which are discretionary with the trial judge, who is at least obliged to *consider* whether that discretion should be exercised.<sup>41</sup>

### 1. The "Prejudice" Discretion

The first of these is self-evident: "a confession [and indeed any

<sup>38</sup> Johnston, *The Exclusionary Rule and Other Controls Over the Abuse of Power by Police*, 54 AUSTR. L.J. 466, 467 (1980) (citing dicta in *Wendo v. R.*, 109 C.L.R. 559, 562, 572 (Austl. 1963)).

<sup>39</sup> See P. WAIGHT & C. WILLIAMS, *CASES AND MATERIAL ON EVIDENCE* 735 (2d ed. 1985) (citing two Australian and a handful of other British Commonwealth cases over a period of 40 years as "some of the very few reported cases where a confession has been excluded because of persistent police questioning"). The Australian cases are *R. v. Burnett*, 1944 V.L.R. 115, and *R. v. Jones*, 1 N.S.W.R. 190 (1970). In *Jones*, the defendant had been interrogated for 17 1/2 hours over a period of 28 3/4 hours, including a 14 hour period of almost continuous questioning from 7:30 p.m. to 9:30 a.m. the next day. The trial judge excluded the confession, not because it was involuntary (mandatory exclusions) but in the exercise of discretion, concluding that it would be "unfair" to use it. In *R. v. Fewster* (Queensl. Apr. 1979), in *THE CRIMINAL INJUSTICE SYSTEM* 106, 277 (J. Basten ed. 1982), the defendant, who had been hit in the mouth at the time of arrest, was told that "if he didn't give a statement the police officers would come down on him as hard as possible." The confession was excluded.

<sup>40</sup> In New South Wales, however, there is a statutory requirement that, in addition to the above stated rules, no confession may be received into evidence if it has been induced by any "untrue representation" made to the defendant. Crimes Act of 1900, N.S.W. Stat. § 410(1)(a) (Supp. 1979). By contrast, a Victorian statute specifically limits the common law rule of *McDermott*, providing that a "confession" should *not* be inadmissible if induced by "promise or threat" unless "that inducement was really calculated to cause an untrue admission of guilt to be made." Evidence Act, Vict. Acts § 149 (1958). The New South Wales courts have never actually excluded a confession pursuant to this section. See generally P. WAIGHT & C. WILLIAMS, *supra* note 39, at 742. Rather, they have limited it to *knowingly* untrue statements of the police made with the object of obtaining a confession from the suspect. Compare *R. v. Thompson*, 62 N.S.W. St. R. 135 (1961) with *Oregon v. Mathiason*, 429 U.S. 492 (1977) (affirming on other grounds the conviction of a suspect whose confession had been induced by police prevarication).

<sup>41</sup> *R. v. Ireland*, 126 C.L.R. 321, 335 (Austl. 1970).

evidence tendered by the prosecution] can be rejected when its probative value is low and its prejudicial effect is great." This discretion has apparently never been exercised in a defendant's favor.<sup>42</sup>

## 2. The "Unfairness" Discretion

The second ground for discretionary exclusion is that a voluntary confession may be excluded if "it would be unfair to use it in evidence against [the defendant]."<sup>43</sup> There has been considerable confusion about whether this "unfairness" refers to misconduct by the police or to concerns about the unreliability of the statement.<sup>44</sup> Recently, however, a majority of the High Court made it clear that the latter concerned the Court: "[u]nfairness, in this sense, is concerned with the accused's right to a fair trial, a right which may be jeopardized if a statement is obtained in circumstances which affect the *reliability of the statement*."<sup>45</sup>

Thus, the Court has implicitly endorsed the earlier statement by Chief Justice Latham in *McDermott* that "examples of such unfairness would be afforded by irresponsibility by the accused on the occasion when the statement was made or failure on his part to understand and appreciate the effect of questions and answers."<sup>46</sup> This category of discretion would not apply to the finding of real evidence which could not be rendered unreliable by the means by which it was obtained.<sup>47</sup>

However, while court opinions refer to this discretion with relative frequency,<sup>48</sup> only two cases could be found, both of trial courts,

<sup>42</sup> P. WAIGHT & C. WILLIAMS, *supra* note 39, at 750; *see also* *Driscoll v. R.*, 137 C.L.R. 517, 541 (Austl. 1977); *R. v. Tetlow*, 27 A. Crim. R. 198, 200 (N.S.W. Crim. App. 1986); *R. v. Gidley*, 3 N.S.W.L.R. 168, 172-73 (1984) (None of these cases involved the actual exclusion of confessional evidence on the basis of prejudice; rather, they stated the principle that it could be done.).

<sup>43</sup> *McDermott v. R.*, 76 C.L.R. 501, 506-07, 517 (Austl. 1948) (Latham, C.J., & Williams, J.); *see also* *R. v. Lee*, 82 C.L.R. 133, 154-55 (Austl. 1950).

<sup>44</sup> "[I]t will be apparent that an element of ambiguity has been introduced into this branch of the law." P. GILLIES, *supra* note 14, at 101 (*see also* Gillies's discussion beginning at page 102).

<sup>45</sup> *Van der Meer v. R.*, 62 A.L.J.R. 656, 666 (Austl. 1988) (Wilson, Dawson & Toohey, J.J.) (emphasis added).

<sup>46</sup> *McDermott*, 76 C.L.R. at 507; *see also* *Ostojic v. R.*, 18 S.A. St. R. 188, 197 (1978) (Wells, J., joined by Hogarth & King, J.J.) ("I can imagine cases in which a trial judge might exercise this discretionary power where no [police] impropriety existed. A suspect might be suffering hidden but naturally occurring pain, [or] he might have sustained severe shock . . .").

<sup>47</sup> But *see infra* note 54 and accompanying text for a discussion of the third head of discretion.

<sup>48</sup> *See generally* cases discussed in P. GILLIES, *supra* note 14, at 98-127; P. WAIGHT & C. WILLIAMS, *supra* note 39, at 771-73.

in which it was actually exercised.

In *Klemenko v. Huffa*,<sup>49</sup> the South Australian Supreme Court reversed the defendant's conviction for possession of stolen property on the ground that psychiatric testimony showed that he was insane at the time he gave his statement to the police and the magistrate had not considered whether or not to exercise his discretion.<sup>50</sup> In a study of all indictable cases that were concluded in the Sydney District Courts in a six week period there was, among the 147 cases, only one in which the judge excluded the confession of a defendant, a heroin addict, who was "physically debilitated and under heavy medication" and exhibited a "very markedly clouded consciousness."<sup>51</sup>

In contrast, in several cases the courts, including the High Court, have upheld the admission of confessions when it seemed that the confessions should have been excluded due to the defendants' incapacity. In *Basto v. R.*,<sup>52</sup> the confession was admitted despite the fact that the defendant was both suffering from an overdose of drugs which he had taken for the purpose of committing suicide and deemed insane later the same day. In *R. v. Starecki*,<sup>53</sup> the defendant's statement had been taken after he had shot himself in the brain.

### 3. The "Police Misconduct" Discretion

The final basis for discretionary exclusion of evidence in Australia is "when the evidence is the product of unfair or unlawful conduct on the part of the police."<sup>54</sup> However, unlike in the United States where the mere failure to give the *Miranda* warnings or to

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<sup>49</sup> 17 S.A. St. R. 549 (1978).

<sup>50</sup> *Id.* at 557.

<sup>51</sup> Stevenson, *Criminal Cases in the NSW District Court: A Pilot Study*, in THE CRIMINAL INJUSTICE SYSTEM, *supra* note 39, at 115.

<sup>52</sup> 91 C.L.R. 628 (Austl. 1954); *see also* Sinclair v. R., 73 C.L.R. 316 (Austl. 1946) (a confession was admitted even though the defendant was considered insane).

<sup>53</sup> 1960 V.R. 141 (Vict.); *see also* R. v. Buchanan, 1966 V.R. 9 (Vict.) (defendant suffering obvious head injuries sustained in automobile accident); *see also* cases cited in P. WAIGHT & C. WILLIAMS, *supra* note 39, at 773. *Cf.* Colorado v. Connelly, 479 U.S. 157 (1986) (holding that the use of a volunteered confession by an insane defendant did not violate the fifth amendment, but leaving the issue of the reliability of such a confession to the state courts). *But see id.* at 174-88 (Brennan, J. dissenting) (protesting that lack of free will was also a fifth amendment concern).

<sup>54</sup> Cleland v. R., 141 C.L.R. 1, 7 (Austl. 1982) (Gibbs, C.J.) (quoting Bunning v. Cross, 141 C.L.R. 54, 75 (Austl. 1978) (Stephen & Aickin J.J., joined by Barwick, C.J.)). The Court went on to observe that the "principal area of operation of this category of discretion will be in relation to what might loosely be called 'real evidence,' such as articles found by illegal search, recordings of conversations, the result of breathalyzer tests, fingerprint evidence and so on." *Id.*

obtain a search warrant when appropriate will *automatically* result in evidentiary exclusion,<sup>55</sup> the trial judge in Australia must weigh two competing requirements against each other: "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."<sup>56</sup>

In *R. v. Ireland*,<sup>57</sup> the High Court held that photographs of the defendant's hands should have been excluded from the defendant's murder trial, where the photographs were taken without consent for the purpose of allowing an expert witness to evaluate whether scratches on the hands were caused by handling the alleged murder weapon. The policeman had told the suspect that he "had to" have his hands photographed.<sup>58</sup> The court held that "neither at common law nor under [the] statute<sup>59</sup> has a police officer power to require a person to submit himself to photography for any purpose other than identification," and further that the photographs should have been excluded in the exercise of the trial court's discretion.<sup>60</sup>

As the High Court later made clear in *Bunning v. Cross*,<sup>61</sup> this category of discretion "[b]y no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."<sup>62</sup> The specific factors to consider include the following: 1) whether the "unlawful or improper conduct"<sup>63</sup> on the part of the police was intentional or reckless on the one hand or merely "accidental" or "unconscious" on the other;<sup>64</sup> 2) "the ease with which the law might have been com-

<sup>55</sup> *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless [he has received the warnings.]").

