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MAPP GOES ABROAD

Craig M. Bradley†

In Mapp v. Ohio, the United States Supreme Court held that evidence obtained by police in violation of the Fourth Amendment must be excluded from state, as well as federal, criminal trials. In doing so, the Court broke from common law tradition, as it had already done in applying the exclusionary rule to the federal government. In England the rule was, and had always been, that relevant evidence was admissible, regardless of how it had been obtained. In general, with the exception of coerced confessions, other countries followed the non-exclusion approach prior to Mapp.

Since Mapp, and partly because of it, the approach of the rest of the world to evidentiary exclusion due to police misconduct is changing. It is no longer true, as Chief Justice Burger declared in 1971, that the exclusionary rule is "unique to American Jurisprudence." I have been following the approaches of various countries to evidentiary exclusion since 1982, culminating in a book published in 1999 which discusses the criminal procedure rules of twelve different countries,

† Craig Bradley is the James Louis Calamaras Professor of Law, Indiana University School of Law, Bloomington, Indiana. The author would like to thank Profs. David Feldman, Simon Bronitt, Joachim Herrmann, and Thomas Weigend for their help in updating my information on exclusionary practices in various countries and for their comments on earlier drafts.


2 Weeks v. United States, 232 U.S. 383 (1914), on which Mapp was based, had explicitly rejected the common law approach. See id. at 394 (holding that Fourth Amendment protection extends to letters and papers taken from the accused's home by government officials).

3 See, e.g., Queen v. Leatham, 121 Eng. Rep. 589 (1861) (finding that evidence would be admissible even if it was stolen).


5 Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). This statement was not completely true then either. See infra note 6 and accompanying text.

6 See Craig M. Bradley, Criminal Procedure in the 'Land of Oz': Lessons for America, 81 J. CRIM. L. & CRIMINOLOGY 99 (1990) (discussing Australia's balancing approach to the exclusionary rule); Bradley, Emerging International Consensus, supra note 4 (arguing that other countries have adopted exclusionary requirements); Craig M. Bradley, The Exclusionary Rule in Germany, 96 HARV. L. REV. 1032 (1983) [hereinafter Bradley, Exclusionary Rule in Germany] (arguing that Germany applies a modified version of the exclusionary rule).
including their rules regarding evidentiary exclusion. This article will discuss the similarities and differences between the American approach of *Mapp* and the approaches of these and other countries.

Hans Lensing, a law professor and judge in the Netherlands summarizes the general state of affairs:

In most systems procedural sanctions, most notably exclusion of evidence or something similar ("nullité") may apply where the police or other agencies have obtained evidence in an unlawful manner, either related to searches and seizures or interrogation. In many of those systems the rationale is not deterrence of [police misconduct]—as it is in the U.S.A—but fairness of the proceedings, the safeguarding of the integrity in the administration of justice and the like (*inter alia* Argentina, Canada, England and Wales, France, Germany, Italy, South Africa and—but less clear—Russia). However, in some systems (China, Israel) only considerations of reliability determine whether evidence is admissible.

The U.S. system seems the most rigid system inasfar [sic] as unlawfully obtained evidence must be excluded, and the court does not have discretion whether to admit the evidence. However, it should be noted that this does not mean that balancing of interests is absent: The exclusionary rule does not apply to all kinds of police misconduct nor does it apply in all kinds of proceedings. For example, the American exclusionary rule does not apply in the grand jury or in deportation proceedings.

On one point, all countries are in agreement, at least in theory: involuntary confessions must be excluded. Beyond that, as Lensing indicates, while evidentiary exclusion due to police misconduct frequently occurs, the rationales and the rigor of exclusionary practices vary greatly. There has been a very significant development in the European Court of Human Rights in the case of *Khan v. United Kingdom*, which will likely solidify the resistance of other countries to America’s mandatory exclusionary rule.

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7 See generally CRIMINAL PROCEDURE: A WORLDWIDE STUDY (Craig Bradley ed. 1999) [hereinafter WORLDWIDE STUDY] (studying Argentina, Canada, China, England, France, Germany, Israel, Italy, Russia, South Africa, Spain, and the United States). For the purposes of this article, China and Russia, which do not have well-developed or consistent policies regarding evidentiary exclusion have been eliminated, and Australia has been added.

8 Hans Lensing, General Comments, in WORLDWIDE STUDY, supra note 7, at 428.

In Khan, the defendant had been stopped at Customs at Manchester Airport after his arrival from Pakistan with another man, A, and both were searched. Heroin was found on A, but not on Khan, who was questioned and released. Several months later, Khan visited a friend, B, in Sheffield. B was already under investigation for dealing in heroin, and an electronic “bug” had surreptitiously been planted in his house. Khan was recorded telling B that he was a co-conspirator of A’s in the Manchester smuggling. Khan was arrested. He moved to suppress the recording on the ground that the bug was illegally planted. The Crown admitted that there was no statutory system to regulate police use of electronic listening devices. Nevertheless, the police had conformed to Home Office guidelines, which required that such bugging should only occur if ordered by a Senior Constable.

The trial court determined that, despite the lack of statutory authority, admission of the recording would not render the proceeding “unfair,” and admitted the tape. Khan was convicted solely on the basis of the tape, and the Court of Appeal and the House of Lords upheld his conviction. The House of Lords agreed with the defendant that the surveillance had been in violation of Article 8 of the European Convention on Human Rights, because it was not authorized by statute. Nevertheless, noting that the recording did not violate British law, the Lords upheld the trial judge’s finding that its use did not render the trial unfair.

The European Court of Human Rights agreed that Article 8 was violated. They further considered whether Article 6, § 1, which guarantees the right, in a criminal case, to a “fair and public hearing” was violated.

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10 See id. at *7 (noting that the Police Act of 1997 has since provided a statutory basis for authorization of police surveillance).
11 See Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.) (providing for the exclusion of evidence if its use would have “an adverse effect on the fairness of the proceedings.”)
12 See Khan, No. 35394/97 at *3 (dismissing Khan’s conviction appeal).
13 See id. at *7 (noting that the evidence was obtained in violation of Article 8, and that this was a relevant but non-determinative fact). Article 8 provides in § 1 that “Everyone has the right to respect for his private . . . life . . . and his correspondence” and in § 2 that “There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society . . . for the prevention of disorder or crime.” Convention for the Protection of Human Rights and Fundamental Freedoms, Apr. 11, 1950, Eur. T.S. No. 5.
14 See Khan, No. 35394/97 at *4.
15 See id. at *7 (noting that due to the lack of a statutory system to regulate the use of covert listening devices at the time the evidence was obtained, the collection of the evidence was not in accordance with the law and therefore violated Article 8).
16 See id. at *7-8.
The Court noted that in an earlier case, *Schenk v. Switzerland*, it had not ordered evidence excluded despite the fact that the electronic surveillance had been *illegal* under Swiss law, because the "trial as a whole was fair." Further, the Court noted that the fact that the questioned evidence was essentially the government's whole case was not determinative since "there was no risk of [the evidence] being unreliable." Likewise, the court concluded, by a vote of 6 to 1, that Khan's trial was "fair" under Article 6, § 1, and that the evidence need not have been excluded. It summarized its position:

It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence—for example, unlawfully obtained evidence—may be admissible or, indeed, whether the applicant was guilty or not. The question... is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.

