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THE EXCLUSIONARY RULE AND ITS ALTERNATIVES—REMEDIES FOR CONSTITUTIONAL VIOLATIONS IN CANADA AND THE UNITED STATES

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I. CONSTITUTIONAL PROTECTION

A. INTRODUCTION

On April 17, 1982, on the lawn of Ottawa's Parliament Hill, Queen Elizabeth II proclaimed into force Canada's constitution.[1] Her action not only ended the United Kingdom's role in Canada's legal system by patriating constitutional amendment, but also entrenched an evidentiary exclusionary clause for certain violations of its guaranteed rights and freedoms. The Constitution Act, 1982[2] has substantially affected Canada's system of constitutional government,[3] including a modification of the previous doctrine of Parliamentary supremacy.[4] Most important for this Article, however, is section 24 which entrenches as the supreme law of Canada remedies for the violation of constitutionally guaranteed rights and liberties; among the remedies, is excluding evidence in court.

While Canada was embracing an evidentiary exclusionary rule as its constitutional remedy, the similar rule in the United States was being questioned by the judiciary, legislature and public. This

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1 *See* Montgomery, *A New Constitution, A Grand Occasion*, Globe & Mail (Toronto), April 19, 1982, at 1.

2 Enacted by the Canada Act 1982, ch. 11 (1982). *See also infra* note 49.

3 A number of rights and liberties concerning language, education, equality, expression, mobility and the criminal process were guaranteed for the first time by a written constitution. Sections 52 and 24 secure judicial review and therefore give the judiciary a new role in defining the nature and extent of Canadian civil rights. This judicial role is qualified, however, by section 33 which allows Parliament or a provincial legislature to override the constitutionality of a legislative enactment.

4 Canada Act 1982, ch. 11, § 52 (1982).

debate was primarily a reaction to the phenomenal judicial expansion of constitutional rights under the Warren Court.[5] The expansion of the exclusionary rule was the most visible product and therefore caused a concerned reexamination of the constitutional and remedial effects flowing from the violation of those constitutional rights. Perhaps no American legal doctrine has raised passions to such a height as the exclusionary rule.

This debate centers mostly on the inadequacies of either the exclusionary rule or the alternatives to it. Adequacy of the remedy, however, is not the only issue. Also important are the availability and accessibility of remedies for the citizen whose rights are violated, the nature of those remedies, and their justifiability.

The introduction of the constitutional Charter of Rights has clearly brought Canada closer to American law, so not surprisingly Canadian judges are citing American authorities more frequently.[6] Thus, the current American reanalysis should not only illuminate a number of legal and public concerns, but also provide insight for the Canadian initiative.

This Article focuses on the remedies available upon the violation of a constitutional right rather than the scope of those rights. Therefore, it does not analyze the way in which these rights have been interpreted by the courts although that is admittedly an important factor in the development of remedies.[7] Furthermore, this is not an analysis of the means by which an individual might seek redress.[8]

After noting the constitutional development and general nature of protecting rights in both Canada and the United States, this Article examines the exclusionary rule. In the United States other remedies—torts, injunctions and criminal sanctions—are considered alternatives to the exclusionary rule for providing protection of constitutional rights; therefore, they also are surveyed. Finally, this Article considers the functional operation of the components of each country's legal system.

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[5] *See* Editors of *The Criminal Law Reporter*, The Criminal Law Revolution and Its Aftermath: 1960-1974 (1975).

[6] M. FRIEDLAND, A CENTURY OF CRIMINAL JUSTICE, PERSPECTIVES ON THE DEVELOPMENT OF CANADIAN LAW 205-06 (1984).

[7] A number of comparisons of American and Canadian rights have appeared. *See* THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (W. McKercher ed. 1983); Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME LAW. 1191, 1211-27 (1984).

[8] *See* L. HURWITZ, THE STATE AS DEFENDANT: GOVERNMENTAL ACCOUNTABILITY AND THE REDRESS OF INDIVIDUAL GRIEVANCES (1981).

B. CONSTITUTIONAL DEVELOPMENT: UNITED STATES AND CANADA

Canadian and American constitutional law developed quite differently despite having a common English background. This dissimilarity is a product partly of timing and partly of the manner in which each country came to be independent.

In the United States a unilateral Declaration of Independence documented the revolutionary political break from Great Britain.[9] The original Constitution of the United States had few provisions dealing with the criminal process,[10] but the first ten amendments introduced some fifteen separate rights specific to the criminal justice process. The fourth amendment proclaims that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[11] Grand jury procedure for a "capital, or other infamous crime" is required by the fifth amendment, which also prohibits a person from being tried twice for the same crime or being compelled "to be a witness against himself."[12] The sixth amendment lists trial rights such as a "speedy and public trial," "impartial jury" and the "Assistance of Counsel for this defence."[13] The eighth amendment prohibits "[e]xcessive bail," the imposition of "excessive fines" and the infliction of "cruel and unusual punishments."[14] Along with these specific guarantees, the fifth amendment requires the criminal justice system to use due process.[15] The judiciary has constructed a network of procedural safeguards around the fifth and, later, the fourteenth amendments.[16]

One aspect of American constitutional rights history that differs from Canada's is the process of incorporating federal constitutional control over state procedures.[17] Until 1868, the courts applied the

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9 The unmanageable Articles of Confederation (1781) soon were remodelled into a Constitution, which was ratified by the thirteen uniting states in 1789. As part of the ratification agreement, ten amendments (referred to as the Bill of Rights) were added in 1791, and these became the basis for most civil liberties. In 1868, after the Civil War (1861-65), the fourteenth amendment established federal due process control over certain state practices and has become another source of civil liberties.

10 *See* U.S. CONST. art. I, § 9; art. III, § 2; art. III, § 3; art. IV, § 2.

11 U.S. CONST. amend. IV.

12 U.S. CONST. amend. V.

13 U.S. CONST. amend. VI.

14 U.S. CONST. amend. VIII.

15 U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law." *Id.*

16 *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.4-.9 (1984 & Supp. 1984).

17 *See* 1 W. LAFAVE & J. ISRAEL, *supra* note 16, at §§ 1.5(b), 2.2-.6; Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59

rights of the first ten amendments solely to the federal government.[18] Yet an estimated 97% of criminal prosecutions involve state, not federal, law.[19] The incorporation of the various rights into state procedures, a result of the adoption of the fourteenth amendment, has had an impact on the scope of those rights and on the remedies available from the court.[20] Now only two protections of the ten amendments do not apply to the states: the necessity of a grand jury indictment for initiating criminal prosecutions[21] and the prohibition of excessive bail.[22] Although the primary source of individual rights traditionally has been the federal Constitution, a state may provide through its own constitution a basis for more expansive rights and liberties and afford greater protection than provided federally. The purpose of the Bill of Rights was to protect against arbitrary and discriminatory use of political power, and the fourteenth amendment has been used to apply that theory to state governments.

In 1867, the British North American colonies adopted the idea of a federal union, as had the United States, but the form taken at both the provincial and central federal level was the British model of parliamentary government. Canadian independence from Britain came more gradually than that of the United States and culminated in the original confederation of four provinces by a British statute, the British North America Act, 1867 (now the Constitution Act, 1867).[23] The primary concern of the Constitution Act, 1867, was the division of legislative power between the central and provincial governments; individual rights were not addressed by the Act. Like the British tradition, the Canadian system accorded special constitutional deference to certain legislation and common law precepts and customs. The preamble to the British North America Act, 1867, asserts the desire that the new confederation have "a Constitution

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NOTRE DAME LAW. 1079 (1984); Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME LAW. 1118 (1984); Wisdom, *Foreward: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME LAW. 1063, 1076-78 (1984).