<sup>56</sup> *Bunning v. Cross*, 141 C.L.R. 54, 74 (Austl. 1978) (Stephen & Aickin, J.J.).

<sup>57</sup> 126 C.L.R. 321 (Austl. 1970).

<sup>58</sup> *Id.* at 327.

<sup>59</sup> *Id.* at 334; Police Offenses Act, S. AUSTRALIAN STAT. § 81 (1960). Under the Australian Constitution, the High Court is also the highest court for each state and has the final word on the meaning of each state's statutes. "The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments . . . [T]he judgment of the High Court . . . shall be final and conclusive." Constitution Act, Austl. Acts. § 73 (1900).

<sup>60</sup> *Ireland*, 126 C.L.R. at 335.

<sup>61</sup> 141 C.L.R. 54 (Austl. 1978).

<sup>62</sup> *Id.* at 569 (Stephen & Aickin, J.J.). These factors include regard for the "liberty of the subject," *id.* at 570 (Stephen & Aickin, J.J.), and that the government not "play an ignoble part" in the conviction of criminals. *Id.* (Stephen & Aickin, J.J.) (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

<sup>63</sup> *Id.* at 569 (Stephen & Aickin, J.J.).

<sup>64</sup> *Id.* at 570 (Stephen & Aickin, J.J.).

plied with";<sup>65</sup> 3) "the nature of the offence charged";<sup>66</sup> 4) and whether there was evidence that the rule broken was one which reflected a "deliberate intent on the part of the legislature narrowly to restrict the police."<sup>67</sup> The probative value of the evidence would be considered only in cases of negligent police violations.<sup>68</sup> In *Bunning*, however, the High Court, by a four to one majority, held that evidence of a breathalyzer test would be admissible in a drunk driving case despite the fact that it had been taken without reasonable suspicion and without performing a preliminary roadside test as required by the statute.<sup>69</sup>

In *R. v. Williams*,<sup>70</sup> the High Court upheld the trial judge's exercise of discretion in excluding the confession of a burglary suspect who had been arrested at 6:00 a.m. on one day and not taken to the magistrate until 10:00 a.m. the following day. If an arrested person is detained, not "for the purpose of enabling him to be brought before a justice," but for the purpose of questioning him, the detention will be unlawful.<sup>71</sup> However, the Court did not hold that evidence *must* be excluded in such circumstances; it simply declined to consider whether the trial judge had exercised inappropriately his discretion in excluding the evidence.<sup>72</sup>

The *Ireland* decision seems strange in view of the general reluctance of the Australian courts to exclude evidence. Given the experience of the ensuing twenty years, one must regard it as an

<sup>65</sup> *Id.* (Stephen & Aickin, J.J.).

<sup>66</sup> *Id.* at 571 (Stephen & Aickin, J.J.).

<sup>67</sup> *Id.* (Stephen & Aickin, J.J.).

<sup>68</sup> *Id.* at 570 (Stephen & Aickin, J.J.). That is, if the police misconduct was intentional, the fact that the evidence was very significant to the prosecution's case would be irrelevant.

<sup>69</sup> *Id.* at 565 (Stephen & Aickin, J.J.).

<sup>70</sup> 161 C.L.R. 278 (Austl. 1986).

<sup>71</sup> *Id.* at 285 (Gibbs, C.J.).

<sup>72</sup> *Id.* at 286 (Gibbs, C.J.); *id.* at 301-02 (Mason & Brennan, J.J.) (this was a mixed question of law and fact, so the prosecution could not appeal an acquittal). This explains the seeming inconsistency between *Williams* and *Cleland v. R.*, 151 C.L.R. 1 (Austl. 1982), in which the Court upheld the admission of a confession of a defendant (though reversing the conviction on other grounds) who was arrested at 1:00 p.m. and held until midnight, despite the Court's recognition that it was unlawful to hold the defendant in custody after 5:30 p.m. without taking him before a magistrate.

Like in *Williams*, in *Mallory v. United States*, 354 U.S. 449 (1957), the United States Supreme Court struck down a conviction on the ground that a seven hour delay (which resulted in a confession) in taking the defendant before a magistrate violated Rule 5(a) of the Federal Rules of Criminal Procedure requiring such an appearance without "unnecessary delay." However, this decision has never been applied to the states through the fourteenth amendment and has subsequently been "repealed" by Congress. See Y. KAMISAR, *MODERN CRIMINAL PROCEDURE* 468 (7th ed. 1989).

aberration on its facts.<sup>73</sup> However, its basic recognition of the discretion to exclude real as well as confessional evidence due to police misconduct continues as the law.<sup>74</sup>

Unlike the Australian "rules" of exclusion heretofore discussed, this "police misconduct" discretion is actually *used* from time to time, at least in confession cases, though not with any regularity or consistent logic. For example, the South Australian Supreme Court has been quite firm in enforcing an apparently "automatic discretionary exclusion"<sup>75</sup> in cases in which the police have continued to question the defendant after he has asserted either his right to silence or to counsel.<sup>76</sup> Queensland has a similar, though clearly not "automatic," rule,<sup>77</sup> at least as to assertion of the right to counsel. However, as one commentator has observed, "in the reported cases [throughout Australia] where confessional evidence was *not* admitted, there was evidence which strongly corroborated the accused's story."<sup>78</sup> That is, courts may have excluded these confessions not because of procedural irregularities, but because the courts believed that they were fabricated.

The High Court, while recognizing the "clearly established judicial discretion"<sup>79</sup> to exclude evidence in cases of police misconduct, has made it clear that such exclusion is not mandatory.<sup>80</sup> In New South Wales, in the extraordinary case of *R. v. Merritt and*

<sup>73</sup> Most Australian state statutes provide for the bodily examination of persons in custody, including the taking of blood and hair samples; thus, the issue is not likely to arise very often. See generally P. GILLIES, *supra* note 14, at 260-61. But see *Ex parte Welden*, 2 N.S.W.L.R. 294 (1971) (excluding breathalyzer evidence obtained in violation of the statute). Cf. *Schmerber v. California*, 384 U.S. 757 (1966) (noting that the accused can be subject to photographing, fingerprinting, and the taking of blood, hair, urine, voice, and handwriting samples for the purpose of using the evidence thus discovered against him). See also *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment lineup did not violate accused's fifth amendment right against self-incrimination, but did require the presence of the accused's counsel).

<sup>74</sup> *Cleland*, 151 C.L.R. at 16.

<sup>75</sup> This oxymoronic characterization is from P. WAIGHT & C. WILLIAMS, *supra* note 39, at 768.

<sup>76</sup> *R. v. Stafford*, 13 S.A. St. R. 392, 398-99 (S. Austl. 1976); accord *R. v. Killick*, 21 S.A. St. R. 321 (S. Austl. 1979); *Walker v. Marklew*, 14 S.A. St. R. 463 (S. Austl. 1976); *R. v. Bucksin*, 10 S.A. St. R. 1, 5 (S. Austl. 1974).

<sup>77</sup> *R. v. Hart*, 1979 Q.R. 8, 13 (Queensl. Crim. App.); *R. v. Borsellino*, 1978 Q.R. 507 (Queensl.) (the circumstance that an accused person has been refused access to his solicitor will not render evidence of his subsequent interrogation legally inadmissible but it may well be a ground for the exercise of the discretion to reject his confession). In *Borsellino*, the court limited this rule to cases in which "no unreasonable delay or hindrance would have been caused to the process of investigation." *Borsellino*, 1978 Q.R. at 512.

<sup>78</sup> *Stevenson*, *supra* note 51, at 120.

<sup>79</sup> *R. v. Ireland*, 126 C.L.R. 321, 333 (Austl. 1970).

<sup>80</sup> *Id.* In *Ireland*, the Court cited *R. v. Basto*, 91 C.L.R. 628 (Austl. 1954), which had

*Roso*,<sup>81</sup> a confession was admitted into evidence despite the fact that the accused had given the police a written declaration, drawn up by his solicitor, stating that he would only answer questions in the presence of a lawyer. The court upheld the trial judge's admission of the confession on the ground that the defendant had failed to prove that his written declaration had come to the attention of the interviewing (as opposed to the arresting) officers.<sup>82</sup> The police claimed that it had not.<sup>83</sup> The defendant further claimed that after being cautioned according to the Judge's Rules and asked if he understood the caution, he replied, "No, and you can tell him [another officer] to stop writing."<sup>84</sup> This argument was rejected on the ground that his assertion of rights was equivocal.<sup>85</sup>

In addition to the "assertion of rights" cases, the problem of holding defendants for the purpose of interrogation has attracted judicial attention in Australia. As discussed, in *Williams*, the High Court affirmed a trial court ruling that a confession should be excluded when obtained during an unnecessary delay in bringing the accused before a magistrate, thereby enforcing a Tasmanian statute that required such an appearance "as soon as practicable."<sup>86</sup>

To the same effect was an earlier unanimous decision based on a Commonwealth statute, *R. v. Iorlano*.<sup>87</sup> A series of Victorian cases had similarly excluded confessional evidence based on section 460 of the Victorian Crimes Act, which required that arrestees be brought before a magistrate "as soon as practicable."<sup>88</sup> This led the

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approved the admission of such a statement in the discretion of the trial judge. See also *R. v. Lee*, 82 C.L.R. 133, 139, 157 (Austl. 1950).

<sup>81</sup> 19 A. Crim. R. 360 (N.S.W. Crim. App. 1985).

<sup>82</sup> *Id.* at 375. Cf. *Arizona v. Robertson*, 486 U.S. 675, 687 (1988) ("attach[ing] no significance to the fact that the officer who conducted the second interrogation did not know that [the suspect] had made a request for counsel").