Only Judge Loucaides disagreed on the ground that use of evidence obtained in violation of Article 8 rendered the trial unfair by definition. However, even in the United States, although such evidence obtained without statutory authority, would have been mandatorily excluded against B, Khan nevertheless would probably not have been able to exclude it due to lack of standing.

This article will summarize the state of exclusionary law in various countries studied.

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18 See id. at 28 (noting that the government admitted that the recording was unlawful).
19 Khan, No. 35394/97 at *9.
20 Id. at *10.
21 See id. at *10-11. The Court noted that it would have also been proper for the British courts to have excluded the evidence, and awarded the defendant 11,500 British Pounds for counsel fees. See id. at *9-10, 13.
22 Id. at *9.
23 See id. at *15 (stating that a trial cannot be "fair" if it is conducted in breach of the law).
24 See Minnesota v. Carter, 525 U.S. 83 (1998) (holding that a business visitor who visits a house solely to package cocaine lacks an expectation of privacy). It is not clear whether Khan's visit was business or personal, or whether he was an overnight guest. Nor is it clear whether Khan might have had standing because an electronic surveillance was involved. See LAFAVE ET AL., CRIMINAL PROCEDURE § 4.6(b) (3d ed. 2000) (discussing *Alderman v. United States*, 394 U.S. 165 (1969), and noting that "in an eavesdropping case the parties to the conversation and the persons with a possessory interest in the place where the conversation occurs all have standing," but, "courts are inclined to define Title III standing as being exactly the same as Fourth Amendment standing, even to the point of taking into account Fourth Amendment developments postdating enactment of Title III").
I. ARGENTINA

Argentine criminal procedure is governed by a code, adopted in 1993, which "retains the basic features of criminal procedure shared by most Continental legal systems influenced by French law."\(^{25}\) Despite early recognition of the principle that wrongly obtained evidence should not be used at trial,\(^{26}\) this idea was ignored until the 1980s.\(^{27}\) However, following recognition by some lower courts of an exclusionary principle in cases of illegal searches, the Supreme Court, in the 1984 case of "Fiorentino,"\(^{28}\) suppressed incriminating evidence on the ground that failure to object to a search was not a valid indication of consent.\(^{29}\) This was found despite the absence of threats or violence on the part of the police.

In another case, "Rayford,"\(^{30}\) the Supreme Court took a somewhat broader view of standing, similar to the view that the U.S. Supreme Court takes, holding that when A confessed following an illegal, warrantless search of his home, his confession, which implicated his co-defendant B, was not usable against either defendant. The drugs found in A's home were likewise not admissible against either defendant. In the United States, neither the drugs nor the confession would be admissible against A, but both would be admissible against B due to his lack of standing. Argentine procedure agrees, however, with that of the U.S., that if the discovery of evidence was independent of the illegality, or if the evidence would have been legally discovered despite the illegality (inevitable discovery), then it can be used at trial.\(^{31}\)

Carrio and Garro conclude that,

The exclusionary rule has been applied often enough by intermediate appellate courts, especially in cases concerning illegal possession of drugs, so as to have an impact on how trial courts handle these cases. Whether these decisions have

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\(^{26}\) See id. at 17 (discussing that the principle of excluding wrongly obtained evidence was affirmed in the "Charles Hermanos" case of 1891).

\(^{27}\) See id. at 18 (noting that until 1980, cases subsequent to "Charles Hermanos" were usually dismissed on the basis that illegal searches were not a constitutional issue).

\(^{28}\) Corte Suprema de Justicia del la Nación [CSIN] [Supreme Court] 306 Fallos 1752 (1985) (Arg.).

\(^{29}\) See Carrio & Garro, supra note 25, at 19 (discussing Fiorentino). In the 1981 case of "Montenegro," CSIN 303 Fallos 1938 (1981) (Arg.), the Court suppressed physical evidence that was found as a result of a coerced confession.

\(^{30}\) CSIN 308 Fallos 733 (1995) (Arg.).

\(^{31}\) See Carrio & Garro, supra note 25, at 22 (noting that Argentina courts distinguish between evidence that could have been obtained legitimately and that which could not).
had a noticeable impact on every day police practices is difficult to ascertain.\(^32\)

Although the authors don’t specify, it seems clear that the exclusionary decision is discretionary with the trial court. Thus, appellate court decisions reversing convictions due to failure to suppress evidence must be based on an abuse of discretion standard.\(^33\) Because of this discretionary approach, based on a tradition of non-suppression, it is obvious that many cases of illegal police behavior do not necessarily result in suppression, and that many court decisions regarding exclusion, both at the trial and appellate levels, are not reported, whatever the result. Nevertheless, as the authors point out, the Mapp principle does seem to be having an impact.

II. AUSTRALIA

The leading Australian case is Bunning v. Cross,\(^34\) in which the High Court of Australia expressly disavowed the common law non-exclusion principle.\(^35\) In Bunning, the court described the various factors that might play into the trial judge’s decision to exclude evidence, such as whether the police misconduct was inadvertent or not, the importance of the evidence, the seriousness of the offense, and the ease with which the law might have been complied with.\(^36\)

The 1995 case of Ridgeway v. The Queen\(^37\) expanded upon Bunning and held that exclusion is to be ordered when “the public interest in maintaining the integrity of the courts and in ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement” requires it.\(^38\) This, in turn, will depend on “the nature, the seriousness and the effect of the illegal [police] conduct,” and whether it was “encouraged or tolerated” by higher police authorities or by prosecutors.\(^39\) Significantly, however, the High Court noted that, “[o]rdinarily . . . any unfairness to the particular accused will be of no more than peripheral importance.”\(^40\) It

\(^{32}\) Id. at 19-20 (footnote omitted).

\(^{33}\) See id. at 48 (noting that the appeal is received as a continuation of the one and only criminal proceeding, and thus it is not viewed as a mechanism to reconsider an erroneous final decision). Appeals may be brought by either party. See id. (noting that the prosecutor may bring an appeal).

\(^{34}\) (1978) 141 C.L.R. 54 (AustL).

\(^{35}\) See id. at 64-65.

\(^{36}\) See id. See also KEITH TRONC ET AL., SEARCH AND SEIZURE IN AUSTRALIA AND NEW ZEALAND 330 (1996) (listing specific criteria that trial judges should use when deciding the admissibility of evidence).


\(^{38}\) Id. at 38.

\(^{39}\) Id.

\(^{40}\) Id.
remains the case that evidentiary exclusion due to police misconduct is very much the exception, rather than the rule.

Indeed, despite the existence of fairly detailed rules governing searches in the various states, as well as a discretionary exclusion policy, rules governing searches were generally ignored by the police, because until the 1990s, evidence had never been excluded by the High Court due to an illegal search. However, in the 1990 case of George v. Rockett, the High Court did suppress evidence seized in an unlawful search. In that case, police in Queensland obtained a search warrant based on an affidavit that simply stated that the police had "reasonable grounds for suspicion" without setting forth the basis. The High Court, sitting in its capacity as the highest court of the state of Queensland, held that the warrant was invalid and the evidence must be suppressed. The Court ruled that the Queensland statute requiring "reasonable grounds" meant that these grounds must be specified in the warrant affidavit. Likewise, in Ridgeway, the High Court suppressed heroin found on the defendant because it had been improperly supplied him by police.