18 *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

19 *See* 1 W. LAFAVE & J. ISRAEL, *supra* note 16, § 1.2 n.2, at 3.

20 There is also a whole body of prior state law experience which is still applicable to state constitutional interpretation.

21 U.S. CONST. amend. V; *see* Hurtado v. California, 110 U.S. 516 (1884).

22 U.S. CONST. amend. VIII; *see* Schilb v. Kuebel, 404 U.S. 357 (1971).

23 British North America Act, 1867, 30 & 31 Vict., ch. 3. It was renamed the Constitution Act, 1867, by the Canada Act 1982, ch. 11, Sched. B, § 50 (1982). Four provinces—Ontario, Quebec, New Brunswick and Nova Scotia—united in 1867; others joined later.

similar in Principle to that of the United Kingdom."[24] Although the judiciary has always had limited power to define and review federal and provincial legislative ability, the foundation of individual rights remained primarily negative in the sense that actions were allowed until they violated some ordinary law of the land.

Power over criminal law and procedure is held by the federal government, which makes criminal law uniform throughout Canada.[25] Provinces have jurisdiction over the administration of justice,[26] meaning the organization of courts and the prosecution of crimes. Before 1982, Canada's general public law and constitution were primarily products of the British model.[27] Until that time, courts had no basis to override otherwise valid governmental actions because individual rights were not entrenched (although restricted judicial review was available).[28]

Three issues remained as major constitutional controversies: the highest judicial authority, the amendment of Canada's independence statute, and the partnership of French Canada. Appeals from the final courts in Canada continued to go to the Judicial Committee of the Privy Council in London until December 23, 1949. Amendment of Canada's constitution (patriation) finally was abrogated completely by Britain on April 17, 1982.[29] The third issue probably will remain forever.

The Canadian government had been concerned for some time about the absence of an amending formula. The government also wanted to make French and English language rights uniform across the country. Therefore, the goals of a written constitution were to transfer the amending power from the United Kingdom to Canada and at the same time attempt to nationalize bilingualism and its at-

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[24] Constitution Act, 1867, at preamble. For a discussion of constitutional rights in the United Kingdom, see Leigh, *The Protection of the Rights of the Accused in Pre-Trial Procedure: England and Wales* and Lidstone, *Human Rights in the English Criminal Trial*, both in HUMAN RIGHTS IN CRIMINAL PROCEDURE—A COMPARATIVE STUDY (J. Andrews ed. 1982).

[25] Constitution Act, 1867, § 91(27).

[26] Constitution Act, 1867, § 92(14). Historically, provincial Attorneys General have prosecuted offences under the Criminal Code of Canada, CAN. REV. STAT. ch. C-34 (1970), even though the Attorney General of Canada has theoretical status to prosecute in provincial courts.

[27] *See* W. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS 47-62 (1981).

[28] In 1960, Parliament attempted to establish written rights by the Canadian Bill of Rights, CAN. REV. STAT. App. III (1970). This was an ordinary federal statute that eventually was interpreted narrowly by overriding inconsistent federal statutes by making them inoperative.

[29] Canada Act 1982, ch. 11, § 2 (1982).

tendant necessities. The Canada Act 1982 accomplished the former and made inroads towards the latter objective.

Canada's new constitutional rights are qualified in two important respects. First, section 1 imposes "reasonable limits" on its rights and freedoms and declares that they are not absolute.[30] Thus, Canada has provided textual and structural guidance for the courts in their examination of restrictions that implicate constitutional rights. For instance, there are permissible restrictions on expression[31] that are clearer than the absolute terms of the American first amendment. Second, as a result of a last minute compromise between the federal and provincial governments on the agreement for a Charter of Rights (representing "the quintessential Canadian compromise"[32]), an override or *non obstante* clause was added:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or a legislature of a province may reenact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).[33]

This "legislative review of judicial review"[34] allows the federal or a provincial government to make a political decision to avoid friction with the judiciary. Parliamentary sovereignty thus is accommodated in the constitution. Subject to those two important provisions, Canada has provided a number of rights and freedoms.

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30 "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Constitution Act, 1982, § 1.

31 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Constitution Act, 1982, § 2.

32 Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts*, 25 CAN. PUB. AD. 1, 32 (1982).

33 Constitution Act, 1982, § 33.

34 Russell, *supra* note 32, at 30.

Under the heading "Fundamental Freedoms," section 2 enumerates freedoms of religion, expression, peaceful assembly and association. "Democratic Rights" are described in sections 3 through 5 and include the right to vote and the length of Parliamentary sessions. Section 6 covers "Mobility Rights" for residence and work.

The rights most pertinent to the criminal justice system are those classified as "Legal Rights."[35] Section 7 affirms the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[36] Section 8 asserts "the right to be secure against unreasonable search or seizure"[37] and section 9 "the right not to be arbitrarily detained or imprisoned."[38] "Arrest or detention" rights of being "informed promptly of the reasons therefor," of retaining and instructing "counsel without delay and [being] informed of that right" and of the applicability of *habeas corpus* are included in Section 10.[39] Section 11 lists a number of rights involved in criminal and penal matters for the person charged with an offence, including being "tried within a reasonable time," not being "compelled to be a witness in proceedings against that person in respect of the offence" and being "presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[40]

Litigation concerning the nature and scope of these rights will continue to illuminate their content. Analytical theories, perhaps similar to the privacy-interest doctrine used to interpret the fourth

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35 Constitution Act, 1982, §§ 7-14.

36 "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Constitution Act, 1982, § 7.

37 "Everyone has the right to be secure against unreasonable search and seizure." Constitution Act, 1982, § 8.

38 "Everyone has the right not to be arbitrarily detained or imprisoned." Constitution Act, 1982, § 9.

39 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Constitution Act, 1982, § 10.

40 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Constitution Act, 1982, § 11(a)-(d).

amendment in the United States, will affect the courts' interpretation of these rights.[41]

What was the impetus in 1982 for entrenching criminal process rights into the constitution? Unlike the American colonies of the mid-1700's, Canada was facing neither outside oppression nor an internal concern for control of government excess or abuse. One participant in the negotiating process stated that it was "a valid response to a widely felt need."[42] In his view it "represented a balance between the dominant English and French legal traditions as well as reflect[ed] the plurality of our country as a whole."[43] Although each province already had human rights legislation, the drafters felt it was necessary to have a uniform law.

> At the same time we did not look upon the Charter as an American Bill of Rights. It did not reflect a state created by revolution and refined in the crucible of a long and bloody civil war. We were not embracing the extensive regime of judicial review which exists under the Constitution of the United States of America.[44]

Although this explanation appears politically acceptable, the reason for the federal individual rights was probably Prime Minister Pierre Trudeau's personal idealism and ambition,[45] along with the complementary existence of civil and common law traditions in Canada. Trudeau had argued for an entrenched bill of rights since his earliest political position as Justice Minister and for him the minority language and education rights were the heart of the Charter. For the remaining rights, the Charter is almost a theoretical and confirmatory document.[46] During the whole process of provincial-federal negotiation and final unilateral action, there was no popular demand for a declaration of criminal process rights.[47] There was growing awareness, however, of how important the constitution was going to be to the legal fabric of the nation.

> Something has now changed. Constitutional law is being recognized as a continuing interaction of different, sometimes directly competing social interests; constitutional law-making is becoming the

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41 *See* Hunter v. Southam Inc., 11 D.L.R. 4th 641 (Can. 1984).