<sup>83</sup> *Merritt and Roso*, 19 A. Crim. R. at 372. The court suggested that even if this declaration had come to the attention of the interviewing officers it might not have been deemed relevant. *Id.* at 374.

<sup>84</sup> *Id.* at 370.

<sup>85</sup> *Id.* at 370, 376-77. The defendant further claimed that his confession had been fabricated by the police. *Id.* at 372; accord *R. v. Dugan*, 92 N.S.W.W.N. 767 (Crim. App. 1970) (The accused had been refused access to his solicitor, who was elsewhere on the premises. The evidence was admitted despite the fact that two judges deemed the police conduct "reprehensible."); *R. v. Barron*, 1975 V.R. 496, 504 (Vict.) (record of interview admissible although defendant stated he did not want to answer questions).

<sup>86</sup> *R. v. Williams*, 161 C.L.R. 278, 300-01 (Austl. 1986) (Mason & Brennan, J.J.) (citing Justices Act, Tas. STAT. § 34A(1) (1959)).

<sup>87</sup> 50 A.L.R. 291 (Austl. 1983). *Iorlano* interpreted the Customs Act, which provided that an arrested person should be brought before the magistrate "without undue delay."

<sup>88</sup> *E.g.*, *R. v. Larson and Lee*, 1984 V.R. 559 (Vict.) ("The conduct of the police demonstrated a flagrant disregard for the rights of the accused."); *R. v. Stewart and Kent* (County Ct. 1983) (Just, J.), in CONSULTATIVE COMMITTEE ON POLICE POWERS OF



Victorian Parliament to amend section 460 to provide that the police could hold a suspect for up to six hours rather than present him "as soon as practicable" before the magistrate.<sup>89</sup> Recently, however, due to police complaints that six hours was not enough, Victoria has amended the statute again, requiring presentment "within a reasonable time of being taken into custody."<sup>90</sup> Whether the courts will interpret this statute more loosely than "as soon as practicable" remains to be seen.

By the same token, some, but not all, Australian courts have held that the discretion to exclude evidence should be exercised when a confession is obtained from a defendant who is in illegal custody *ab initio*.<sup>91</sup> It would seem to follow from *Williams* that if unduly extended custody should provide the grounds for exclusion of a confession on the grounds of police misconduct, then so should custody illegal at its inception.<sup>92</sup> Beyond these cases, Australian law exhibits only sporadic examples of evidentiary exclusion based on police misconduct, usually by single state supreme court trial justices that can, in no sense, be considered to state a "rule" that is generally applied by the courts of that state, much less the country.<sup>93</sup>

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INVESTIGATION, CUSTODY AND INVESTIGATION: REPORT ON § 460 OF THE CRIMES ACT 1958 21 [hereinafter CUSTODY AND INVESTIGATION]; *R. v. Carter* (County Ct. 1983) (Just, J.), in CUSTODY AND INVESTIGATION, *supra*.

<sup>89</sup> Crimes Act, Vict. Acts (1984). Section 460 allowed the police to apply to a judge for an additional six hour continuance period but only with the consent of the accused. Crimes Act, Vict. Acts § 460(3),(7),(10).

<sup>90</sup> Crimes Act, Vict. Acts § 464A(1)(c) (1988).

<sup>91</sup> Compare *R. v. Stafford*, 13 S.A. St. R. 392 (A. Austl. 1976) and *Walker v. Marklew*, 14 S.A. St. R. 463, 467, 475, 482 (S. Austl. 1976) (Bray, C.J., & Jacobs & King, J.J., filing separate opinions) (excluding the confession, in part, due to an illegal arrest) with *R. v. Banner*, 1970 V.R. 240, 249 (Vict.) and *R. v. Lavery*, 20 S.A. St. R. 430 (S. Austl. 1979) (admitting the confession).

<sup>92</sup> In the United States, exclusion in such a case is mandatory, *Brown v. Illinois*, 422 U.S. 590 (1975), unless intervening factors, such as release from custody or consultation with a lawyer, have broken the causal connection between the illegal arrest and the confession. *Miranda* warnings alone will not suffice. *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>93</sup> For example, in *R. v. Soundry* (Queensl. Mar. 26, 1980) (Macrossan, J.), in THE CRIMINAL INJUSTICE SYSTEM, *supra* note 39, at 277, the judge excluded a confession when the police had given "deliberately false answers" to solicitors who called the police to locate an accused. And, in the unusual case of *R. v. Amad*, 1962 V.R. 545 (Vict.), a confession was excluded on the ground that it was obtained by a mild "cross examination" of a suspect in custody. *But see R. v. Van Aspern*, 1964 V.R. 91, 93 (taking a broader view of police powers to interrogate). The High Court in *R. v. Lee*, 182 C.L.R. 133, 155 (Austl. 1950), explained, "[A]n invitation to explain established facts can hardly be called cross-examination in any relevant sense. It is cross-examination in the sense of breaking down the will and extorting admissions by persons who are being questioned by the police that is to be reprehended."

By contrast, there are numerous cases in which the courts have refused to exclude evidence despite rather extreme examples of police misbehavior. The most important of these is the recent High Court case of *Van Der Meer v. R.*,<sup>94</sup> in which the five Justices unanimously condemned the police interrogation techniques. The procedures included confronting a suspect with the victims and noting his responses to their accusation, the effect of which was "virtually to put [the suspect] on trial" at the police station.<sup>95</sup> Also, the police, during an interrogation that had begun at about 10:00 a.m. and continued sporadically until about midnight, persistently confronted each suspect "with the alleged statements of the other [suspects] in an endeavour to break down his denial of guilt," and failed to give any caution to the two suspects until late in the interrogation.<sup>96</sup> The three to two majority deemed the techniques "unbelievable" and "rather bizarre,"<sup>97</sup> but never flatly held that they were illegal; rather, the majority upheld the trial judge's decision not to exclude the suspect's admissions.<sup>98</sup>

The majority further brushed off the fact that, when one of the suspects finally was cautioned and asked if he was prepared to answer further questions, he replied, "No, not really."<sup>99</sup> Despite this, he was encouraged to, and did, respond to what the police told him his fellow suspects had said.<sup>100</sup> Oddly, none of the opinions discussed the *Ireland* (deterrence of police misconduct) discretion. The majority confined itself to the reliability issue and, concluding that the statements were reliable, admitted them.<sup>101</sup>

In *R. v. Banner*,<sup>102</sup> a suspect was arrested without reasonable

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<sup>94</sup> 62 A.L.J.R. 656 (Austl. 1988).

<sup>95</sup> *Id.* at 665 (Wilson, Dawson & Toohey, J.J.).

<sup>96</sup> *Id.* at 660 (Mason, C.J.). This latter factor was not condemned by the majority, which noted that the police sergeant was not "satisfied that they had a case against [the suspects]" until the cautions were issued. *Id.* at 665 (Wilson, Dawson & Toohey, J.J.).

<sup>97</sup> *Id.* (Wilson, Dawson & Toohey, J.J.).

<sup>98</sup> *Id.* (Wilson, Dawson & Toohey, J.J.).

<sup>99</sup> *Id.* at 658 (Mason, C.J.).

<sup>100</sup> *Id.* at 658, 670 (Mason, C.J., & Dean, J., filing separate opinions). Justice Dean described this case as "an enactment of how police investigations should not be conducted in this country." *Id.* at 670 (Dean, J.).

<sup>101</sup> *E.g., id.* at 666 (Wilson, Dawson & Toohey, J.J.). The majority stated that "the question is not whether the police have acted unfairly; the question is whether it would be unfair to the accused to use his statement against him." *Id.* (Wilson, Dawson & Toohey, J.J.). The accused's right to a fair trial may be jeopardized "if a statement is obtained in circumstances which affect [its] reliability." *Id.* (Wilson, Dawson & Toohey, J.J.). The failure to discuss the *Ireland* discretion in *Van der Meer* suggests ambivalence on the part of the High Court as to what its stance should be toward excluding evidence to deter police misconduct.

<sup>102</sup> 1970 V.R. 240 (Vict.).

suspicion, held incommunicado, and interrogated by police for three days without being taken before a magistrate. The Victorian Supreme Court, while strongly condemning the police behavior and declaring the police "guilty . . . of unlawful acts" and "possibly criminal conduct,"<sup>103</sup> nevertheless admitted the suspect's murder confession into evidence.<sup>104</sup>

In *R. v. S. and J.*,<sup>105</sup> the South Australian statutory requirement that arrestees be brought "forthwith" before a magistrate was avoided by the simple expedient of not formally arresting the sixteen-year-old Aboriginal suspects until after "many hours" of interrogation.<sup>106</sup> The two suspects had been taken separately to police headquarters.<sup>107</sup> Although they had been told that they were "not under arrest," the police admitted that they would have arrested them had the suspects not agreed to go to the police station, and "the suspects believed [arrest] would be the result of non-compliance."<sup>108</sup>

While the Australian courts' attitudes toward exclusion of confessions on any of the grounds set forth by the High Court can charitably be described as erratic, at least it is apparent that courts are alive to the possibility that they could, through enforcement of exclusionary principles, put pressure on the police to follow the rules, if only there were more clear-cut "rules" to follow. In contrast, Australian courts have failed to *ever* exclude the fruits of an illegal search

<sup>103</sup> *Id.* at 249. The court noted that during the first 15 hours of detention, before the suspect gave his first confession, the police did not even have reasonable grounds for suspecting him of any crime, or that a crime had even been committed.

<sup>104</sup> *Id.* at 251-52. The court, as in *Van der Meer*, held that it was not "unfair to use the confession." However, this case was decided before *Ireland*, where the "deterrence of police misconduct" head of discretion was established. *But see R. v. Larson and Lee*, 1984 V.R. 559 (Vict.), a more recent Victorian case excluding evidence in a case of similar, though less serious, police misconduct.