As for interrogations, police are required to give Miranda-type warnings as to silence and right to counsel "when the police have sufficient evidence in their possession to justify a charge, even if they have not decided to charge the suspect." Thus, Miranda-type warnings are required somewhat earlier in the process than they are required in the United States. However, failure to give the "caution" does not necessarily lead to exclusion—it is simply a "matter to be considered." In four of the eight Australian states and territories,

41 See Bradley, Emerging International Consensus, supra note 4, at 192 (noting that most Australian states have detailed search and arrest statutory rules).
42 See id. (noting that the fact that evidence from illegal searches had never been excluded showed that the police did not take the laws seriously).
44 See id. at 489.
45 See id.
47 It is not completely clear whether the warning includes the right to counsel in all states.
49 Laws of Australia, supra note 47, §§ 77-78. However, evidence has been excluded for this reason "in several cases." See id. § 78 (citing cases in which evidence has been excluded for failure to warn).
interrogations must be tape-recorded. Failure to record is "likely to lead to the exclusion of untaped confessions..."

III. CANADA

Canada has the most fully developed exclusionary law of any country studied outside of the United States. The Canadian Charter of Rights and Freedoms includes both a right against "unreasonable search or seizure" and a right, upon arrest or detention "to be informed promptly of the reasons therefor," and "to retain and instruct counsel without delay and to be informed of that right." Moreover, the Charter provides that:

where... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Despite the discretionary nature of the Canadian exclusionary rule, Professor Roach has set forth numerous examples of its use in cases of both illegal searches and improperly obtained confessions. There are two tests to determine if evidence should be excluded. First, evidence will be excluded if it would affect the fairness of the trial, and second, it will be excluded to "avoid judicial condonation of a serious Charter violation."

Under the first test, "evidence that could not be obtained but for unconstitutional participation of the accused" should be excluded. "This includes statements and other evidence such as hair, blood and breath samples taken from the accused in violation of the right [to]..."
counsel.\textsuperscript{59} It has also been applied to a gun to which the accused led police who were interrogating him in violation of his right to counsel. Thus, the concept of "fairness of the trial" has been broadly applied in Canada to apply to more situations than simply that of a coerced, and therefore inherently unreliable, confession.

Likewise, the "judicial condonation" prong has been used to exclude real (i.e., physical) evidence, even though the police could have obtained the evidence by legal means.\textsuperscript{60} In fact, this circumstance can cut against the police "by suggesting that the police could have done their job without violating the accused's rights."\textsuperscript{61} Examples of exclusion include:

- drugs [that] were seized by a choke hold when the police did not have reasonable grounds to believe that the accused was a drug handler;
- when drugs were seized through a defective warrant and a no knock entry with excessive force;
- when drugs were seized through an intrusive and unconstitutional rectal search;
- when drugs were seized after a trespass without reasonable grounds that the police ought to have known was illegal and when bloody clothes and other evidence in a murder case were seized after the police made a warrantless entry and arrest in the accused's home without even a subjective belief that they had grounds for an arrest . . . \textsuperscript{62}

But while the Canadian courts are thus active in suppressing evidence due to search violations by police, the cases discussed generally involve more extreme police misbehavior than merely failing to get a warrant when police have probable cause to search a house or arrest someone on less than probable cause (though this is not invariably true).\textsuperscript{63} Professor Roach notes that "violations committed in good faith" by police do not lead to exclusion.\textsuperscript{64} Moreover, under the "judicial condonation" approach (but not under the "fair trial" test), the seriousness of the offense charged and the importance of the evidence

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\textsuperscript{59} Id.
\textsuperscript{60} See id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 64-65 (footnotes omitted) (citing Canadian cases where real evidence has been excluded because of police violations of search and seizure regulations).
\textsuperscript{63} For example, in Kokesch v. The Queen [1990] C.C.C. 207 (Can.), the Court suppressed the marijuana evidence due to a trespass onto the curtilage of the suspect's home which provided grounds (inter alia, the scent of marijuana) for the search warrant, because the trespass violated clear statutory rules.
\textsuperscript{64} Roach, supra note 56, at 64.
to the prosecution's case may militate against exclusion, contrary to American law.

Because confessions involve the defendant being "conscripted against himself," Canadian law is somewhat stricter than American law when it comes to both the defendant's rights and the police's failure to observe them. Upon arrest or "detention," the accused must be informed of his right to silence and counsel. If he asserts the right to silence, he may not, unlike in America, be questioned by an informant or undercover agent. If he asserts his right to counsel, "the police must facilitate access to counsel by offering the use of a telephone... The police must hold off eliciting evidence until the suspect has had a reasonable opportunity to contact counsel." "Most provinces have established toll free telephone numbers that allow detainees to contact duty counsel on a twenty four hour basis." However, unlike in America, once the suspect has spoken to counsel, the police may resume questioning without counsel being present, and may also "lie and engage in deception in order to obtain statements."

Confessions obtained in violation of the above rules, as well as real evidence discovered as a result of such confessions, are generally excluded. There have been only a few exceptions to this "general presumption," such as where the accused has been "too intoxicated to exercise his right to counsel or had an irresistible desire to confess."

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65 See id. at 65 (noting that "[b]efore evidence is excluded under the second, 'serious violation' test (but not the first 'fair trial' test), courts will consider the effects of excluding the evidence on the repute of the administration of justice').
66 Collins v. The Queen [1987] C.C.C. 1, 3 (Can.).
67 This term is broader than "custody" (arrest) in America, and has been held to include a "brief 5 minute detention in the back of a police car," and detention at a sobriety checkpoint. Roach, supra note 56, at 68-69. Cf. Berkemer v. McCarty, 468 U.S. 420 (1984) (finding that warnings are not required during a traffic stop).
68 See Bradley, Emerging International Consensus, supra note 4, at 198 (quoting the Supreme Court of Canada which held in The Queen v. Herbert, 77 C.R. (3d) 145, 146, that "the most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence").
69 See id. at 198-99. (observing that the Supreme Court of Canada, in Herbert, also noted that "statements made to passive undercover agents, to real prisoners who are not police agents, or overheard by a listening device would still be admissible") (footnote omitted).
70 Roach, supra note 56, at 69.
71 Id. at 68-69.
72 See id. at 69. But see Minnick v. Mississippi, 498 U.S. 146 (1990) (holding that police may not further interrogate a suspect after he has consulted with counsel unless counsel is present).
73 Roach, supra note 56, at 70.
74 See id. at 70-71.
75 Id. at 71 (footnotes omitted).
Criminal procedure in England is governed by the detailed *Police and Criminal Evidence Act of 1984*, PACE, which is elaborated by various Codes of Procedure. Under PACE, England has search and seizure laws similar to those of the United States, although England’s interrogation laws are stricter than those of the U.S., requiring *Miranda*-type warnings as soon as there are “grounds to suspect of an offense” rather than after the suspect is “in custody.”