42 McMurtry, *The Search for a Constitutional Accord—A Personal Memoir*, 8 QUEEN'S L.J. 28, 58 (1982/83) (former Attorney General of Ontario).

43 *Id.*

44 *Id.*

45 *See* P. TRUDEAU, A CANADIAN CHARTER OF RIGHTS (1968); P. TRUDEAU, FEDERALISM AND THE FRENCH CANADIANS (1977).

46 See the preamble to the Resolution respecting the Constitution of Canada adopted by the House of Commons and Senate in December 1981, *infra* note 49.

47 *See* Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 30 (1983). Even when the public came aroused after the November 5, 1981 accord, its interest centered on aboriginal and women's rights.

> resolution or synthesis of those conflicts. It is all rather American, with the courts destined, as in the United States, to be at the heart of the process, whether they like it or not.[48]

The first drafts of the unborn constitution contained no enforcement for breach of its provisions; it was an articulation of principles but not of power.[49] When later testimony before the Joint Subcommittee pointed out the futility and possible confusion of enacting a constitution without entrenched remedies, the present form of section 24 came into existence.

After failing to obtain unanimous support from the provinces, the Canadian government asked the Parliament of the United Kingdom for a statute which would incorporate the new proposals as well as previous constitutional statutes.[50] That Act, the Canada Act 1982, was hastily passed and its incorporated Schedule B, called the Constitution Act, 1982 (although not an act of the Canadian Parliament) became the supreme law of Canada.[51]

Although Canada and the United States share a language and have close social, economic and political ties, there are a number of differences which affect an analysis of civil rights. Several important aspects of Canada's constitutional development—responsible government in the 1840's (within the continued parliamentary framework), federation in the 1860's (with a different conception of power allocation), and a written constitution in the 1980's—as well as their peaceful acquisition, contrast greatly with the American experience. Both Canadian federal and provincial governments derive their power from constitutional allocation, whereas in the United States

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48 E. McWHINNEY, CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS 112 (1982).

49 The legislative history of Canada's constitution is somewhat obscure. On October 2, 1980, the most modern of proposals was published by the Government of Canada as "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada." The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada was formed to consider and report on the "Proposed Resolution . . . ." The "Proposed Resolution . . .", as it was later amended, was adopted by the House of Commons (April 23, 1981) and the Senate (April 24, 1981). On November 5, 1981, a resolution was agreed to by the federal and provincial representatives, except for Quebec, and as a result the "Proposed Resolution . . ." was withdrawn and a new resolution was adopted by the House of Commons (December 2, 1981) and the Senate (December 8, 1981). This resolution was submitted to the United Kingdom Parliament, which as a result passed the Canada Act 1982, which incorporated as Schedule B the Constitution Act, 1982. The Canada Act received Royal assent on March 29, 1982, and was proclaimed in force April 17, 1982. The first amendments were made to the Constitution Act, 1982 on June 21, 1984. For an overview of the political process, see E. McWHINNEY, *supra* note 48.

50 *See* G. MARSHALL, CONSTITUTIONAL CONVENTIONS ch. XI (1984); Phillips, *The Canada Act 1982*, 31 INT'L & COMP. L.Q. 845 (1982).

51 Constitution Act, 1982, § 52.

the states have general sovereign power except where the Constitution confers onto the federal government. Canada's federal government controls criminal law and procedure, thus eliminating the need for the judiciary to impose uniformity, unlike the United States where criminal law is primarily a state responsibility.[52] In the United States, the Supreme Court plays an important role in imposing minimum standards on state institutions, while in Canada federal legislation does this directly.

The role of the judiciary in the constitutional process is also different. In the United States the process is "structurally confrontational,"[53] giving the federal judiciary ultimate responsibility for establishing constitutional norms. Canada basically has a unitary court system, in contrast to the American system of federal and state courts with different jurisdictions. The Federal Court of Canada has limited jurisdiction over federal revenue, citizenship, patents and federal agencies and this latter jurisdiction often includes constitutional cases involving prisoners in federal institutions. The Supreme Court of Canada is the highest court of appeal for all Canadian courts and can decide all questions of provincial and federal law. In contrast, state law can reach only the particular state's highest state court, while the jurisdiction of the United States Supreme Court is preconditioned on a federal law question. "Thus, the dichotomy between questions of federal and state law" which is of "such importance in the United States is . . . absent in Canada."[54] In addition, the Canadian judiciary has both an advisory and adjudicative function. Constitutional questions may be brought to courts by government references and this has been an important aspect of constitutional interpretation in Canada. Unlike the United States, judicial review in Canada does not necessarily result in supremacy because the federal parliament or provincial legislature can specifically exempt legislation from the Charter's control.[55]

There are other aspects of unknown influence on the constitutional process. For instance, Canada's smaller population apparently generates less crime and litigation both in the aggregate and per capita. The smaller judiciary in Canada and the presence of only ten provincial bodies makes uniformity of law somewhat less of a problem. Furthermore, the clash between competing interests is seemingly less intense in Canada, where the debate is less politicized and is directed towards different constitutional concerns.

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52 Constitution Act, 1867, § 91(27).
53 Sedler, *supra* note 7, at 1231.
54 *See id.* at 1200-01.
55 Constitution Act, 1982, § 33.

Sensitivity to the separation of powers on both the federal-provincial and the executive-legislature-judiciary level is not as strong in Canada. In the United States, race and indigency have been seen as major factors in civil rights development, while in Canada, language, heritage and education are likely to provide that fulcrum.

C. PROTECTING THE RIGHTS

If a constitution is of ultimate legal importance to a nation, then surely the violation of a constitutional right should result in a remedy of equal dimension. Unfortunately, the distinction between right and remedy is not always clear. To many in the United States, the exclusionary rule, not the fourth amendment, is the prohibition against illegal behavior by law enforcement officials. Although this belief almost has become part of the legal culture, it is necessary to separate right from remedy, because the latter depends on the theoretical basis of the rule. There is a tendency to focus on the scope of the right or the definition of the liberty at the expense of addressing pointedly the redress which should follow a violation. "Protection," although it is the word most used in reference to civil rights, raises the question of what it means to "guarantee a right" or "protect a right." If we mean protection against the government's legislative power, then the remedy is judicial quashing of legislation or ruling that it has no effect. Protection against the activity of government agents may entail compensation to the aggrieved party, punishment of the transgressor or his class of society, or legal nullification of the results of the transgression. As Chief Justice Holt astutely noted in 1703 when considering English fundamental rights: "[I]t is a vain thing to imagine a right without a remedy."[56]

The United States Constitution provides no explicit remedy or redress for the violation of its rights. For the most part rights are described and asserted by proscribing activity. In the Canadian constitution the freedoms and rights are "guarantee[d]"[57] and sections 24 and 52 provide enforcement mechanisms. Section 52(1) explicitly provides for the court's right to review legislation and to invalidate it.[58] In the United States, the concept of judicial review was

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56 Ashby v. White, 2 Ld. Raym. 938, 953, 92 Eng. Rep. 126, 136 (H.L. 1703).

57 Constitution Act, 1982, § 1.

58 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes
(a) the *Canada Act 1982*, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

developed by the Supreme Court in *Marbury v. Madison*.[59]

The citizen is protected from unconstitutional action of government officials in the United States by the judicial development of the exclusionary rule as the main protection for criminal process rights and also by Congressional enactment of enforcement legislation,[60] most notably the various civil rights acts. In Canada, the constitution provides such remedies in section 24 (which can be invoked concurrently with section 52):

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), 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.[61]

Subsections (1) and (2) are interdependent and must be read together with sections 1 (reasonable limits), 32 (state action) and 52. Only those rights and freedoms in the constitution are enforced by section 24 remedies. The courts presently are considering many preliminary problems. The standing of a party recently has been widened by the Canadian Supreme Court in a number of non-Charter cases.[62] The problems of defining the forum, or "court of competent jurisdiction," and of determining the burden on each party at various stages also have resulted in much litigation, especially at the trial court level.