<sup>105</sup> 8 A. Crim. R. 88 (S. Austl. Crim. App. 1983).

<sup>106</sup> *Id.* at 98 (White, J., dissenting).

<sup>107</sup> *Id.* at 94 (Mitchell, J.).

<sup>108</sup> *Id.* (Mitchell, J.). The police also failed to have a parent, guardian, or representative of the Aboriginal Rights Movement present at the interrogation as required by police interrogation rules. *Id.* at 91. *But see R. v. W.*, 2 Q.R. 308 (Queensl. 1988) (Dowsett, J.) (on virtually identical facts, a Queensland trial judge excluded confessions of Aboriginal juveniles as both involuntary and unfair).

In *R. v. Byczko and McCloud*, 30 S.A. St. R. 578 (S. Austl. Crim. App. 1982), the fact that the defendants were "detained without lawful authority," *id.* at 584, and believed that they were not free to go (one even had his overalls taken away by the police) was not sufficient to require exclusion of a confession. This, despite the court's conclusion that "the infringement of the appellants' legal rights was undoubtedly serious." *Id.* at 585; *accord R. v. Narula*, 22 A. Crim. R. 409 (Vict. Crim. App. 1986) (illegal delay in arraignment—no exclusion of confession).

in a reported case.<sup>109</sup>

As discussed, every state has statutory rules governing searches<sup>110</sup> that are similar to American rules, and in numerous cases the courts have struck down warrants and ordered the evidence returned due to failure to set forth reasonable and specific grounds.<sup>111</sup> However, these decisions do not necessarily preclude the police from proceeding with a prosecution and reobtaining the same evidence by subpoena.<sup>112</sup> Moreover, these decisions are solely *warrant* cases, in which the police are already making an effort to comply with the law. More in need of scrutiny are warrantless searches and seizures, but these appear largely to have escaped judicial notice.

In *R. v. Tilev*,<sup>113</sup> one of the rare cases in which this issue has been considered, the police entered a flat without a warrant and without reasonable suspicion and found significant evidence of a murder. The trial judge, while recognizing his discretionary power to exclude the evidence under *Bunning*, refused to do so on the

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<sup>109</sup> In a letter to the Author, Professor Peter Sallman agreed: "[A]s far as I am aware there has not been any significant or reported case in which evidence has been excluded because of the illegality of the means of its production." Letter from Peter Sallman to Craig M. Bradley (May 18, 1989).

Such exclusion does occur sometimes in unreported cases, but the experience of one former prosecutor was that evidence was only excluded "if it was unimportant." Interview with Gary Trimble, in Canberra, Austl. (July 1989); see also P. GILLIES, *supra* note 14, at 241. Gillies cites three Australian cases in support of the proposition that "when real evidence has been improperly or unlawfully obtained . . . the trial judge [may] exercise his discretion to reject it." In all three cases, the evidence was, in fact, admitted. *Trimboli v. Onley*, 37 A.L.R. 38 (Austl. 1981); *McIntyre v. Sing*, 30 A.L.R. 299 (Austl. 1979); *Crowley v. Murphy*, 28 A.C.L.R. 1 (Austl. 1979). *R. v. Ireland*, 126 C.L.R. 321 (Austl. 1970), and *R. v. Weldon*, 15 S.A. St. R. 320 (S. Austl. 1977), involving illegal seizures but not searches, are the only cases discovered involving exclusion of real evidence on any ground. Even evidence obtained by an illegal wiretap is admissible in cases punishable by more than three years imprisonment. P. GILLIES, *supra* note 14, at 289, 290 (citing Telecommunications Act, Austl. Acts § 7 (1975)). However, the High Court has held that documents which would not be admissible in court anyway due to legal professional privilege may not be seized pursuant to a search warrant. *Baker v. Campbell*, 153 C.L.R. 52 (Austl. 1983).

<sup>110</sup> See *supra* note 12.

<sup>111</sup> *Parker v. Churchill*, 9 F.L.R. 334 (Austl. Full Fed. Ct. 1986); *Tran Nominees Party Ltd. v. Schleffler*, 20 A. Crim. R. 287 (S. Austl. 1985); *Hedges v. Grundman*, 19 A. Crim. R. 303 (Queensl. Full Sup. Ct. 1985); *R. v. Official Prescription Spectacle Makers Party Ltd.*, 25 A. Crim. R. 143 (Austl. Fed. 1978).

<sup>112</sup> In fact, in *Hedges* the court ordered the return only of private medical files seized by the police that had no relevance to a criminal case. *Hedges*, 19 A. Crim. R. at 304. The court explicitly did "not extend the order to other property seized at the time of the execution of the warrants in view of the pending criminal proceedings." *Id.* (Campbell & Connelly, J.J., concurring). This despite the court's finding that the warrants in question were "bad on their face." *Id.* at 303.

<sup>113</sup> 33 S.A. St. R. 344 (S. Austl. 1983).

ground that the police conduct, while illegal, was not "wholly outrageous."<sup>114</sup> Thus, despite the pronouncements of the High Court in *Bunning*, Australian courts still seem, in practice, to cleave to the British view that "the interest of the state must excuse the seizure of documents, which seizure would otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by anyone."<sup>115</sup>

Discussions with Australian defense attorneys keenly aware of police violations in the confessions area did not reveal much concern about illegal searches.<sup>116</sup> In part, this could be explained by the high proportion of arrests followed by a confession—ninety-six percent in one study.<sup>117</sup> If the police can obtain (or fabricate) a confession, they will not have as much need to search. Another explanation lies in the finding of the Law Reform Commission that "very many of the searches of premises undertaken by police officers are made . . . at the 'invitation' or at least the consent of the occupier."<sup>118</sup> Still, in contrast to the large number of cases involving the suppression of illegally seized evidence in the United States despite the existence of a consent doctrine<sup>119</sup> and a keen desire by police to obtain confessions, it is inconceivable that there are not a significant number of cases involving evidentiary seizures by Australian police in which the propriety of the search (or the existence or voluntariness of the consent) should at least be discussed.<sup>120</sup>

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<sup>114</sup> *Id.* at 354; see also *Milner v. Anderson*, 42 A.C.T.R. 23 (Austl. 1982) (evidence of a search of defendant's person admitted despite the lack of reasonable suspicion or consent).

<sup>115</sup> J. OXLEY-OXLAND, NSW POLICE LAW HANDBOOK 1806 (1988) (quoting *Elias v. Passmore*, 2 K.B. 164 (1934)). Oxley-Oxland opines, however, that if the police conduct were "oppressive . . . it would not be right to allow the Crown to rely upon it." *Id.*

<sup>116</sup> *E.g.*, Interview with Ben Salmon, Canberra, Austl. (Feb. 13, 1989); Interview with Terry, Canberra, Austl. (Feb. 23, 1989).

<sup>117</sup> Stevenson, *supra* note 51, at 108-09. This figure apparently was a percentage only of cases which resulted in conviction, whether by guilty plea or trial and did not include dismissals and acquittals.

<sup>118</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 91. One study showed that, in a six month period in 1975, 62% of the searches conducted by the (former) Narcotics Bureau and Customs Department were made by consent. *Id.* The Commission recommended that police should produce a signed acknowledgement claiming consent and that "the absence of such acknowledgement would be prima facie evidence" that the search was not consented to. *Id.* at 92. Obviously, it is believed by the Commission that the police are as willing to fabricate consents to search as they are confessions. In his American study, the Author found that consents were advanced as a justification for the search in 17% (37 of 223) of the appellate cases studied. Bradley, *Are the State Courts Enforcing the Fourth Amendment?*, 77 GEO. L.J. 501 (1989).

<sup>119</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (defendant need not be informed of his right to withhold consent nor need the consent be written).

<sup>120</sup> This impression is confirmed by two cases where the court's description of the police behavior seemed to involve an illegal search, even though that issue was not dis-

Clearly, the lack of enthusiasm of the bar for these issues reflects the futility of raising them.

A particularly striking example of not only the relative rarity of, but also the lack of concern in the Australian legal system for, illegal searches is provided by the 1978 Beach Report.<sup>121</sup> The study sets forth twenty cases of gross violations of individual rights by Melbourne police including false arrest, fabricated confessions, and the brutalizing of arrestees.<sup>122</sup> Only one of these cases involved a search at all.<sup>123</sup> In that case, the police, acting with reasonable suspicion but apparently without a search warrant or exigent circumstances, broke into a flat occupied by two suspects, pushed one of them out of a window to the street thirty feet below, and kicked him as he lay on the ground with broken limbs.<sup>124</sup> Yet, despite the obvious illegality of this search, the Board of Inquiry made no mention of the fact that no warrant was obtained, focusing instead on the subsequent police brutality. While the brutality was certainly the most important feature of the incident, it is still inconceivable that an American analysis of a similar incident would not point out, as a matter of first principle, the illegality of the warrantless entry.

Such extreme police behavior is not limited to the past. Three examples of police conduct that would have "shocked the conscience" of American courts were reported in the Canberra Times. In the first, Melbourne "police completely demolished a house in a search for clues to the Walsh Street police murders, but found nothing."<sup>125</sup> This was done on the authority of a bankruptcy judge after the owners of the house had been evicted for failure to keep up their mortgage payments, apparently because they were in police custody.<sup>126</sup>

The second case is bizarre: "Armed and hooded police burst into an outer Brisbane home, fired stun grenades, tied up the owner

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cussed. In *R. v. Narula*, 22 A. Crim. R. 409 (Vict. Crim. App. 1986), the court, in discussing whether a confession was admissible, mentioned that the heroin was located by the police during a "surreptitious search" of a hotel room. *Id.* at 413. Since no search warrant is mentioned, it is presumed that this was the result of an illegal entry. In another case, *R. v. Kushkarian*, 16 A. Crim. R. 416 (N.S.W. Crim. App. 1984), the appellant was arrested for possession of a sawed-off shotgun, and later charged and convicted of armed robbery, after the shotgun "was found [by police] in the back of his motor vehicle." *Id.* at 417. There is no discussion of how the police came to look in the back of his vehicle, which was parked at his home.