Moreover, unlike the fictitious “right to counsel” in the U.S., PACE requires that a “Duty Solicitor” be available, and that the suspect be told of this. Finally, as of 1991, tape recording of interrogations is required where practicable.

There are four possible grounds of exclusion under PACE. Section 76(2) requires exclusion of confessions (a) obtained “by oppression” or (b) likely to have been rendered “unreliable” by anything said or done by anyone. Section 78(1) further provides that “the court may refuse to allow evidence . . . if it appears . . . that . . . the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.” Finally, § 82(3) “saves pre-existing common law powers . . . to exclude evidence whose prejudicial effect outweighed its probative value.”

Professor David Feldman has summarized the English practice on evidentiary exclusion when an illegal search has occurred:

> English law has no general exclusionary rule for improperly obtained evidence. Instead, it distinguished [sic] between confessions by the accused and other evidence. The fact that evidence has been obtained by improper or unlawful means does not necessarily (or, except in relation to confessions, even usually) make evidence of the discovery inadmissible or excluded at trial. The judge has a discretion to exclude real evidence obtained in the course of a search if that

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76 Because Scotland and Northern Ireland have separate criminal procedure systems, this section is properly called “England and Wales” not “Great Britain” or the “United Kingdom.”


80 See Code of Practice on Tape Recording, 1988, ch. E, para. 3.1 (Eng.).

81 See Police and Criminal Evidence Act, 1984, ch. 60, § 76(2) (Eng.).

82 Id. § 78(1).

in all the circumstances admitting it would make the proceedings unfair.\textsuperscript{84}

Indeed, only a few examples of exclusion of "real" (as opposed to confessional) evidence may be found.\textsuperscript{85}

When it comes to confessions, however, the English courts have become quite strict. Police are required to warn suspects, in essentially identical terms as \textit{Miranda},\textsuperscript{86} whenever they have "grounds to suspect of an offense."\textsuperscript{87} These warnings must be conveyed both orally and in writing,\textsuperscript{88} although police may further inform the suspect that his silence may be used against him at trial.\textsuperscript{89} The suspect must further be informed of the availability of a "duty solicitor" free of charge.\textsuperscript{90} Moreover, interviews conducted at police stations must be tape-recorded.\textsuperscript{91}

As always, violations of these rules do not necessarily result in evidentiary exclusion. "For a breach of the Codes to lead to exclusion it must be significant and substantial."\textsuperscript{92} However, "[f]ailure to caution a suspect and wrongful refusal of access to legal advice are serious and substantial breaches,"\textsuperscript{93} and thus will usually lead to exclusion of the suspect's statement. Likewise, failure to tape record a statement will generally lead to exclusion.\textsuperscript{94}

\begin{footnotesize}
\begin{footnote}{\textsuperscript{84} David J. Feldman, \textit{England and Wales, in WORLDWIDE STUDY, supra note 7, at 105.}\end{footnote}
\begin{footnote}{\textsuperscript{85} See id. It is "relatively unusual" for a judge to exclude real evidence. For example, a recent decision of the House of Lords found that "it was not improper for a trial judge to admit evidence obtained by . . . police trespass [into] the house of a non-consenting third party, because the public interest in detecting . . . serious crime . . . outweighed the interest in privacy." \textit{Id.} See also Bradley, \textit{Emerging International Consensus, supra note 4, at 189-90 (citing Matto v. Wolverhampton Crown Court, [1987] R.T.R. 337 (D.C.) (Eng.), where the breath specimen of a suspect was suppressed because of his earlier unlawful arrest, and Queen v. Conway, 1990 CRIM. L. REV. 402, where a conviction was reversed because no lineup had been held as required by law).}\end{footnote}
\begin{footnote}{\textsuperscript{86} See Bradley, \textit{Emerging International Consensus, supra note 4, at 183-84 (discussing that the English Interrogation Code defines the "obligation of the police to inform suspects of their rights").}\end{footnote}
\begin{footnote}{\textsuperscript{87} \textit{Id.} at 186 (quoting the English Code of Practice for the Detention, Treatment, and Questioning of Persons by Police Officers, 1991, ch. C, para 10.1 (Eng.)).}\end{footnote}
\begin{footnote}{\textsuperscript{88} See Michael Zander, \textit{The Act in the Station, in THE POLICE: POWERS, PROCEDURES AND PROPERTIES 123, 126 (John Benyon & Colin Bourne eds., 1986) (discussing the effect of the Act on police procedures in the stationhouse).}\end{footnote}
\begin{footnote}{\textsuperscript{89} See id.}\end{footnote}
\begin{footnote}{\textsuperscript{90} See id.}\end{footnote}
\begin{footnote}{\textsuperscript{91} See David Ashby, \textit{Safeguarding the Suspect, in THE POLICE: POWERS, PROCEDURES AND PROPERTIES 183, 187-88 (John Benyon & Colin Bourne eds., 1986) (discussing the section of the Act which safeguards suspects in police custody).}\end{footnote}
\begin{footnote}{\textsuperscript{92} Feldman, \textit{supra note 84, at 113.}\end{footnote}
\begin{footnote}{\textsuperscript{93} \textit{Id.} at 114.}\end{footnote}
\begin{footnote}{\textsuperscript{94} See id. (noting that "failure to comply with the recording provisions will be likely to undermine the court’s faith in the police evidence so as to make it unfair to admit the evidence" (footnote omitted))).}\end{footnote}
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The French system is, to an American observer, disturbingly vague. In part, this is because the French repose a good deal of trust in the "investigating judge" who is in charge of criminal investigations. Professor Frase has described the "rules" pertaining to searches: during an investigation of a "flagrant" offense, police, prosecutors, or investigating judges may search the scene as well as the domicile of "all 'persons who appear to have participated' in the offense, or (who appear) 'to be in possession of papers or objects relating to' the crime, and seize any evidence useful to the manifestation of the truth . . . ." Domicile searches are subject to limitations as to time of day, [and] requirements for the presence of . . . [a] non-police witness, . . . however, no warrant is required, and it is not clear what degree of suspicion is required . . . .

Likewise, during investigation of non-flagrant offenses, the investigating judge or his delegate (i.e., the police) may also search houses, apparently with no particular degree of suspicion. "The French procedure code does not expressly regulate searches of places other than houses . . . However, French courts have applied some of the Procedure Code's restrictions on domicile searches to other searches and seizures. For example, hotel rooms and private offices are treated the same as domiciles . . . ."

Professor Frase further points out that violations of "[t]he safeguards applicable to domicile searches" and "some of the limitations applied to identity checks and wiretapping" give rise to a mandatory evidentiary exclusion. However, the "rules" are so lax that it's not surprising that such cases of mandatory exclusion are rare.