Canada has provided the nature and general structure, broad though they may be, for judicially imposed remedies. One American commentator has noted that the specificity in delineating rights, freedoms and remedies in the Canadian constitution relative to the American Constitution will make textual analysis of prime importance.[63] The implicit delegation of rights control to the judiciary

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Constitution Act, 1982, § 52(1)-(2). *See* Law Society of Upper Canada v. Skapinker, 9 D.L.R.4th 161 (Can. 1984).

59 5 U.S. (1 Cranch) 137 (1803).

60 Enforcement legislation is authorized by sections 2 of the thirteenth and fifteenth amendments and section 5 of the fourteenth amendment.

61 Constitution Act, 1982, § 24.

62 *Compare* Baker v. Carr, 369 U.S. 186, 204-08 (1962) *with* Minister of Justice v. Borowski, 130 D.L.R.3d 588 (Can. 1981) and Nova Scotia Bd. of Censors v. McNeil, 55 D.L.R.3d 632 (Can. 1975) and Thorson v. Atty.-Gen. of Canada (No. 2), 43 D.L.R.3d 1 (Can. 1974). *See* 1 W. LAFAVE & J. ISRAEL, *supra* note 16, § 9.1-.2.

63 Sedler, *supra* note 7, at 1228.

has ramifications for the entire legal system. Because most of the rights and freedoms are related to criminal procedure, excluding reliable evidence of a crime to protect rights and control police malpractice will bring into tension the contrasting requirements of a criminal justice system: that the innocent go free, that the guilty be convicted, and that there are enforceable restrictions on arbitrary or wrongful police powers.

II. EVIDENTIARY REMEDIES—THE EXCLUSIONARY RULE

A. EXCLUSION OF EVIDENCE

There are an assortment of exclusionary rules in both Canada and the United States. The regulation of allowable evidence at trial has two objectives.[64] First, and most important, is the objective of promoting truth through reliability. Thus, there are exclusionary rules prohibiting hearsay, opinions, bad character and secondary evidence, which might otherwise be unreliable, prejudicial or misleading evidence.

Second, there are inhibitive rules such as privileges concerning marital and attorney-client communications. These rules have a public policy objective of protecting privacy interests and social relationships regarded as sufficiently important to justify sacrifice of reliable and relevant evidence. Along with these inhibitive rules are what McCormick calls "Constitutional Privileges,"[65] which in the United States are those against self-incrimination,[66] confessions[67] and illegally obtained evidence.[68]

In England, the general rule always has been that illegally or improperly obtained evidence is admissible although the judiciary may exclude evidence on the ground that operation of the strict rule of admissibility would operate unfairly against the accused.[69] This limited exclusionary discretion based on unfairness to the accused was most recently confirmed by the House of Lords in *R. v. Sang*.[70] The House of Lords said that a trial judge always could refuse ad-

64 *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2175 (J. McNaughton rev. 1961); MCCORMICK ON EVIDENCE § 72 (E. Cleary 3d ed. 1984).

65 *See generally* MCCORMICK ON EVIDENCE (E. Cleary 3d ed. 1984).

66 U.S. CONST. amend. V.

67 U.S. CONST. amends. V, VI.

68 U.S. CONST. amend. IV.

69 *See* Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP. L.Q. 513, 534-37 (1982); Federal/Provincial Task Force on the Uniform Rules of Evidence (Canada), Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982).

70 1980 A.C. 425 (H.L. 1979) (certified question on use of evidence obtained by entrapment).

mission of evidence if in the judge's opinion its prejudicial effect outweighed its probative value.[71] The judge has no discretion, however, to refuse relevant and otherwise admissible evidence on the ground that it was obtained improperly or by unfair means.[72] Therefore, with respect to real, reliable, physical evidence, supervision of the police is not a judicial function:

> [T]he function of the judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained, but with how it is used by the prosecution at the trial.[73]

The Scottish and Irish courts have used judicial exclusion of evidence as a policy to denounce police wrongdoing.[74] The Scottish inclusionary discretion has been stated as follows: "[E]vidence illegally or irregularly obtained is inadmissible unless the illegality or irregularity associated with its procurement can be excused by the court."[75]

Neither Australia nor New Zealand has an automatic exclusionary rule, but the judiciary has broader discretion to exclude illegally or unfairly obtained evidence than in England.[76] Although the aim of England's discretion appears to be unfairness to the accused, recent Australian cases have viewed that as only one factor and incorporated broader public policy considerations, balancing disapproval of unlawful conduct with the objective of convicting the guilty.[77]

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71 *Id.* at 434, 437 (Lord Diplock), 438 (Viscount Dilhorne).

72 *Id.* at 436 (Lord Diplock). Nevertheless, the judge could exclude admissions, confessions and evidence obtained from the accused after the commission of the offense.

73 *Id.* at 436 (Lord Diplock).

74 Federal/Provincial Task Force on the Uniform Rules of Evidence (Canada), *supra* note 69, at 225, 229. The principal Scottish case is Lawrie v. Muir, 1950 J.C. 19 (Scot. H.C.J. 1949). *See* Dawson, *supra* note 69, at 537-38; Yeo, *Inclusionary Discretion Over Unfairly Obtained Evidence*, 31 INT'L & COMP. L.Q. 392 (1982).

75 Sheriff MacPhail, "Law of Evidence in Scotland" (April 1979, para. 21.01), cited by Lord Scarman in *Sang*, 1980 A.C. at 457.

76 Federal/Provincial Task Force on the Uniform Rules of Evidence (Canada), *supra* note 69, at 227-29. *See* Dawson, *supra* note 69, at 538-43; Yeo, *supra* note 74.

77 Bunning v. Cross, 19 Austl. L.R. 641 (Austl. 1978) (plurality opinion); The Queen v. Ireland, 126 C.L.R. 321 (Austl. 1970); Federal/Provincial Task Force on the Uniform Rules of Evidence (Canada), *supra* note 69.

B. DEVELOPMENT IN CANADA

Both Canadian and English courts previously have focused on illegally or improperly obtained evidence. This usage may be due to the absence of textual constitutional rights because in the United States the courts have concentrated solely on *illegally* obtained evidence. Evidence which is obtained by a party through violation of a constitution, a statute, or a rule of common law is illegally obtained. Although not unlawfully obtained, evidence obtained by way of unfair or unethical trick may be classified as improperly procured evidence.

It is doubtful that the conjunction of these two terms is still accurate in Canada. Section 24 certainly incorporates the concept of illegally obtained evidence because that is an obvious factor in determining if a constitutional right or freedom has been "infringed or denied." Improperly obtained evidence, however, is not necessarily relevant to section 24 unless the particular impropriety is seen as a consideration in determining the infringement or denial of a right. In order to appreciate their separate effects, the mixed concepts of illegality and impropriety in pre-1982 decisions will have to be reexamined and the terms distinguished.

Before the 1982 constitution, Canada had no legislated rule of evidence concerning illegally or improperly obtained evidence. The judicially developed law was that such evidence was admissible if it was relevant, although the courts had limited discretion to exclude evidence when "the strict rules of admissibility would operate unfairly against the accused."[78] The unfairness test was that the prejudicial effect outweighed its probative value, not an examination of the manner in which the evidence was obtained.