<sup>121</sup> See *supra* note 7.

<sup>122</sup> *Id.* at 31-49.

<sup>123</sup> *The Sellers Matter*, in BEACH REPORT, *supra* note 7, 486 *et seq.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Canberra Times, Jan. 6, 1989, at 4.

and then realized they had raided the wrong house."<sup>127</sup> The owner, a fifty-five-year-old pensioner, reported that "three masked men had dragged him at gunpoint into the [living room] and tied him up with tape."<sup>128</sup> "They threatened to kill anyone who moved," he said.<sup>129</sup> Moreover, they bulldozed the front fence.<sup>130</sup> All this, not in a search for a mass murderer, but for a "dangerous bank robber."<sup>131</sup> No mention of a warrant appears in the article.<sup>132</sup> This debacle was widely reported in the newspapers and was obviously considered extremely bad form on the part of the police. However, my impression was that it was not so much the manner in which the police treated the suspect that was considered so outrageous, as the fact that they had raided the wrong house.

Finally, in Perth, a police elite tactical response group "terrified" a sleeping family by smashing into their house in the middle of the night armed with shotguns and knives and wearing masks, apparently without a warrant, after a complaint from a neighbor that shots had been fired during a noisy domestic argument five hours earlier.<sup>133</sup>

Of course, similar horror stories could be found in American papers. However, nothing in America since the Wickersham Report in 1930<sup>134</sup> could match the consistent patterns of police misconduct exposed in the Lucas and Beach Reports, which studied police misconduct in Brisbane and Melbourne in the late 1970s.<sup>135</sup>

#### IV. AUSTRALIAN PROPOSALS FOR CHANGE

As the cases illustrate, and as Australians who have studied the system agree, "the 'law' of criminal investigation in Australia is in a totally unsatisfactory state."<sup>136</sup> Despite this recognition, however, neither of the two major models of reform—the Law Reform Commission reports on criminal investigation (1975) and evidence

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Canberra Times, Jan. 15, 1989, at 2.

<sup>133</sup> Canberra Times, Feb. 22, 1989, at 6.

<sup>134</sup> ENFORCEMENT OF THE PROHIBITION LAWS, OFFICIAL RECORD OF THE NATIONAL COMMITTEE ON LAW OBSERVANCE AND ENFORCEMENT, S. DOC. NO. 307, 71st Cong., 3d Sess. 30, 209-10 (1930).

<sup>135</sup> LUCAS REPORT, *supra* note 4; BEACH REPORT, *supra* note 7.

<sup>136</sup> P. SALLMAN & J. WILLIS, *supra* note 3, at 40. The sanctions currently used have not "been a particularly effective deterrent to overly enthusiastic law enforcement activity." LRC CRIMINAL INVESTIGATION, *supra* note 7, at 136. "The voluntariness rule suffers from many deficiencies." LRC EVIDENCE, *supra* note 7, at 87.

(1987)— recommends the adoption of the American-style automatic or mandatory exclusionary rule.<sup>137</sup> This despite the Law Reform Commission's recognition that the current practice results in very little exclusion and that the failure to exclude evidence may encourage reliance on illegally obtained evidence.<sup>138</sup> Why is an automatic exclusionary rule rejected when, by providing a relatively certain sanction for rights violations, it should have the effect of deterring (or at least tending to deter) such police misconduct?<sup>139</sup> The answer given by the Law Reform Commission is instructive to Americans: "the American rule has [its] limits."<sup>140</sup> They point to the ways in which the United States Supreme Court has cabined the operation of the exclusionary rule:

An accused person cannot invoke the rule if the evidence was obtained in breach of another's rights. The rule does not apply to breaches by a private individual rather than a state official. It does not apply so as to prevent the presentation of illegally obtained evidence to a federal grand jury. And the rule does not apply where the evidence is admitted not on the issue of the accused's guilt but on some collateral issue such as his credibility as a witness. *This kind of narrow distinction between evidence proving guilt and evidence proving that an accused who says he is not guilty is not worthy of belief as a witness tends to bring the law and lawyers into contempt.*<sup>141</sup>

The above are exceptions to the "automatic" exclusionary rule—cases in which the rule does not operate despite concededly illegal police behavior. The other way in which the United States Supreme Court has mitigated the seeming harshness of a rule that automatically excludes evidence in the event of a violation is by

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<sup>137</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 141; LRC EVIDENCE, *supra* note 7, at 94 ("In the Commission's view, the policy concerns do not justify automatic exclusion. The policy concerns compete and operate with varying force depending on the circumstances of a particular case. The situation is one in which a discretionary approach is the most appropriate." But, "once misconduct has been established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted."); *see* LRC EVIDENCE, *supra* note 7, at 171 (Draft Legislation § 79) (court should have discretion to exclude admission if "it would be unfair to the defendant to use the evidence").

<sup>138</sup> *Id.* at 94.

<sup>139</sup> *See* Orfield, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (finding that the exclusionary rule does deter police search and seizure violations). The former Attorney General of Maryland agrees. *United States v. Leon*, 468 U.S. 897, 954 n.13 (1984) (Brennan, J., dissenting).

<sup>140</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 136.

<sup>141</sup> *Id.* (emphasis added) (citations omitted); *see also* *Leon*, 468 U.S. at 897 (establishing a "reasonable good faith" exception to the exclusionary rule in case of police violations in search warrant cases).

For criticism of the Supreme Court's "standing" doctrine, *see* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 635 (1983).



loosening the definition of what constitutes a "violation,"<sup>142</sup> for example by establishing a search warrant "requirement" and then creating over twenty exceptions to it.<sup>143</sup>

Of course, these kinds of exceptions are not necessarily inherent in a mandatory exclusionary rule. The Court could instead enforce its "warrant requirement," and impose no "standing" or "use for impeachment purposes" limitations on the operation of the exclusionary rule, as the dissenting Justices have consistently urged.<sup>144</sup> Clearly, the Court's reluctance to have a clearcut rule that applies without exception is due to the Justices' belief that this will lead to an unacceptably high number of criminals going free because the police blundered.

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,"<sup>145</sup> can hardly be considered an adequate safeguard for civil liberties.<sup>146</sup> The Law Reform Commission proposals to remedy this problem deserve serious consideration.<sup>147</sup> They would require that when the police have broken the rules in obtaining evidence "the court shall not admit the evidence unless it is, on the balance of probabilities, satisfied [*by the prosecution*]"<sup>148</sup> that admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedoms of any person." Factors to consider include the seriousness of the offense, the seriousness of the police misconduct, and the extent to which the evidence in question might have been lawfully

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<sup>142</sup> As the Law Reform Commission pointed out, the mandatory exclusionary rule "tempts courts to reduce the protection of the substantive search-seizure rules by holding no illegality has occurred in order to avoid important evidence being excluded." LRC CRIMINAL INVESTIGATION, *supra* note 7, at 140.

<sup>143</sup> See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985); Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198-204 (1977).

<sup>144</sup> See, e.g., *Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting) (terms the majority view an "abandon[ment] altogether [of] the exclusionary rule"). Justice White, dissenting in *Rakas v. Illinois*, 439 U.S. 128, 157 (1978), put the problem well: "If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases."

<sup>145</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 136.

<sup>146</sup> See Kamisar, *supra* note 6, at 5-6 (rejecting a discretionary approach).

<sup>147</sup> The Australian Law Reform Commission proposes statutes that would only be applicable to the federal government, but which can serve as models for reform of state laws as well.

<sup>148</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 209 (Draft Legislation § 71). Currently the defendant bears the burden of convincing the Court that the discretion should be exercised in his favor.

obtained.<sup>149</sup>

Certainly the Australian experience to date makes a compelling case *against* discretionary, and in favor of mandatory, exclusion.<sup>150</sup> However, Australia's current mandatory rule against involuntary confessions also does not seem to be producing very consistent results. On the other hand, the American mandatory rule has led to the courts waffling, and hence creating confusion, as to the rules which require exclusion when broken.<sup>151</sup>

This much can be said for a nonmandatory rule: as a matter of deterrence, it is surely not necessary to exclude evidence *every time* the police err. If the police *knew* that the evidence would be excluded, for example, two-thirds of the time, they would likely be just as deterred from illegal searches as they are now. The trouble with this approach is that it has to be random. Otherwise, whatever the standards, the police will learn them and adjust their conduct accordingly. Thus, the standard proposed by the Law Reform Commission of considering the seriousness of the case<sup>152</sup> will tend to have little or no deterrent effect in serious cases because the police will know in advance that almost anything they do will not lead to the exclusion of evidence. It is hard to imagine that merely shifting the burden of proof to the prosecution will cause judges who have virtually never excluded evidence on the basis of an illegal search to suddenly begin doing so with enough regularity to ensure police compliance with the rules.<sup>153</sup>

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<sup>149</sup> LRC CRIMINAL INVESTIGATION, *supra* note 7, at 209 (Draft Legislation § 71). A more recent Law Reform Commission report takes essentially the same view but deletes the "substantially" provision, merely requiring that "the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been [illegally] obtained." LRC EVIDENCE, *supra* note 7, at 190 (Draft Legislation § 119). It also adds other factors to consider including "the importance of the evidence in the proceeding" and "whether the impropriety . . . was contrary to or inconsistent with a right of a person recognized by the International Covenant on Civil and Political Rights." *Id.*

<sup>150</sup> See Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 521-24 (6th ed. 1986) (discussing the inadequacy of the pre-*Miranda* "voluntariness" test in the United States).

<sup>151</sup> See *supra* note 141 and accompanying text.

<sup>152</sup> See Kaplan, *supra* note 6, at 1046 (proposing that evidentiary exclusion *never* be allowed in certain serious cases).