Frase continues:

[Most violations give rise to exclusion only if they are deemed to have violated "substantial" provisions of the Code . . . . [E]xclusion further requires the court to find that the violation has caused "harm to the interests of the party that it

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95 The dubious investigative practices in France are to be contrasted to the trial, which contains many features that seem admirable. Of course, if the defendant's rights have already been trampled by police, a "good" trial may not be of much value. For an excellent description of a French murder trial, see Renee Lettow Lemer, The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises, 2001 U. ILL. L. REV. 791.
96 This is limited to major felonies and jailable offenses. See Richard S. Frase, France, in WORLDWIDE STUDY, supra note 7, at 149. "[A] flagrant offense investigation conveys a wide variety of temporary detention, interrogation, search, and seizure powers . . . ." Id.
97 Id. at 153 (quoting portions of Article 54 of the French Code of Criminal Procedure).
98 Id.
99 Id. at 154 (footnote omitted).
100 Id. at 155 (footnotes omitted).
concerns." However, when the violation affects important public interests . . . no showing of prejudice or defendant "standing" is required . . . [T]rial courts have very limited authority to exclude evidence in cases subject to judicial investigation.101

Interrogations are likewise unlikely to be hindered by an exclusionary sanction. While "French authorities are expected to avoid the use of unfair, brutal or deceptive methods, . . . French courts have traditionally been lax in controlling the use of psychological pressure . . . ."102

French police are "required" to inform the suspect that the interrogation is limited to twenty-four hours (with the possibility of an extension up to forty-eight hours in certain cases), to have his family informed that he is being held, and to be examined by a doctor or the prosecutor on demand.103 Only after twenty hours of interrogation is the suspect allowed to "speak in private and 'without delay' with an attorney, for up to 30 minutes."105 There is no warning as to the right to silence, although the police have no legal power to compel the suspect to talk.106 After charging, the suspect may be further questioned in court by the investigating judge, but only with his consent in the presence of counsel.107

Breach of these undemanding formalities in the post-charge setting does frequently give rise to discretionary exclusion at trial. Precharge police interrogations, by contrast, "rarely" give rise to exclusion.108 Recently, however, the highest court has held that extending the interrogation for more than forty-eight hours resulted in a "presumption" of prejudice, and hence exclusion.109 Lower courts have also excluded confessions where the police failed to "grant appropri-

101 Id. at 155-56 (footnotes omitted) (quoting portions of the French Code of Criminal Procedure). Unlike in Germany where evidence remains in the dossier, in France, excluded evidence is actually removed from the dossier used by the court at trial. See id. See also Bradley, Exclusionary Rule in Germany, supra note 6, at 1063 (describing German criminal procedure which allows the presiding judge to "prepare[] the case in advance by reading through the entire file, including evidence that has been or will be 'excluded' from use at trial").
102 Frase, supra note 96, at 161.
103 See id. at 158.
104 This is not true for certain crimes, including extortion, "aggravated pimping," drug, and terrorism cases where this right may be postponed to thirty-six or even seventy-two hours into the interrogation. See id. at 159.
105 Id. at 158.
106 See id. at 158-59.
107 See id. at 160.
108 See id. at 162 (citing the French cases declining to exclude pre-charge police interrogations made under varying circumstances).
109 See id.
ate access to counsel after 20 hours of detention.”

Professor Frase terms these developments a “dramatic shift in French law” which “appears to reflect two watershed developments in 1993: The clear legislative intent to increase the rights of suspects during police questioning, and a decision of the Constitutional Council which declared that the right to consult an attorney after 20 hours forms part of the constitutionally protected ‘rights of the defense.’”

VI. GERMANY

Professor Thomas Weigend summarizes the German stance on evidentiary exclusion, which is similar in its general approach to that of the rest of Europe, but more specific and demanding than the general approach in France:

There is no general exclusionary rule that would make illegally obtained evidence inadmissible. Para. 136a section 3 CCP does provide for [the] inadmissibility of statements elicited by certain forbidden means . . . . In other instances of violations of procedural rules by law enforcement personnel, German courts weigh the seriousness of the violation against the public interest in determining the truth.

It is a particularly interesting aspect of the German system that, while evidence is not necessarily excluded due to police misconduct, the fact that the police behaved properly does not guarantee its admission. Thus, in one case, a diary was suppressed in a perjury charge, even though it had been legally obtained by the police, on the ground that its use in court would violate the defendant’s constitutional right to privacy. However, the court added that, had this been a murder case, the diary might have been admissible.

It also must be noted that “exclusion” in Germany does not mean that the finder of fact is not aware of the excluded evidence. To the

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111 Id. (footnote omitted).
112 § 136a Nr. I, III STRAFPROZEBORDNUNG [StPO] (F.R.G.) (providing that “[t]he freedom of the accused to determine and exercise his will shall not be impaired by ill-treatment, by fatigue, by physical interference, by dispensing medicines, by torture, by deception or by hypnosis . . . . Statements which were obtained in violation of these prohibitions may not be used even if the accused agrees to said use”).
113 Thomas Weigend, Germany, in WORLDWIDE STUDY, supra note 7, at 195.
115 It was voluntarily handed over by the defendant’s spouse.
116 See Bradley, Emerging International Consensus, supra note 4, at 212. Indeed, in a later murder case, the court held that a diary was admissible because it “contained descriptions of the writer’s feelings toward others and therefore went beyond pure introspection.” Weigend, supra note 113, at 196 n.39 (citing Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 80, (1989), 367 (373-83) (F.R.G.).
contrary, the "excluded" evidence remains in the dossier used at trial, with the judges and lay judges enjoined to "ignore" it. Exclusion simply means that "excluded" evidence must not be included in the written justification that must accompany every verdict.\textsuperscript{117} Therefore, such reliance on excluded evidence in the written justification, express or suggested, may be the basis of reversal on appeal.

Weigend notes that although the Federal Court of Appeals (which is the highest court for most criminal appeals) has in one case "refused to give hard and fast rules on the exclusion of illegally obtained evidence, it noted that violation of a rule which has the purpose of safeguarding the defendant's basic procedural rights normally leads to exclusion."\textsuperscript{118} This observation was made in regard to § 136 of the CCP, which requires police to inform suspects of the charge against them, and of their rights to silence and counsel.\textsuperscript{119} In the above-mentioned case, the Federal Court of Appeals approved the state court's exclusion of an unwarned confession.\textsuperscript{120} Thus, it appears that exclusion is mandatory for failure to give the silence warning, and although not mandatory, exclusion is usual for failure to give the counsel warning.\textsuperscript{121}

Given the prohibition of § 136a on the use of deceit by police, and the mandatory exclusion of any confession so obtained, the German rules are, in this respect, somewhat more restrictive than those of the U.S., where the Supreme Court has never forbidden police deceit.\textsuperscript{122} However, in practice, the German courts are not consistent in excluding confessions due to police rule breaking.\textsuperscript{123}

When it comes to searches, exclusion depends on "the grievousness of the violation (which is greater when law enforcement officers