> I am not aware of any judicial authority in this country or in England which supports the proposition that a trial Judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute. . . . [T]he exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.[79]

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[78] The Queen v. Wray, 11 D.L.R.3d 673, 685 (Can. 1970). The words are used in *Sang*, 1980 A.C. 425, 434 (H.L. 1979) (Lord Diplock) and come from Kuruma v. The Queen, 1955 A.C. 197, 204 (P.C.).

[79] *Wray*, 11 D.L.R.3d at 685, 689-90 (Can. 1970).

The issue in Canada, as in the United Kingdom in *Sang*, was whether excluding unlawfully obtained evidence would avoid unfairness to the accused at his trial. This notion of a fair trial derives from a background of affording greater protection to the individual in order to counterbalance the greater resources of the state.

As late as 1981, the Canadian Federal/Provincial Task Force on Evidence, after a four year ongoing study of rules of evidence, recommended that no provision be enacted in a draft Uniform Law of Evidence to exclude illegally or improperly obtained evidence.[80] This recommendation was later approved by the Uniform Law Conference of Canada, which recommended integrating the rule of *Wray* into the proposed Act.[81]

The Proposed Constitutional Resolution of October 1980 included two remedial sections, neither of which contemplated exclusion as a constitutional remedy:

> 25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.
>
> 26. No provision of this Charter, other than section 13 [which dealt with self-incrimination], affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.[82]

The document presented by the Special Joint Committee in 1981 incorporated section 25 into the present section 52(1), deleted section 26 and added the present section 24. The minority views of discretion found in *Wray* became constitutionalized.

Since the enactment of section 24, there has been an avalanche of cases that attempt to determine the extent and scope of the Charter "rights and freedoms" and what amounts to a denial or infringement. The steps in an application for exclusion of evidence under section 24 are (1) determining whether a right or freedom under the Charter has been infringed or denied, which includes a consideration of sections 1 and 33, and then (2) determining whether the admission of the evidence would bring the administration of justice into disrepute. An affirmative answer to the last issue makes exclusion mandatory.[83] Because the exclusion of evidence in subsection (2) is restricted to "proceedings under subsection (1)" together with the additional requirements, accused persons have attempted to ap-

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80 Federal/Provincial Task Force on the Uniform Rules of Evidence (Canada), *supra* note 69, at 225.

81 *Id.* at 514.

82 *See supra* note 49.

83 *See* R. v. Bryant, 15 D.L.R.4th 66 (Ont. Ct. App. 1984); R. v. Simmons, 7 D.L.R.4th 719 (Ont. Ct. App. 1984).

ply under subsection (1) itself for an exclusionary remedy.[84] In that case, the Court could exclude the evidence without considering the matter of disrepute or "all the circumstances." There are other preliminary issues that must be resolved before determining whether evidence should be excluded as well as questions of derivative evidence, causation and the burden of proving a likelihood.

The major issue, however, is what brings the administration of justice into disrepute. This somewhat ambiguous phrase was first used legislatively in Canada in the 1976 enactment of section 178.16(2) of the Criminal Code,[85] which allows a judge to hold derivative evidence from wiretapping inadmissible. It also received judicial comment from two dissents in the Canadian Supreme Court by judges obviously anticipating the constitution. In *Rothman v. The Queen*,[86] the court held that a confession made by the accused to a disguised policeman placed in his cell was admissible. Justice Estey's dissent examined the propriety of the police activity and stated that what would bring the administration of justice into disrepute was what "would prejudice the public interest in the integrity of the judicial process."[87] Justice Lamer, in a separate opinion concurring with the result, elaborated on the integrity of the judicial process as a factor in admitting evidence and suggested some standards:

> The Judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver

84 R. v. Therens, 18 D.L.R.4th 655 (Can. 1985).
85 CAN. REV. STAT. ch. C-34, § 178.16(2) (1976).
86 12 D.L.R.3d 578 (Can. 1981).
87 *Id.* at 599 (Estey, J., dissenting).

> to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.[88]

This shock to the community test echoes the due process interpretation of the United States Supreme Court in *Rochin v. California,*[89] and the contrasting processes of constitutional interpretation in the two cases illustrate the problem of distinguishing right from remedy. In *Rochin*, the shocking conduct of obtaining swallowed evidence (pills) by administering an emetic was considered by the Court to determine whether the right to due process under the fourteenth amendment was breached. In *Rothman*, however, the court examined the conduct to determine whether it brought the administration of justice into disrepute and thus should result in excluded evidence. Although *Rothman* is a pre-Charter of Rights judgment, it did propose persuasive criteria for consideration under section 24(2). These criteria might be more useful, however, when determining whether or not a right was infringed or denied in the first place. The *Rothman* test has been questioned by at least one provincial appellate court, which commented that it is better to consider each case on its merits rather than to substitute such a community shock test.[90] The administration of justice may be brought into disrepute without necessarily shocking the Canadian community as a whole.

All judges of the Supreme Court of Canada save one declined to expatiate the meaning of the expression "bring the administration of justice into disrepute" when that issue first came before the court.[91] Only Justice LeDain, who dissented in the result, considered the test or standard prescribed by section 24(2).[92] He wrote that the "central concern" of the section is "the maintenance of respect for and confidence in the administration of justice."[93] The other value which must be taken into consideration, Justice LeDain opined, is "the availability of otherwise admissible evidence for the ascertainment of truth in the judicial process."[94] Justice LeDain stated that the two principal factors to consider were the relative seriousness of the constitutional violation and the "relative serious-

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88 *Id.* at 621-22 (Lamer, J., concurring).

89 342 U.S. 165 (1952).

90 *Simmons*, 7 D.L.R.4th at 744 (Ont. Ct. App. 1984). See the provincial appellate court decisions cited in *Therens*, 18 D.L.R.4th at 684-85.

91 *Therens*, 18 D.L.R.4th 655.

92 *Id.* at 683-88 (LeDain, J., dissenting).

93 *Id.* at 686 (LeDain, J., dissenting).

94 *Id.*

ness of the criminal charge."[95] Factors which affect the seriousness of the constitutional violation include the good faith of the violator, inadvertence or deliberateness, urgency and the need "to prevent the loss or destruction of evidence."[96]

The criteria which a court should consider has been raised recently in several different contexts.[97] Until there is greater predictability, the judiciary will have to consider a number of factors.

If the violator acts willfully or deliberately, the violation is more serious than if it was an inadvertent error. This consideration, however, puts a premium on the ignorance of the officer. The good faith test is better because it focuses on the intent of the violator. Therefore, for policy reason, the courts should also consider whether the officer's ignorance was inexcusable. Urgency also is a factor which incorporates the intent or knowledge of the violator. Using this factor may lead to dilution of the guarantees, if it becomes a justification when there is no other way to get evidence for a conviction.

The nature and extent of the violation's illegality addresses the constitutional importance of the right. The denial of a right itself may not be the only consideration as denials in different circumstances may have drastically different consequences. Courts should weigh the extent to which human dignity and social values were breached in obtaining the evidence, whether harm was inflicted on the accused or others and the seriousness of any breach of law in obtaining the evidence. This last factor and the seriousness of the charge both involve considering the proportionality of the remedy to the constitutional violation. The judge should be aware of the consequences for society of freeing, because of the excluded evidence, the particular individual before the court. On the other hand, fairness to the accused is presumably still within the parameters of the common law discretion available to the judge.