<sup>153</sup> As a supplement to its discretionary rule, the Law Reform Commission urges the creation of an external police review board to discipline the police for rights violations. LRC CRIMINAL INVESTIGATION, *supra* note 7, at 143-44; LAW REFORM COMMISSION, COMPLAINTS AGAINST POLICE—REPORT NO. 1, App. F, at 83-106 (1975). The Commission believes that the combination of this board and the discretionary exclusionary remedy will cause the rules of criminal procedure to be "taken very seriously indeed." LRC CRIMINAL INVESTIGATION, *supra* note 7, at 144.

Criminal procedure will not likely be taken seriously, however. First, it is highly doubtful that convicted criminals or their lawyers will be motivated to bring, and suc-

It was my strong impression as a prosecutor in Washington, D.C.,—an impression confirmed by a recent study in Chicago—that the mandatory exclusionary rule works.<sup>154</sup> If evidence is excluded or likely to be excluded, due to police misconduct the prosecutor is upset. He registers a complaint with the police hierarchy or directly confronts the officers involved or does both, and (at least in Washington and Chicago) the police discipline the offending officer and endeavor to prevent such exclusions of evidence in the future.<sup>155</sup> Thus, in my view, the mandatory rule works and the Australian proposal for continuation of a (slightly modified) discretionary rule is a mistake.

A more recent Australian Law Reform Commission proposal imposes a stringent requirement on the use of admissions obtained during interrogation of persons “reasonably suspected” of crime,<sup>156</sup> declaring that the confessions are “*not admissible*” unless 1) the defendant is cautioned as to his right to silence and to the possible use of his statements against him, and 2) his *admission is tape recorded*.<sup>157</sup>

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cessful if they do bring, actions before such a board. Such a board seems most useful as a supplement to a mandatory exclusionary rule to vindicate the rights of innocent people aggrieved by police misconduct, rather than as a substitute for such a rule. Second, it seems unlikely that the police department, not facing loss of evidence due to officers' misconduct, would take the disciplinary recommendations of such a board very seriously. Professor Amsterdam has observed, “Realistically, no extra-departmental body has the information, resources and direct disciplinary authority necessary to control the police effectively and consistently.” Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 428 (1974); accord Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L. & CRIMINOLOGY 160, 162 (1967).

<sup>154</sup> Orfield, *supra* note 139, at 1017 (“On an institutional level, the rule has changed police, prosecutorial and judicial procedures; on an individual level, it has educated police officers in the requirements of the fourth amendment and has punished them when they have violated those requirements.”).

<sup>155</sup> “The police department instituted an officer rating system that made the loss of evidence a personal liability to officers by ensuring that suppressions negatively affected an officer's ability to retain her assignments and, to a lesser extent, to obtain promotions.” *Id.* at 1027-28.

<sup>156</sup> The proposal also includes those who “ought reasonably to have been suspected.” LRC EVIDENCE, *supra* note 7, at 169 (Draft Legislation § 74). This is somewhat broader than the “custody” requirement in the United States which does not, for example, apply to a brief detention of a motorist pursuant to a traffic stop, *Berkemer v. McCarty*, 468 U.S. 420 (1984), or to a suspect who volunteers to come to the police station to talk about a crime, *California v. Beheler*, 463 U.S. 1121 (1983). Since both of these people were certainly “reasonably suspected” of crime, the proposed Australian rules would apply to them. Such a broad application might not be advisable, however, since the line between “custody” and “no custody” is not completely clear. In *Florida v. Royer*, 460 U.S. 491 (1983), the Court developed an approach that is much clearer than the line between people who ought and ought not to have been reasonably suspected of a crime. Moreover, the concerns expressed in *Miranda* are not as great in such brief detentions.

<sup>157</sup> LRC EVIDENCE, *supra* note 7, at 169 (Draft Legislation § 74). If it was not reasonably practicable to have made such a recording of the actual admission, a recording of

Admissions "influenced by violent, oppressive, inhuman or degrading conduct, whether toward the person who made the admission or toward some other person, or by a threat of conduct of that kind," also are not admissible.<sup>158</sup> In other words, the Commission has proposed a mandatory exclusionary rule.

These recommendations are eminently sensible. They will largely eliminate police fabrication of confessional evidence while, by requiring confessions to be taped, increase their value in the prosecution's case. Indeed, *videotaping* confessions, when practicable, would be an even more desirable requirement.<sup>159</sup> The one thing missing from the proposal, evidently left out in deference to, or in fear of, the police lobby,<sup>160</sup> is a specific limitation, similar to the former Victorian statute previously discussed,<sup>161</sup> on the amount of time a suspect can be held for questioning before being taken before a judge or magistrate. By adopting in Victoria, and proposing nationwide, a comprehensive statutory approach to confession law, Australia is prepared to cover the field much more thoroughly than the patchwork approach of the United States Supreme Court, focusing not just on concerns that the defendant be adequately informed, as the Supreme Court has done,<sup>162</sup> but also on matters such as the reliability of confession and the length of interrogation. Surely, from the point of view of police and defendants alike, this is an approach that should be emulated.

## V. A STATUTORY APPROACH IN AMERICA?

The Australians are surely right in assuming that statutes are the correct means of declaring rules of criminal procedure. The problem in America is not the mandatory exclusionary rule, but the

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the suspect confirming the admission will suffice. Also, confessions made in the presence of a suspect's attorney or, if the attorney was not reasonably available, a person chosen by the suspect ("not being an investigating official") are also admissible.

If none of the above were reasonably practicable, the confession may be admitted anyway, though it is hard to imagine a situation where an after-the-fact recording would not be reasonably practicable. *See also supra* note 23.

<sup>158</sup> LRC EVIDENCE, *supra* note 7, at 168-69 (Draft Legislation § 72).

<sup>159</sup> Chief Justice Mason shares this view, noting that videotaped confessions would expedite criminal proceedings. *Canberra Times*, March 21, 1989, at 10. While not requiring video recording, the Commission also made it clear that it was not prohibited. LRC EVIDENCE, *supra* note 7, at 92. THE AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4 (Proposed Official Draft 1975), proposed a similar tape recording requirement for the United States.

<sup>160</sup> *See supra* note 8.

<sup>161</sup> *See supra* note 23.

<sup>162</sup> For example, *Mallory v. United States*, 354 U.S. 449 (1957), limiting the length of federal interrogations, has never been applied to the states.

fact that the criminal procedure "rules," the violation of which leads to exclusion, are totally inadequate.<sup>163</sup> I have previously proposed that the Court could improve, at least its fourth amendment law, by requiring either that searches simply be "reasonable," without any attempt being made to set more detailed rules, or that the warrant requirement be strictly enforced, subject only to a narrowly drawn exigent circumstances exception.<sup>164</sup>

As a *judicial* approach to the problem, either of these two approaches would be an improvement over the present system. However, neither of these approaches is entirely satisfactory, and my experience in the Australian "laboratory" caused me to recognize more clearly why not. Both approaches assume that the only way to deal with the problems of criminal procedure is through court-made rules based on the constitutional rights contained in the fourth, fifth, and sixth amendments.<sup>165</sup> Such "rights oriented" approaches are fundamentally flawed as methods of governing police behavior for at least two reasons: incompleteness and lack of clarity.

#### A. THE INADEQUACY OF THE COURT-MADE RULES

One problem with utilizing direct interpretations of the Bill of Rights as a means of declaring rules of criminal procedure is that the Bill of Rights frequently does not have any obvious application to the regulated conduct. The Warren Court, feeling compelled to act by the failure of legislative bodies to regulate the police,<sup>166</sup> tortured the language of the fifth amendment unmercifully in *Miranda*. It held that a clause that forbade a person from being "compelled in any criminal case to be a witness against himself" required the police to warn suspects of their rights to both silence and counsel before they could be asked to give *voluntary*, noncompelled statements prior to the beginning of the criminal "case."<sup>167</sup> That this

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<sup>163</sup> Bradley, *supra* note 143, at 1472-73.

<sup>164</sup> *Id.* at 1471-72.

<sup>165</sup> This assumption is widely held in America by the Court and criminal procedure scholars alike. *E.g.*, Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 472-73 (1985) (Supreme Court should set forth clearer rules of police conduct).

<sup>166</sup> See Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525.

<sup>167</sup> Of course, before the Court could torture the fifth amendment, it had to torture the fourteenth to make the fifth applicable to the states. This result also had no historical support. *E.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934 (1965).

To recognize that *Miranda* required a distortion of the fifth amendment is not necessarily to disagree with the result. *Miranda*, being a legislative-type rule, *does* provide relatively clear guidance for police. Compare U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL

exercise in judicial legislation damaged the Court is well accepted.<sup>168</sup>

In other cases, the Court, adhering more closely to the constitutional language, has been forced to reach unsatisfactory results. A good example of this is found in *United States v. Wade*.<sup>169</sup> In *Wade* the Court was obviously determined to curtail abuses in lineup procedures. Certainly, lineups as such had nothing to do with the fourth amendment<sup>170</sup> and, not wanting to unduly hamper police investigations, the Court was constrained to hold that the fifth amendment was not violated by requiring the defendant to appear, and even to speak, in a lineup. This left the Court with the sixth amendment right to counsel as its only vehicle for lineup reform. But, as anyone who has ever attended a lineup knows, this is no place for counsel. There are no witnesses to examine, no arguments to make, and no evidence to offer. Counsel may object if he wants, but the police are free to ignore his objections.<sup>171</sup> What the Court really wanted was to ensure that lineups were fair; the best way to do this is to require that they be photographed and tape recorded (or videotaped) and that these records be produced in court. However, even the Warren Court was apparently unable to find an amendment it could squeeze hard enough to yield this result. Consequently, it devised an incomplete rule, based on constitutional footing that was vulnerable to being effectively overruled by a plurality in *Kirby v. Illinois*<sup>172</sup> which held that the "right to counsel" does not attach until "adversary judicial proceedings" have begun.<sup>173</sup> Since lineups are usually held *before* "adversary judicial proceedings" have begun, the *Wade* Court's attempt to set rules for lineups was largely nullified.