\textsuperscript{117} See Bradley, Exclusionary Rule in Germany, supra note 6, at 1063; Weigend, supra note 113, at 197-98.
\textsuperscript{118} Weigend, supra note 113, at 196 (discussing BGHS: 38, 214).
\textsuperscript{119} § 136 Nr. 1 STPO (F.R.G.) ("[T]he accused shall be informed of the act with which he is charged and of the applicable penal provisions. It shall be pointed out to him that the law grants him the right to respond to the accusation, or not to answer regarding the charge, and at all times, even before his examination, to consult with defense counsel of his choice.").
\textsuperscript{120} BGHS: 38, 214 (F.R.G.). The Court cited Miranda v. Arizona, 384 U.S. 436 (1966), and noted that Britain, France, Denmark, Italy, and the Netherlands also excluded such unwarned confessions.
\textsuperscript{121} See Weigend, supra note 113, at 204, and cases cited therein.
\textsuperscript{122} However, while the German Federal Court of Appeals forbids direct falsehoods, it does not consider that "withholding of available information even if the effect is deceptive" requires exclusion. Id. at 202.
\textsuperscript{123} See Joachim Herrmann, Das Recht des Beschuldigten, vor der polizeilichen Vernehmung einen Verteidiger zu befragen: Der BGH spricht mit gespaltener Zunge [The Right of the Accused to Consult Counsel Prior to Interrogation: The Court of Appeals Speaks With a Forked Tongue], NEUE ZERFchrift FÜR STREbRECFT [NSZ] 209 (1997) (discussing two cases in which the police did not help the accused, who had asserted his right to counsel to contact his counsel, and went on to extract an uncounseled confession from him—in one case the Court excluded the confession, and in the other it did not).
act in conscious disregard of the law), the importance of the individual interest infringed upon, the relevance of the piece of evidence for the resolution of the case, and the seriousness of the offense.”

Evidence obtained by an illegal search is “usually held admissible in criminal proceedings.” For example, evidence obtained in violation of the search warrant requirement has been held admissible if there would have been an adequate basis for a warrant had the police applied for one, thus rendering the search warrant “requirement” somewhat ineffective. However, as noted above, such evidence may be excluded if its use would interfere with the accused’s right of privacy.

VII. ISRAEL

Professors Eliahu Harnon and Alex Stein observe that “Israeli courts have continually ruled that illegally obtained evidence is admissible, subject to three statutory exceptions: [i]nvoluntary confessions, [i]nformation obtained through unlawful eavesdropping . . . [and] [i]nformation obtained by an unlawful infringement of privacy.” The authors note that, while this latter rule “could have a significant impact on the development of a broad exclusionary rule” it has not been so interpreted. “Instead, it has been limited to the informational type of privacy, which made it inapplicable in cases involving police brutality, as well as in most cases that involve illegal searches.” However, the authors suggest that this approach “may be undergoing revision,” and note:

There is growing academic literature urging courts to interpret the Israeli Constitution as embodying an exclusionary rule. Following this literature, the District Court of Nazareth has recently ruled inadmissible a voluntary confession not preceded by an adequate police warning that ought to have informed the suspect about his basic rights. Furthermore, . . . the trial court has the power to dismiss an entire indictment “in the interests of justice,” if it finds the indictment to be

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124 Weigend, supra note 113, at 196.
125 Id.
126 See id. (citing a case, BGHS 40, 1741 (1744), in which the court held that evidence should not be excluded if “the judge would, on a proper motion, have authorized the search and if the objects found were otherwise admissible”). But see Bradley, Emerging International Consensus, supra note 4, at 212-14 (providing examples of evidence being suppressed due to illegal searches).
127 Eliahu Harnon & Alex Stein, Israel, in WORLDWIDE STUDY, supra note 7, at 230-31.
128 Id. at 231.
129 Id.
based upon evidence that was obtained by violation of the accused's constitutional rights.\textsuperscript{130}

However, the harshness of this remedy suggests that it will not often be employed. The authors predict that a Canadian-style discretionary exclusionary rule is likely to be developed, "as opposed to the American law that adopted a rigid exclusionary rule qualified by a limited number of exceptions."\textsuperscript{131}

VIII. ITALY

In its 1989 criminal code revision, Italy adopted a more accusatorial system of criminal procedure that sought to codify "many aspects of the American Supreme Court's 'criminal procedure revolution' of the 1960's."\textsuperscript{132} This includes fairly detailed rules governing searches, and especially, confessions.

Article 191 of the Italian Code of Criminal Procedure flatly declares, "evidence acquired in violation of prohibitions established by law may not be used."\textsuperscript{133} Indeed, it further provides that "the parties may raise this issue at any stage in the proceedings and that the judge, \textit{sua sponte} may declare evidence unusable."\textsuperscript{134} But, Professor VanCleave observes, "[d]espite this broad language, in practice this provision has limited effect."\textsuperscript{135} This is because:

First . . . there are a number of special laws which allow the police to conduct searches and seizures on their own initiative . . . . Second, interpretations by the Supreme Court have narrowed the application of this provision in the context of searches and seizures by finding that the sanction only applies where there has been a violation of an express and specific prohibition. While it is well established that evidence obtained by torture or other violation of personal dignity is excluded from consideration for purposes of judgment, it is

\textsuperscript{130} Id. (footnotes omitted) (citing Katz v. Attorney General, (delivered by the Supreme Court on May 21, 1997, and not yet published)).

\textsuperscript{131} Id.


\textsuperscript{133} CODICE DI PROCEDURA PENALE [C.P.P.] art. 191(1) (Italy).

\textsuperscript{134} Rachel VanCleave, \textit{Italy, in WORLDWIDE STUDY}, supra note 7, at 258 (citing C.P.P. art. 191(2)).

\textsuperscript{135} Id.
unclear the extent to which an illegally performed search affects evidence subsequently seized.\textsuperscript{136}

In particular, “the great bulk of the American exclusionary rules in the search and seizure area, together with the doctrine known as the ‘fruit of the poisonous tree,’ has been rejected in the Italian model.”\textsuperscript{137} Italian courts use the argument that searches and seizures are independent of each other and, if police find evidence, they are obliged to seize it, even if the search was illegal.\textsuperscript{138} Only if the seizure was illegal (e.g. accomplished with undue violence) must the evidence be suppressed. One panel of the Supreme Court has, however, departed from this approach and excluded documents discovered by means of an illegal search.\textsuperscript{139}

Similar to the rules of other European countries, the breach of confession rules are more likely to have exclusionary consequences. According to Professor VanCleave, upon arrest or detention, a suspect must be warned of his right to silence,\textsuperscript{140} and invited “to name a defense attorney or to have counsel appointed.\textsuperscript{141} The police must then notify counsel of the questioning before it occurs and the defense attorney must be present during the questioning.”\textsuperscript{142} Appointed counsel must be arranged for those who don’t have a lawyer. “There is nothing to indicate that a suspect may waive the right to have counsel present.”\textsuperscript{143} Uncounselled statements may not be used against the suspect.\textsuperscript{144} Even spontaneous statements made after warnings, but in the absence of counsel, may be used only to impeach, or for investigatory purposes.\textsuperscript{145} 

However, as Professor Grande has noted, “exclusionary rules are not aimed at insulating the trier of fact from the impact of the inadmissible evidence.”\textsuperscript{146} Rather, concurrent with the German ap-

\textsuperscript{136} Id. at 258-59 (footnotes omitted).
\textsuperscript{137} Grande, supra note 132, at 249.
\textsuperscript{138} See VanCleave, supra note 134, at 259.
\textsuperscript{139} See id. (citing Cass., V, 23 May 1992, ord. 899, which held that “where the decree for the search was wholly lacking any reasons supporting the search, the subsequent seizure of documents discovered during a residential search was also illegitimate.”).
\textsuperscript{140} See id. at 263.
\textsuperscript{141} Id. (footnote omitted).
\textsuperscript{142} Id. (footnote omitted). Non-suspects must also be warned by the police prior to questioning. See id.
\textsuperscript{143} Id. at 264.
\textsuperscript{144} See id. (noting that “[w]here a suspect makes statements in the absence of counsel, such statements may not be used at trial except for purposes of impeachment”).
\textsuperscript{145} See id.
\textsuperscript{146} Grande, supra note 132, at 247.
"excluded" evidence is only excluded from the written judgement.