The reliability of the evidence is the underlying concern of most criticisms of the American rule. One commentator states that

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95 *Id.*

96 *Id.*

97 CANADIAN COMMITTEE ON CORRECTIONS, REPORT (1969); COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, SECOND REPORT, VOLUME 2, FREEDOM AND SECURITY UNDER THE LAW 1046-53 (1981); LAW REFORM COMMISSION OF CANADA, EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE (1974); LAW REFORM COMMISSION OF CANADA, REPORT ON EVIDENCE (1977). *See also* R. v. Stevens, 1 D.L.R.4th 465 (N.S. Ct. App. 1983); R. v. Collins, 148 D.L.R.3d 40 (B.C. Ct. App. 1983); R. v. Esau, 147 D.L.R.3d 561 (Man. Ct. App. 1983).

this concern should operate only "in favour of the accused."[98] For instance, if there is some cruel and unusual treatment which may produce evidence with dubious credibility or accuracy, the judge should exclude the suspect evidence. On the other hand, if a murder weapon is found after a rights violation, the reliability of such evidence would favor admission.

C. DEVELOPMENT IN THE UNITED STATES

Until the Canadian 1982 Constitution, the development of exclusionary sanctions to protect or enforce federal constitutional rights was unique to American jurisprudence. The United States Constitution does not expressly provide a remedy to someone whose constitutionally given rights are violated, but if evidence is obtained in violation thereof the general rule has developed that it is automatically inadmissible.[99]

The American courts have developed essentially five constitutional exclusionary rules. There are rules governing investigative evidence concerning identification procedures and lineups (fifth and sixth amendments)[100] and searches and seizures (fourth amendment).[101] Trial rights of due process (fifth amendment), self-incrimination (fifth amendment)[102] and right to counsel (sixth amendment)[103] also are exclusionary remedies. All of these remedies have differences in scope, exceptions and some have become violation-specific. The due process guarantee is based on a concern with unreliability and inappropriate procedure which are so directly linked with the right that the right itself embodies the exclusion. The right against self-incrimination and the right to counsel have both caused exclusion of voluntary confessions.[104] The source of the most controversy, however, has been the exclusion of evidence because of the search and seizure rule.

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98 Gibson, *Enforcement of the Canadian Charter of Rights and Freedoms*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 523 (W. Tarnopolsky & G.-A. Beaudoin eds. 1982).

99 The common law rule at the time of the Constitution and for some years thereafter was that illegally obtained evidence was admissible. 8 J. WIGMORE, *supra* note 64, § 2183.

100 1 W. LAFAVE & J. ISRAEL, *supra* note 16, § 7.1-.5.

101 *Id.*, §§ 3.1-.10, 9.1-.6.

102 *See* Miranda v. Arizona, 384 U.S. 436 (1966); 1 W. LAFAVE & J. ISRAEL, *supra* note 16, §§ 3.1, 6.5-.10.

103 *See* Brewer v. Williams, 430 U.S. 387 (1977); Escobedo v. Illinois, 378 U.S. 478 (1964); 1 W. LAFAVE & J. ISRAEL, *supra* note 16, § 6.4.

104 *See* 1 W. LAFAVE & J. ISRAEL, *supra* note 16, §§ 6.1-3; 3 J. WIGMORE §§ 821-63 (J. Chadbourn rev. 1970 Supp. 1985); 8 J. WIGMORE, *supra* 64, § 2266. Due process can be invoked in the test of voluntariness but the confession rule and self-incrimination privilege are distinct.

In large measure, the debate over the fourth amendment exclusionary rule revolves around two fundamental issues: first, that the evidence is usually physically real, reliable and not a product of the constitutional violation and, second, the extent and nature of police abuse in obtaining evidence by unreasonable searches. The first may result in convincing evidence of crime and the second theory lacks conclusive support, therefore the debate continues. The development of the judicially imposed exclusionary rule for fourth amendment violations began almost parenthetically in *Boyd v. United States*.[105] The Court stated that "admission in evidence" of an invoice found in violation of the fourth and fifth amendments was an "unconstitutional proceeding."[106] Although this dictum was virtually repudiated in *Adams v. New York*,[107] it was revived and imposed on the federal courts by *Weeks v. United States*.[108]

The rule was expanded by a number of cases, including *Silverthorne*,[109] *Gouled*[110] and *Agnello*,[111] and by 1925, the exclusionary rule was completely annexed to the fourth amendment. The next stage was the coupling of that amendment to the fourteenth amendment so that the exclusionary rule applied to the states. In *Wolf v. Colorado*, the Supreme Court held that fourth amendment rights were enforceable against the states through the due process clause of the fourteenth amendment but found that there were a number of ways to enforce the search and seizure right, none of which were characterized as constitutionally required.[112] This was the first Supreme Court examination of whether to exclude evidence as a matter of remedies separate from a right secured by the fourth amendment.[113] The Court refused to impose the exclusionary rule on states when there were other equally effective state remedies in place.[114] In *Mapp v. Ohio*,[115] however, the exclusionary rule was constitutionally required: "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority,

105 116 U.S. 616 (1886).

106 *Id.* at 638.

107 192 U.S. 585 (1904).

108 232 U.S. 383 (1914).

109 Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

110 Gouled v. United States, 255 U.S. 298 (1921).

111 Agnello v. United States, 269 U.S. 20 (1925).

112 Wolf v. Colorado, 338 U.S. 25 (1949).

113 *See* Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1378 (1983).

114 *Wolf*, 338 U.S. 25 (1949).

115 367 U.S. 643 (1961).

inadmissible in a state court,"[116] although the largely unstated source for this statement has raised much of the present argument over the rule.[117]

An insight into the decisionmaking of *Mapp* and the evolution of the exclusionary rule is given by former Supreme Court Justice Potter Stewart. Although the decision overruled *Wolf*, Justice Stewart points out that the parties' briefs and arguments did not even raise that issue.[118] In fact, when the appellant's counsel was asked by the Court, he answered that he had never heard of the *Wolf* case.[119]

As for the constitutional underpinnings of the exclusionary rule, "no decision by the Court has ever fully explored the possible alternative doctrinal bases for the rule, and the justifications for the rule seem to have changed subtly over time—usually without any explicit recognition by the Justices involved."[120]

The cases recognized by the courts as seminal should be limited to their facts.[121] *Boyd* was a civil, not criminal, case and did not involve the police. There was no search or seizure as that is presently defined[122] and the exclusionary rule was not declared necessary to remedy a fourth amendment violation. Instead, the rule was necessary to prevent violation of the fifth amendment, which specifically excludes testimony and is designed to protect rights at trial. The Court therefore produced the rule as a byproduct of the fifth amendment ban on compulsory testimony. *Adams* was a criminal case and the issue was characterized as evidentiary, not constitutional. Consequently, the evidence was admitted regardless of how it was obtained. *Weeks* involved illegally seized property which was wrongly not returned before trial and can be distinguished from a search for fruits or evidence of a crime.[123]

Stewart notes that the present law of the search and seizure exclusionary rule is "as complex a delineation of rules, exceptions and refinements as exists in any field of jurisprudence."[124] Discovering its history becomes "an analysis of almost a hundred years of case

116 *Id.* at 655 (effectively overruling *Wolf*, 338 U.S. 25 (1949), and applying *Weeks*, 232 U.S. 383 (1914) to the states).

117 *See* Stewart, *supra* note 113, at 1380.

118 *Id.* at 1366-68.

119 *Id.* at 1367.

120 *Id.* at 1372.

121 *See id.* at 1372-77.

122 *See* United States v. Dionisio, 410 U.S. 1 (1973).

123 *Weeks*, 232 U.S. at 398.