The Court is constantly torn between memory and desire: its memory that "nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials"<sup>174</sup> and its desire to

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POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986, with addendum of Jan. 20, 1987) (*Miranda* not constitutionally justified) with Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) (*Miranda* is constitutionally justified).

<sup>168</sup> See F. GRAHAM, *THE SELF INFLICTED WOUND* (1970).

<sup>169</sup> 388 U.S. 218 (1967).

<sup>170</sup> Of course, if the defendant is seized off the street for the purpose of appearing in a lineup, he can challenge that seizure on fourth amendment grounds; but that is a different issue. Normally, if a non-arrested suspect is wanted for a lineup, a court order must be obtained.

<sup>171</sup> See Polsky, Uviller, Ziccardi & Davis, *The Role of the Defense Counsel at a Lineup in Light of the Wade, Gilbert, and Stovall Decisions*, 4 CRIM. L. BULL. 273, 278, 285-86 (1968).

<sup>172</sup> 406 U.S. 682 (1972).

<sup>173</sup> *Id.* at 688-91.

<sup>174</sup> *Moran v. Burbine*, 475 U.S. 412, 425 (1986).

protect the rights of criminal defendants or establish a clear rule for the police to follow. The result has been a patchwork approach that finds the Court overly involved in the details of some interests of criminal suspects—for example, the need to be warned of rights—and oblivious to other, equally important interests.<sup>175</sup>

The Court's work in the confessions area well illustrates this point. Since declaring the *Miranda* rule, the Court, in the ensuing twenty-odd years, has contented itself with interpreting and reinterpreting that decision. What is "custody"? What is "interrogation"? What if the defendant asserts his right to silence or counsel?<sup>176</sup> But in focusing on the warnings the Court has overlooked other, equally fundamental aspects of the interrogation process: how to guard against police fabrication of confessions; what to do if the police induce a confession by trickery;<sup>177</sup> what to do if, after warning the defendant, the police engage in the psychological ploys discussed in *Miranda* such as the "Mutt and Jeff" technique;<sup>178</sup> and how long the interrogation may last.

In *Miranda* the Court "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient [law] enforcement . . ." <sup>179</sup> But the Court has coopted the field. One can look, almost in vain, through a criminal procedure book<sup>180</sup> for any reference to statutory material in an area that every other country, including our common law mentor, Britain, considers to be appro-

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<sup>175</sup> Professor Francis Allen has expressed similar concerns about the "criminal procedure revolution":

These comments do not attack the Court's attempt to expand the rights of defendants in criminal cases, rather they indicate that narrowing one's focus to the Bill of Rights can lead to a failure to view criminal process issues in the proper perspective of defining the judicial role in that process. The failure to question the judicial role in assuring fairness in the criminal process may lead to a restriction of the rights of the defendant as easily, and perhaps even more easily, than it may lead to an expansion of those rights.

Nowak, *Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397, 401 (1979) (discussing Allen, *supra* note 166, at 540); accord Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

<sup>176</sup> See C. BRADLEY, Y. KAMISAR, J. GRANO & J. HADDAD, *SUM AND SUBSTANCE: CRIMINAL PROCEDURE* §§ 6.6200, 6.6300, 6.7000 (2d ed. 1988).

<sup>177</sup> The Court ignored such trickery in *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977).

<sup>178</sup> The Court condemned the "Mutt and Jeff" technique, wherein an interrogator who is hostile to the defendant is replaced by one who is sympathetic in *Miranda v. Arizona*, 384 U.S. 436, 452-53 (1966).

<sup>179</sup> *Id.* at 467.

<sup>180</sup> See, e.g., Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 150. Only in the relatively minor matter of joinder and severance of defendants is there any detailed discussion of Federal Rules of Criminal Procedure, and federal statutes play a major role only in the chapter on wiretapping. State statutes are, of course, not mentioned at all.

priately dealt with by statute.<sup>181</sup> Since Supreme Court rulemaking is limited by the Court's docket, the facts of the cases before it, and its frequent unwillingness to "mandate a code of behavior for state officials,"<sup>182</sup> the result is a patchwork of rules that cover some, but ignore equally important aspects of criminal procedure.

#### B. THE CLARITY PROBLEM

In addition to the incomplete nature of the Court's criminal procedure rules, they suffer from a second serious flaw: lack of clarity. Rules of criminal procedure should take a form that can be posted on the stationhouse wall to be read and followed by the police without requiring them to delve into the mysteries of innumerable cases to find out what they are supposed to do.<sup>183</sup> Of course, statutes, like cases, can leave many unanswered questions. However, a statute has two major advantages over case law as a method of declaring rules for police to follow.<sup>184</sup> First, it is not subject to the case or controversy limitation. Future cases can be anticipated and dealt with definitively. For example, in *Michigan v. Mosley*,<sup>185</sup> the Court sought to resolve the issue of what the police should do when a defendant, after receiving his *Miranda* warnings, states that he does not want to speak. The facts of *Mosley* were unusual in that the defendant, after invoking his right to silence, was questioned two hours later by a different detective about a different crime.<sup>186</sup> The Supreme Court held that this questioning was permissible.<sup>187</sup> *Mosley*, however, did not resolve the much more common issue of whether a defendant, once he has invoked his right to silence, can

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<sup>181</sup> Police and Criminal Evidence Act, 1984, ch. 60 (Gr. Brit.). In Australia, "it is also generally accepted that what is needed is a comprehensive code setting out with as much particularity as possible the rights and duties of police, suspects and others concerned in the criminal investigation process." P. SALLMAN & J. WILLIS, *supra* note 3, at 23. Of course, continental countries have had such codes for decades. See, e.g., STRAFGESETZBUCH [StGB] (W. Ger.) (Code of Criminal Procedure); accord Friendly, *supra* note 167, at 930 (citation omitted) ("How complex the subject is, and how much it calls for the compromise that is the genius of legislation rather than the everlasting aye or nay of constitutional decision."); see also AMERICAN LAW INSTITUTE, *supra* note 159.

<sup>182</sup> *Moran v. Burbine*, 475 U.S. 412, 425 (1986).

<sup>183</sup> "Of course there has to be an exclusionary rule. I don't want this to be a police state. There have to be guidelines. The problem is that the guidelines aren't clear . . . [and] the Supreme Court is not making the law clear." Orfield, *supra* note 139, at 1052.

Professor Uviller has observed that the *Miranda* warnings, which are similar to the kind of legislative rules I am proposing, are, literally, posted on the stationhouse wall at the precinct he studied in New York. H.R. UVILLER, *TEMPERED ZEAL* 206 (1989).

<sup>184</sup> The problems with case law as a means of developing rules of procedure are discussed in Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1.

<sup>185</sup> 423 U.S. 96 (1975).

<sup>186</sup> *Id.* at 97-98.

<sup>187</sup> *Id.* at 107.



ever be questioned again by the *same* police officers about the *same* crime. This issue remains unresolved twenty-four years after *Miranda* was decided. In *Edwards v. Arizona*,<sup>188</sup> the Court held that a defendant could *not* be questioned further after he had invoked his right to counsel. In *Oregon v. Bradshaw*,<sup>189</sup> the Court found an exception to *Edwards* when the defendant "initiated" further conversation. *Bradshaw* was not decided until seventeen years after *Miranda*, during which period the issue remained unsettled.<sup>190</sup> But it all could have been resolved in advance by a statute which provided the following:

If the defendant indicates that he wishes to remain silent or to communicate with counsel, questioning must cease unless: a) Counsel is provided; or b) The defendant initiates further communication; or c) Only in the case of invocation of the right to silence, police want to question the defendant about a different crime.<sup>191</sup>

The other problem of clarity with case-made rules is caused by *stare decisis*. When a legislature wants to declare or change a rule, it simply does so. There is no need to account for previous, similar rules in the process. Courts, in contrast, are bound by *stare decisis*. Consequently, if a court seeks to establish a new rule that departs from precedent but does not want to openly overrule the previous case—which *stare decisis* suggests it should be loath to do—one of two things may happen: either the new rule may be altered to make it a less radical break than it might have seemed, or the precedent may be distorted for the same reason.<sup>192</sup> The first result may limit the effectiveness of the new rule, the second will cause confusion as to the import of the rule and subject it to being distinguished in later cases. A statute is a much more straightforward method of rule making.

### C. THE STATUTORY SOLUTION

The problem with statutes is two-fold. The first is simply get-

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<sup>188</sup> 451 U.S. 477 (1981).

<sup>189</sup> 462 U.S. 1039 (1983).

<sup>190</sup> See also *Moran v. Burbine*, 475 U.S. 412 (1986) (finally resolving the issue raised, but not decided, 22 years before in *Escobedo v. Illinois*, 378 U.S. 478, 486-87 (1964), of whether the right to counsel attached when, during interrogation, the lawyer asked to see the client).

<sup>191</sup> This is assuming that the legislature had wanted to adopt the rules of *Mosley*, *Edwards*, and *Bradshaw*. See Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303 (1986) (setting forth a comprehensive interrogation statute).

<sup>192</sup> As Professor Alshuler has pointed out, "The open disapproval of past precedents might . . . undermine the Court's position in American life less than the repeated invocation of disingenuous distinctions." Alshuler, *Failed Pragmatism*, 100 HARV. L. REV. 1436, 1453 (1957).

ting them passed. Thirteen years and three statutory schemes after criminal procedure reform was first attempted in Australia, nothing has yet been done.<sup>193</sup> However, such an effort in the United States, devoted largely to *codifying* and *simplifying* current Supreme Court law, and to making the rules more comprehensive, rather than to changing the law's ideological content, might prove more successful. At least it is worth a try.