IX. SOUTH AFRICA

In close resemblance to other countries discussed, in South Africa, "[s]earch and seizure without a warrant is only exceptionally permitted," according to Professors Schwikkard and van der Merwe. A search warrant may be issued by a magistrate or justice of the peace, who, after considering information on oath, has reasonable grounds for believing that an article, which can be of use in proving a criminal case, is in the possession or under the control or upon any person or upon or at any premises [including vehicles] within his area of jurisdiction. However, since police officers are also justices of the peace, it is unclear what the force of this limitation may be.

South Africa further recognizes consent and exigent circumstances as exceptions to the warrant requirement, with the state being required to establish these exceptions. "If . . . it is found that there was no urgency or immediate risk of destruction of vital evidence, the conduct of the police officer would generally be considered unreasonable."

Interrogations of detainees or arrestees must be preceded by advice of rights resembling the Miranda warnings. However, it is not clear whether the police are required to contact counsel should the suspect so request. "Evidence elicited during an interrogation that has not been preceded by the requisite warning will run the risk of exclusion." At this time, there has been no reported case on exclusion; however, the idea of excluding evidence due to police misconduct is alive in South Africa. Professors Schwikkard and van der Merwe explain:

147 See Weigend, supra note 113, at 197-98.
149 P.J. Schwikkard & S.E. van der Merwe, South Africa, in WORLDWIDE STUDY, supra note 7, at 331.
150 Id.
151 See id. at 327.
152 Id. at 332.
153 See id. at 338 (summarizing the Constitution of the Republic of South Africa, the Criminal Procedure Act, and the Judge’s Rules, and finding that “whenever a person is arrested or detained she must be promptly advised of her right: to remain silent; the consequences of not remaining silent; the right to consult with a legal practitioner; and that if she cannot afford the services of a legal practitioner that she may apply for legal aid and that a legal practitioner will be assigned to her if substantial injustice would otherwise result”).
154 Id.
It took South African courts many years to come to the conclusion that evidence obtained in breach of the rules that govern arrest, search and seizure, should as a rule be excluded. For several decades they had admitted such evidence on the basis of the general English common law rule that relevance is the test for admissibility and that a court should therefore not be concerned with the manner in which the evidence has been procured.

However, immediately prior to constitutionalization [in 1996] there was a sudden judicial awareness of the danger of indirectly permitting the state and its officials to obtain evidence in an illegal manner.\footnote{Id. at 333.}

The authors cite \textit{S. v Hammer} as an example. In that case, an eighteen-year-old accused asked police for permission to write a letter to his mother. The police agreed, but then gave the letter to the prosecutor. The court excluded the letter from evidence both as a breach of the accused's right to privacy, and because it had been unfairly obtained. While the police may have been allowed to read the letter for security purposes, they were not allowed to hand it over to the prosecutor.

In another case, a warrantless search of a room sublet by the accused from one \textit{M} was declared invalid because only \textit{M}, not the accused, had consented.\footnote{1994 (2) SACR 496 (C) (S. Afr.).} Bloody banknotes found in the accused's music system were suppressed. The court explicitly rejected the rigid rule of \textit{Mapp}, but, relying on the Irish case of \textit{People v. O'Brien},\footnote{See Schwikkard & van der Merwe, supra note 149, at 334 (discussing \textit{S v Motloutsi}, 1996 (1) SACR 78 (C) (S. Afr.)).} concluded that the evidence should be excluded because of the "conscious and deliberate violation of the accused's right to privacy in the absence of any extraordinary circumstances."\footnote{[1965] I.R. 142 (Ir.).}

These cases predated the present Constitution which specifically provides that evidence "obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."\footnote{See Schwikkard & van der Merwe, supra note 149, at 334.} The authors note that since this language was adopted from the Canadian Constitution, "[i]t is to be expected

\footnote{155 Id. at 333.} \footnote{156 1994 (2) SACR 496 (C) (S. Afr.).} \footnote{157 See Schwikkard & van der Merwe, supra note 149, at 334 (discussing \textit{S v Motloutsi}, 1996 (1) SACR 78 (C) (S. Afr.)).} \footnote{158 [1965] I.R. 142 (Ir.).} \footnote{159 See Schwikkard & van der Merwe, supra note 149, at 334.} \footnote{160 S. AFR. CONST. § 35(5).}
that Canadian decisions on this point will be useful to South African
courts in their interpretation of [this provision].”

In a recent article, Professor van der Merwe discusses other
timely cases in which evidence has been excluded due to police
misconduct. In S v Naidoo, the police gave a judge false
information in seeking a wiretapping warrant. The trial judge
excluded the evidence on the ground that its use would render the trial
unfair. He further found that use of the evidence would be detrimental
to the interests of justice:

[The Constitution affirms] the Legislature’s commitment to
the concept of protection of private communications against
violation or infringement. To countenance the violations in
this case would leave the general public with the impression
that the courts are prepared to condone serious failures by the
police to observe the laid-down standards of investigation so
long as a conviction results.

The robbery in question has been referred to as the biggest
robbery in the history of South Africa. There may be those
members of the public who will regard the exclusion of the
evidence as being evidence of undue leniency towards crim-
inals. The answer to that is that crime in this country cannot
be brought under control unless we have an efficient, honest,
responsible and respected police force, capable of enforcing
the law. One of the mistakes which must be learnt from the
past is that illegal methods of investigation are unacceptable
and can only bring the administration of justice into disre-
pute, particularly when they impinge upon the basic human
rights which the Constitution seeks to protect.

Likewise, in a recent confession case, the police informed the
accused’s attorney that the accused would make statements at two
o’clock p.m. The attorney planned to meet with his client before the
two p.m. statements, and when the attorney arrived, he was informed

161 Schwikkard & van der Merwe, supra note 149, at 335.
162 See S.E. Van der Merwe, The ‘Good Faith’ of the Police and the Exclusion of
163 1998 (1) BCLR 46 (D).
164 Id. at 94 (emphasis added).
165 S v. Mphala, 1998 (4) BCLR 494 (W) (S. Afr.).
that confessions had already been given. The trial court excluded the
collections on the ground of unfairness.\textsuperscript{166}

In a third case, \textit{S v Soci},\textsuperscript{167} the trial judge excluded the identifica-
tion of the suspect by a witness because of the police did not inform
the accused that he had the immediate right to consult with a legal
practitioner. This goes beyond \textit{Miranda}, which would only require
the suppression of a statement, not a witness identification. Oddly,
however, the judge admitted the confession.\textsuperscript{168}

These are trial court decisions. No doubt, other trial court deci-
sions could be found with opposite holdings on similar facts. This is
the nature of a discretionary exclusion regime. In years to come,
however, appellate and High Court decisions will likely begin to flesh
out the circumstances of when police misconduct renders the trial
“unfair.”