124 Stewart, *supra* note 113, at 1365.

law in this country and literally hundreds of years of history."[125] The reason for this quagmire is that the doctrine itself has been affected by the necessity of distinguishing incidental factors. One confusing question is whether the exclusionary rule is a constitutional principle[126] or a court adopted rule of evidence.[127] Another difficulty is whether the Supreme Court has exerted its jurisdiction as a result of supervisory powers[128] or as admissibility prohibited by the United States Constitution.[129] To disentangle these various elements and yet keep them in sight is not always an easy task for the judiciary.

Lately, the courts have narrowed the exclusionary rule. In *Alderman v. United States*,[130] which one commentator claims marks the "point of diminishing returns"[131] of the deterrent function of the exclusionary rule, the Court first suggested that the decision whether to apply the rule turns on a balancing of the costs and benefits of exclusion.[132] The Court in *United States v. Calandra* seemed to settle the question of the rationale of the exclusionary rule by deciding that it is a constitutional remedy based on deterrence.[133] The *Calandra* decision defined the balancing test as the potential injury to the proper functioning of the proceeding as opposed to the incremental deterrence effect.[134]

The good faith exception, which often had been suggested as a limitation to the rule's availability,[135] has been partly accepted by the Supreme Court in *United States v. Leon*.[136] In *Leon*, the majority held that "[t]he Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[137] Thus, the

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125 *Id.*

126 Implied by *Boyd*, 116 U.S. 616 (1886) and *Weeks*, 232 U.S. 383 (1914).

127 *See, e.g.*, Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25 (1949); McNabb v. United States, 318 U.S. 332 (1943).

128 For a discussion of whether the Supreme Court has its jurisdiction as a result of supervisory powers, see Ker v. California, 374 U.S. 23 (1962).

129 Mapp v. Ohio, 367 U.S. 643 (1961).

130 394 U.S. 165 (1969).

131 Note, *The Vicarious Exclusionary Rule in California*, 24 STAN. L. REV. 947, 958 (1972).

132 *Alderman*, 394 U.S. at 174-75.

133 United States v. Calandra, 414 U.S. 338, 347-48, 354 (1974). *See also* United States v. Janis, 428 U.S. 433 (1976).

134 *Calandra*, 414 U.S. at 349. *See also* Stone v. Powell, 428 U.S. 465, 488-89 (1975).

135 *See* United States v. Leon, 104 S. Ct. 3405, 3416 n.11 (1984).

136 *Id.*

137 *Id.* at 3409, 3417.

majority accepted that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect," the applicability of which "must be resolved by weighing the costs and benefits of preventing the use" in evidence of illegally seized evidence.[138] The Court in *Leon* decided that good faith by the constitutional violator nullifies the use of the exclusionary rule, based on the deterrent rationale. Extensions of the exclusionary rule doctrine into areas such as derivative evidence (fruit of the poisonous tree doctrine) also have resulted in exceptions to the rule such as cases of attenuated circumstances, an independent source or an inevitable discovery.[139]

There are three theories that attempt to explain that the exclusionary rule is constitutionally required, although the distinctions between them are not always clear.[140] First, the exclusionary rule is required to preserve the integrity of government and the judicial process. Courts have a duty to refrain from sanctioning illegal law enforcement, otherwise they will breed contempt for law and the judiciary. This doctrine finds it roots in *Weeks*,[141] is probably most emphasized in *Silverthorne*,[142] and was repeated in *Elkins*,[143] *Mapp*,[144] *Terry*[145] and *Dunaway*.[146] This theory, however, no longer seems to have significant independent effect.[147] The problem with it is that there is no textual support in the Constitution[148] and that the courts historically have admitted illegally obtained evidence. Stewart concludes that because a value judgment is the source for this theory there is no justification in making the exclusionary rule mandatory.[149]

A second theory is that exclusion is mandated directly by the Constitution, that there is a constitutional right to the exclusion and

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138 *Id.* at 3412 (quoting *Calandra*, 414 U.S. at 348).

139 *See, e.g.*, Nix v. Williams, 104 S. Ct. 2501 (1984); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Silverthorne v. United States, 251 U.S. 385 (1920). *See generally* 1 W. LAFAVE & J. ISRAEL, *supra* note 16, § 9.3-.5.

140 *See* Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647, 647-51 (1982); Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 879-80 (1982); Stewart, *supra* note 113, at 1380-84.

141 232 U.S. at 391-94.

142 251 U.S. at 392; *see also* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

143 364 U.S. 206.

144 367 U.S. at 648, 651-59.

145 Terry v. Ohio, 392 U.S. 1 (1968).

146 Dunaway v. New York, 442 U.S. 200, 218 (1979).

147 *Elkins*, 364 U.S. at 222-23; Stewart, *supra* note 113, at 1396.

148 *Olmstead*, 277 U.S. at 469-70 (Holmes, J., dissenting).

149 Stewart, *supra* note 113, at 1383.

admitting the evidence would nullify that right. Thus, the fourth or fifth amendment, separately or taken together absolutely forbid the introduction of illegally obtained evidence. This theory has support in *Weeks*[150] and *Mapp*.[151] In *Gouled*, exclusion of evidence is called "a constitutional right"[152] and the dissenting justices in *Leon* reiterated this theory. Again, there is no textual support in the Constitution for an explicit right to have unconstitutionally acquired evidence excluded.

More compelling is the theory that exclusion is a constitutionally required *remedy*. The Constitution creates rights and duties and it is the judiciary's primary responsibility to enforce them.[153] This theory postulates that the need to enforce the Constitution's limits and to preserve the rule of law requires the exclusionary rule. Exclusion is not a right but a remedy developed by "constitutional common law."[154] The necessity of using exclusion as a remedy then depends on whether there are other effective remedies to ensure obedience to the constitutional requirement. Support for this doctrine is found in *Wolf*,[155] *Mapp*,[156] *Calandra*,[157] *Bivens*[158] and *Leon*.[159] Exclusion has been chosen as a remedy because of its deterrence value. This reliance upon deterrence as the rule's sole rationale is probably the most significant development in recent years. The function has been described as "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[160]

While *Leon* has been the most recent comprehensive Supreme Court reexamination of the purposes of the exclusionary rule,[161] it appears that the debate is not over. *Leon* involved drugs found by police officers, objectively acting in good faith on a search warrant subsequently found to be invalid because it lacked the required probable cause. The Court reviewed the purposes of the fourth

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150 232 U.S. at 126 (the constitutional right was not to have the evidence excluded but returned).

151 367 U.S. at 657; *id.* at 662 (Black, J., dissenting); *see also Ker*, 374 U.S. at 30.

152 *Gouled*, 225 U.S. at 313 (the exclusionary rule is a constitutional right in the context of the fifth amendment).

153 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

154 Stewart, *supra* note 113, at 1384.

155 338 U.S. at 31; *but see id.* at 41 (Murphy, J., dissenting).

156 367 U.S. at 652.

157 414 U.S. at 348.

158 Bivens v. Six Unknown Named Agents of the F.B.I., 403 U.S. 388, 414-15 (1971) (Burger, C.J., dissenting).

159 104 S. Ct. at 3412.

160 *Elkins*, 364 U.S. at 217; *see also Leon*, 104 S. Ct. at 3412.