The second "problem", in both the United States and Australia is federalism. The criminal investigation bills proposed in Australia would only apply to the federal authorities because the federal government has very limited powers vis-à-vis the states. It is generally assumed that Congress's power is similarly constrained in the United States. This is a serious problem because such fundamental rights must be enforced uniformly nationwide, not subjected to the differing whims of state legislatures or state courts. This would seem to be the major reason why the Supreme Court has undertaken the job of declaring nationally applicable "rules" of criminal procedure.

In my view, this "problem" is a chimera in the United States. Congress *has the power* to prescribe a national code of criminal procedure. If Congress can provide a tort remedy for violation of constitutional rights by state officers,<sup>194</sup> then it can also legislate the precise obligations that those rights place on the police, as well as an exclusionary remedy. The fourth, fifth, and sixth amendments have all been applied to the states through the fourteenth amendment.<sup>195</sup> That amendment provides in section 5 that "Congress shall have power to enforce, by appropriate legislation, the provi-

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<sup>193</sup> The Criminal Investigations Bills of 1976 and 1981 were rejected by Parliament. A more recent proposal by the Law Reform Commission is currently being studied by governmental agencies and seems to have better prospects for passage. Telephone conversation with Stephen Mason, Secretary and Director of Research, Law Reform Commission (Mar. 2, 1989).

The police lobby has been highly influential in opposing and defeating previous efforts at reform. "The Victoria Police responded to the findings . . . of the Beach Inquiry with remarkable vigour and hostility, and fought a largely successful campaign . . . to prevent the implementation of its procedural recommendations." P. SALLMAN & J. WILLIS, *supra* note 3, at 18.

In response to the Criminal Investigation Bill of 1981, the President of the Police Federation of Australia and New Zealand threatened a police strike if the procedural protections of the bill were enacted. 26 REFORM 63 (Apr. 1982). Senator Evans, then Attorney General, "suggested that the police response to the Bill . . . demonstrated 'a profound indifference to the constraints of existing law.'" *Id.*

<sup>194</sup> 42 U.S.C. § 1983 (1982); see *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>195</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964) (fifth amendment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (fourth amendment).

sions of this article.”<sup>196</sup> Since the criminal procedure amendments have been incorporated into the due process clause of the fourteenth amendment, it is clear that Congress is now empowered to enforce them “by appropriate legislation”<sup>197</sup>—that is, by a national code of criminal procedure. Such a code would provide the uniformity necessary for enforcement of federal constitutional rights,<sup>198</sup> combined with a relative certainty as to the scope of those rights.<sup>199</sup> This is currently unattainable by reference to precedent bound Supreme Court decisions.<sup>200</sup>

Congress could base a code on its general authority to enforce the fourth, fifth, and sixth amendments without necessarily tying each rule to a specific constitutional violation and thereby avoid the “patchwork” problem. Thus, Congress could declare that fair conduct of lineups implicates defendants’ fifth and sixth amendment rights and that lineups must therefore be photographed and tape recorded in order to be admissible at trial, without specifying precisely which constitutional phrase required this rule. In the past the states through members of Congress might have resisted such legislation as trenching on matters that were exclusively of state concern. However, in the thirty years since *Mapp*, everyone has become so accustomed to criminal procedure as a *federal* matter that it seems unlikely that serious states’ rights arguments would be raised. Other political concerns might incapacitate Congress from adequately performing this function; nevertheless, Congress has the power to enact national legislation and the criminal procedure system would be much improved if it did.

This approach is reminiscent of that used in the loansharking

<sup>196</sup> U.S. CONST. amend. XIV, § 4.

<sup>197</sup> The holding of the *Civil Rights Cases*, 109 U.S. 3 (1883), that the fourteenth amendment gives Congress no authority to regulate the behavior of private individuals, would have no bearing here since Congress would be limiting the conduct of a quintessential state/local governmental agency—the police. See *Katzenbach v. Morgan*, 384 U.S. 641, 650-51 (1966) (holding that Congress has independent authority to interpret the provisions of the fourteenth amendment). Cf. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

<sup>198</sup> Such a code would not, of course, prevent individualized states from holding their own police to higher standards, as they are currently free to do. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). But it would provide uniformity as to the bottom line, the most fundamental rights.

<sup>199</sup> For an example of such a code, see AMERICAN LAW INSTITUTE, *supra* note 159.

<sup>200</sup> It might be argued that the power to “enforce” includes only the power to provide remedies, not to declare rules. This seems an unduly crabbed reading of the fourteenth amendment, especially in view of the statutes already enacted to “enforce” it, such as 42 U.S.C. § 1983, and 18 U.S.C. §§ 241, 242 (1988). A power to “enforce” without the power to flesh out the vague terms of the amendment with statutory rules would be largely meaningless.

statutes,<sup>201</sup> where Congress simply declared that loansharking affected interstate commerce without requiring proof of the effect in a given case.<sup>202</sup> A grateful Court, relieved at last of its burden of carrying the code of criminal procedure on its own shoulders, would surely support such legislation.

But if the Court is no longer to declare the rules of criminal procedure, what will its role be? Professor Francis Allen foresaw this in 1975:

A new allocation of responsibilities is required. The role of the Court will remain critical. It has shown its capacity to identify and dramatize problems in criminal justice administration; this role is an essential catalyst for reform. *The Court will have to make the ultimate decisions on the constitutional validity of the solutions devised.* Nevertheless, its role is better adapted to review than to initiation. If categorical rules for the system are needed, it is better that other institutions formulate most rules.<sup>203</sup>

The Supreme Court would have not only to determine the validity of such congressional rules but, no doubt, resolve questions left unanswered by the rules. This is, as a practical as well as a theoretical matter,<sup>204</sup> what courts do best.

In his introduction to this Symposium, Professor Ronald Allen, while tacitly agreeing that Congress has this power, disagrees that this proposal should be implemented. He notes that Congress, unlike the Supreme Court, is subject to "special interest groups, log-rolling, the concerns for reelection, uninformed voting, and the like."<sup>205</sup> Having once investigated Congress as a federal prosecutor (in connection with the so-called "Koreagate" bribery scandal) I would be the last person to indulge in idealized characterizations of

<sup>201</sup> 18 U.S.C. §§ 891-896 (1988).

<sup>202</sup> The Supreme Court approved this exercise in *Perez v. United States*, 402 U.S. 146 (1971).

<sup>203</sup> Allen, *supra* note 166, at 542 (emphasis added). Professor Packer, recognizing that the Court's actions were due to "a law-making vacuum into which, rightly or wrongly, it [saw] itself as having to rush" deemed the Court's establishment of criminal procedure rules as "moves of desperation." Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCIENCE 238, 240 (1966). This means that "the rules of the criminal process, which ought to be the subject of flexible inquiry and adjustment by law-making bodies having the institutional capacity to deal with them, are evolved through a process that its warmest defenders recognize as to some extent awkward and inept." *Id.*

<sup>204</sup> The arguments in this Article are based on utilitarian concerns. This Article does not address itself to the oft-debated question of whether it is/was appropriate, in our constitutional system, for the Supreme Court to take on the power to declare rules of criminal procedure. For a discussion of this issue, compare J. ELY, *DEMOCRACY AND DIS-TRUST* (1980) with Brest, *The Fundamental Rights Controversy: —The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

<sup>205</sup> Allen, *The Pressures and Prospects for Change*, 81 J. CRIM. L. & CRIMINOLOGY 1, 7 (1990).

that institution's capacities. But since Congress is the only body that can produce a comprehensive, nationally applicable code of criminal procedure, then it is to Congress, with all its faults, that we must go. In an area such as criminal procedure, where economic interests are not generally at stake, some of the problems cited by Professor Allen would be minimized. Also, it is not obvious that the Supreme Court, whose members have virtually no experience in the criminal justice area, is less subject to the problem of "uninformed voting" than Congress, with its capacity to hold hearings and seek expert advice. Finally, since Congress would be aware that their rules would be carefully scrutinized by the Supreme Court, it seems likely that they would endeavor to craft those rules to meet Supreme Court standards. Congress has proved capable of producing reasonable federal criminal law. I see no reason to doubt that it could perform as well in the area of criminal procedure.

## VI. CONCLUSION

A study of Australian criminal procedure reveals that the Australians have embarked on one bad and one good road to resolving the problems of criminal procedure. The discretionary exclusionary rule has not worked in Australia and merely tinkering with it by shifting the burden of establishing admissibility to the prosecution seems unlikely to solve the problems, especially since the judges have shown little inclination toward deterring police misconduct through evidentiary exclusion under the current discretionary system.

On the other hand, the Australian states have largely adopted a statutory approach to regulating police—at least in the search area—and it appears that federal legislation may be imminent. This is as it should be. While the United States Supreme Court must be commended for its heroic efforts on behalf of criminal defendants, rulemaking is what is needed, and rulemaking is a task for which courts are singularly unsuited.<sup>206</sup> The time has come for the United States Congress, legislating pursuant to its powers under the fourteenth amendment, to take over this effort from the Court and promulgate a national code of criminal procedure which safeguards constitutional rights and provides clear, comprehensive rules for the

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<sup>206</sup> Professors Bator and Vorenberg, the Reporters of the Model Code of Pre-Arrestment Procedure, recognized the "peculiar appropriateness of legislation to the solution of the major issues of criminal procedure" in 1966. Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 63-64 (1966).

police to follow.<sup>207</sup> While politics would undoubtedly cause such rules to vary somewhat from the civil libertarian ideal, such variance has already occurred anyway due to recent Supreme Court rulings. It is far better to have realistic rules that will really be enforced than idealistic ones that will not be. And, if Congress deviates too far from fundamental rights concerns, the Court can always strike down its statute(s).

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<sup>207</sup> As this article was going to press, I discovered that this proposal had already been made, twenty-five years ago in this very Journal. The author of that article, without the benefit of seeing the tangled mess that criminal procedure law has become, must be given credit for unusual prescience. Dowling, Escobedo *and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. Crim. L., Criminology & Police Science 143 (1965).