\textbf{X. SPAIN}

Professor Richard Vogler summarizes the position of Spanish law
on evidentiary exclusion:

This area of the law has undergone radical changes over
the last two decades under the influence of anglo-american
law and the need to restrict the hitherto unregulated powers
of the police. Article 11 of the [code of criminal procedure]
lays down the principle that “evidence obtained either di-
rectly or indirectly in contravention of fundamental rights
and liberties will be of no effect.” This provision has been
held to apply to the guarantees set out in . . . the Constitution.
Evidence obtained unlawfully will therefore be declared a
nullity, references to it will be removed from the \textit{dossier} and
it cannot be referred to in the proceedings. The police offi-
cers or others involved may face disciplinary or penal sanc-
tions.\textsuperscript{169}

Professor Vogler continues: “A means of proof is unlawful when
it is obtained in breach of a fundamental right, for example, a search
without a warrant or other justification, a telephone tap carried out
without authority or the use of physical or psychological torture dur-
ing an interrogation.”\textsuperscript{170}

\textsuperscript{166} See \textit{id}.
\textsuperscript{167} 1998 (3) BCLR 376 (E) (S. Afr.).
\textsuperscript{168} See also \textit{S v Ngwenya}, 1999 (3) BCLR 308 (W) (holding that the failure to warn a
suspect of his right to counsel did not invalidate a lineup).
\textsuperscript{169} Richard Vogler, \textit{Spain, in WORLDWIDE STUDY}, supra note 7, at 381 (footnote omitted).
\textsuperscript{170} \textit{Id}.
Spanish law declares that the “home is inviolable,” and continues that “[n]o-one may enter or search a domicile without the consent of the owner or a judicial warrant, except in cases of flagrante delito.”

This exception seems to be limited to true emergencies “when the officers directly perceive the alleged wrongdoing and not when, for example, information received leads them to a particular premises.” Vogler further notes that protection “extends to tents, caravans, and hotels,” but not to public buildings.

Professor Vogler describes the Spanish Constitutional Court’s protection of domiciles from searches to be “admirably robust” and notes that, in 1993, the Constitutional Court struck down, over fervent police objection, a provision of the code of criminal procedure that had allowed warrantless searches of homes on “‘firm evidence to believe’ that a drug-related offence was being committed there.”

However, he qualifies this by noting inconsistency in the application of the nullity (exclusionary) rule. He notes that one line of cases holds that items discovered in searches that go beyond the scope of the warrant are inadmissible, whereas another line allows such items to be used.

As for interrogations, upon arrest, the arrestee must be informed of the reason for his arrest, of his right to silence or to insist on answering only to the Examining Magistrate. He must further be informed of his right to counsel and of the availability of a duty lawyer provided by the bar.

The lawyer is entitled to be present at the interrogation (which cannot commence until either the lawyer arrives or eight hours have elapsed since the call-out) . . . A failure to observe any of the above formalities will result in nullification (i.e., the removal of the offending documents from the file and non-use at trial) . . .
However, it is not clear to what extent this rigorous regime is actually being followed. Professor Vogler notes that "abuses of these procedures are still evident."\footnote{Id. at 377.}

**CONCLUSION**

In sum, it appears that *Miranda* has had a profound effect on other countries. Warnings similar to the *Miranda* warnings are almost universally required. In some countries, the police must warn suspects sooner than *Miranda* requires, and some police are actually required to provide counsel when the suspect asks for it, contrary to *Miranda* which only requires that "interrogation must cease."\footnote{Id. at 377.}

But this is not a symposium of the University of Arizona Law School about the forthcoming 40th Anniversary of *Miranda*. Rather, it is of an Ohio law school about *Mapp*. As to this case, the returns are more mixed. *Mapp* may be considered as having two components. First, the abrogation of the common law rule that the method by which evidence is obtained is irrelevant to the issue of whether it should be excluded. The illegality of the search or seizure of evidence is now a relevant consideration in determining its admissibility. In this respect, *Mapp* has been largely adopted. Other countries have rules governing searches and seizures, and agree that police violation of those rules may lead to evidentiary exclusion.

By contrast, the second component of *Mapp* has been universally rejected. That is, that once a violation of search and seizure rules has been found, evidence must be excluded. While *United States v. Leon*\footnote{468 U.S. 897 (1984).} has created a major exception to this principle when police rely in good faith on a judicially-issued (but defective) search warrant, the mandatory rule otherwise remains in place here.\footnote{There is another exception, rarely applicable, for police reliance on a statute later declared unconstitutional. See *Illinois v. Krull*, 480 U.S. 340 (1987).}

Why do other countries seem to care more about improperly obtained confessions than about illegal searches? The most likely reason is that warnings about rights to counsel and silence, as well as subsequent respect shown to the suspect’s assertion of those rights, adds to the courts’ confidence in the reliability of the confession. While every country excludes coerced confessions, there are lots of confessions that, while not technically coerced, may nevertheless be the product of the suspect’s will having been overborne by police pressure. Requirements of warnings, of police compliance with requests for counsel and of tape recording, help to give courts confi-
vidence that the confession is accurate. By contrast, real evidence is not made any less reliable by police methods in obtaining it.

Still, in terms of the values being protected, having police, with no probable cause and no warrant, bursting into one’s house in the middle of the night is obviously a greater interference with fundamental liberties than is failing to tell a suspect that he has a right to silence and counsel, especially if, as in the U.S., this does not mean that counsel is actually available. The answer of other countries to this situation is that, if the police behavior constitutes a severe or purposeful breach of civil liberties, then the evidence will be excluded. By contrast, if the breach is a minor or technical violation of the rules governing searches, evidentiary exclusion is not justified.

Is there anything about the United States that renders a mandatory rule necessary here, when it is not thought to be needed in other countries? Certainly, a country with many minority groups, whose rights are less likely to be respected by police, requires more detailed criminal procedure rules and tougher enforcement of those rules. But this distinction was never valid for Argentina and South Africa, and is increasing less applicable to the countries of western Europe which are much more diverse than they used to be. Moreover, none of these countries appears to have any alternative form of discipline for police that is effective in preventing search violations.

So are these countries simply insensitive to violations of residential rights and behind the times in not adopting a mandatory exclusionary rule? To some extent, I believe the answer to this question is “Yes.” In virtually all of the countries studied, there are examples of clear breaches of search rules by police that should, from an American (i.e., my) viewpoint, have been sanctioned by evidentiary exclusion but were not. On the other hand, it would be quite easy to find many cases in the United States of courts excluding evidence for relatively minor breaches of our incredibly complex Fourth Amendment rules. The decision of the European Court of Human Rights, which has generally been quite protective of the rights of criminal defendants, rejecting the mandatory approach of Mapp, suggests that the mandatory exclusionary rule should be reconsidered. 184 But any such reconsideration should recognize that the countries discussed in this Article have not necessarily adopted the ideal counter-approach.