161 *Leon*, 104 S. Ct. 3405.

amendment exclusionary rule to determine the propriety of its application to a case where the constitutional transgressors were acting in "good faith."[162] Justice White, for the Court, recognized at the outset that strict application of the rule has created a dilemma for courts by impeding the truth-finding function of the judge and jury.[163] The Court held that the rule was not a corollary of the fourth amendment,[164] but that the judiciary had to employ a balancing test. "[P]articularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."[165] The Court asserted that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."[166] The exclusionary rule is "designed to deter police misconduct rather than to punish the errors of judges"[167] and is therefore generally inappropriate in most due process arguments. Its applicability, the Court asserted, "must be resolved by weighing the costs and benefits of preventing the use [in evidence] of inherently trustworthy tangible [but illegally seized] evidence."[168]

Leon was applied by the Supreme Court in *Massachusetts v. Sheppard*,[169] which involved evidence of a murder (the victim's bloodied clothing and possessions) found as a result of a search warrant which was defective in its particulars. The objectively reasonable reliance by the officers on the warrant, which they believed to be valid (and were told by the authorizing judge that it was valid) made the exclusionary rule inappropriate.[170]

The Supreme Court was divided, however, in both *Leon* and *Sheppard*. Justices Brennan and Marshall lamented "the Court's gradual [since *Calandra*] but determined strangulation of the rule. . . . It now appears that the Court's victory over the Fourth Amendment is complete."[171] These Justices declared that the majority "ignore[d] the fundamental constitutional importance of what is at stake here."[172] They objected strongly to construing the rule

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162 *Id.* at 3416-23.
163 *Id.* at 3413.
164 *Id.* at 3412.
165 *Id.* at 3413.
166 *Id.* at 3419.
167 *Id.* at 3418.
168 *Id.* at 3412.
169 104 S. Ct. 3424 (1984).
170 *Id.* at 3429.
171 *Leon*, 104 S. Ct. at 3430 (Brennan, J., dissenting).
172 *Id.* at 3430-31.

as a judicially created remedy that was operational due to its deterrent effect and categorically stated that it is a "personal right to exclude all evidence secured by means of unreasonable searches and seizures."[173] From *Calandra* to *Leon*, it is clear that the deterrence rationale has blossomed as the paramount focus of the debate, to the exclusion of other considerations.

Judge Posner has examined the exclusionary rule from a different perspective, but arrived at basically the same conclusion. Using economic analysis, he finds that "[t]he common law remedies for governmental misconduct in criminal cases are best explained by assuming that judges are preeminently concerned with economic efficiency, even though the underlying norms defining that misconduct are often not economic."[174] Nevertheless, he agrees that the economic and historical explanations are consistent: "[T]he rule was adopted because until recently there was no alternative sanction for violations of the fourth amendment that did not cause severe underdeterrence."[175] Posner claims that his economic analysis explains the rule and that he is supported by the Court's refusal to bar or exclude prosecution on the basis of an illegal arrest.[176] Although a literal application of the exclusionary rule would lead to the conclusion that the arrestee could not be prosecuted, such barring of prosecution would cause overdeterrence of an even more costly sort than the evidence exclusionary rule and is not applied on that economic basis.

D. CRITICISM AND SUPPORT

Legal commentators and legislators have vigorously debated the justification for the exclusionary rule, especially as it results from the fourth amendment, and the issue has divided the Supreme Court of the United States. In the touchstone of American evidence treatises, Wigmore explains his opposition to the development of the "magnetic" effect of the "relatively modern federal doctrine excluding evidence seized in violation of search and seizure laws": As a general rule, our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means. A judge does not attempt, in the course of specific litigation, to investigate and punish all offences which incidentally cross the path of that

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173 *Id.* at 3433.

174 Posner, *Excessive Sanctions For Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 636 (1982).

175 *Id.* at 638.

176 *See* United States v. Crews, 445 U.S. 463, 474 (1980).

litigation.[177]

Wigmore's unrestrained and acrid caricature of the rule as "indirect and unnatural" follows:

> 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'
>
> Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice.[178]

Exclusion of illegally obtained evidence was offensive to Wigmore for four reasons: (1) it ignores the proper complaint, investigation process and trial of an alleged violation of law; (2) as an incidental violation it jeopardizes (by delay, confusion, etc.) the primary litigation; (3) it is unnecessary because persons harmed have more direct means of redress; and (4) "[t]he judicial rules of evidence were never meant to be used as an indirect method of punishment."[179]

Wigmore's basic criticisms often have been modified. The rule discriminates because it benefits only the guilty; the issue arises solely when the evidence is incriminating. The exclusionary rule is not proportionate because it does not distinguish the minor violations from major ones. In most search and seizure cases the real evidence is not created by the official wrong, as may be the case in an extorted confession, and therefore the rule ignores reliability. Its federal development is also criticized because although the exclusionary rule was conceived originally for the federal system, its schematic application to the states does not give sufficient regard to the different types of crime in the two systems, especially the prevalence of violence in state crimes. Lastly, the rule is not remedial because the return or suppression of evidence is not a remedy in the strict sense of a constitutional wrong. The critics' reaction is summed up by Justice Cardozo: "The criminal is to go free because the consta-

177 8 J. WIGMORE, *supra* note 64, at § 2183.

178 *Id.* § 2184a n.1.

179 *Id.* § 2183.

ble has blundered."[180]

Posner argues that the exclusionary rule ought to be abandoned because it overdeters and produces a deadweight loss that violates the Pareto-superiority criterion of economic analysis.[181] The exclusionary rule does not satisfy this criterion because it suppresses socially valuable evidence, a situation which is avoided if the misbehaving government official is fined instead. The overdeterrence objection is based on the possibility of the private and social cost imposed on the government greatly exceeding the social cost of the misconduct.

The underlying norms defining government misconduct in criminal cases are, however, not merely economic. For instance, when considering characteristics of due process, a conviction based on a coerced confession is unjust even if the defendant is clearly guilty. Posner asserts that the objection to an unreasonable search and seizure is not that it renders unfair the criminal proceeding which uses its fruits, but that it invades collateral interests in property and tranquility.[182] These interests, he states, are fully protected by tort remedies.[183] To Posner, the pivotal considerations are reliability of the evidence and fairness in the process.[184]

Professor Kamisar has noted that the present judicial view of the exclusionary rule, deterrence weighed in a cost-benefit analysis, results in a balancing of competing and different kinds of interests, such as suppression of crime against the rights of privacy and liberty.[185] Although the costs are immediately apparent, the rule's benefits are only conjectural and the reliance on balancing the two demands has resulted in problematic extensions. For instance, illegally obtained evidence is admissible in civil proceedings and can be used to attack the defendant's credibility if he testifies.[186]

These criticisms, then, are that the rule is internally inconsistent and lacks benefits, that it preserves rights only by imposing some-

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180 People v. Defore, 150 N.E. 585, 587 (N.Y. Ct. App. 1926) (rejects the application of the exclusionary rule to a state case).

181 *See* Posner, *supra* note 174, at 638. The Pareto theory of equilibrium holds that an optimum is a state in which no person can benefit without a corresponding detriment to another person.

182 *Id.* at 643.

183 *Id.*

184 *Id.*

185 Kamisar, *Court's 'Good-Faith' Exception*, New York Times, July 11, 1984, at A25, col. 1.

186 *See Janis*, 438 U.S. 433 (1976); Harris v. New York, 401 U.S. 222 (1971); *but see* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399-401 (1981).

times dreadfully high costs on society and that the benefit to the defendant is disproportionate to the violation.

Many commentators have replied that criticisms of the exclusionary rule are "nonsense"[187] and are really criticisms of the right for which protection is sought. Although this may be true, if it is constitutionally required, the right and rule become one and criticism in many instances may be valid. One criticism of the rule is that it restricts police investigation or lacks clarity in standards. This is indeed a criticism of the right behind the remedy and should be properly addressed to it. Posner asserts that "the Fourth Amendment was not intended to give criminals a right to conceal evidence of their crimes" and that it only protects lawful interest.[188] In fact, the English cases inspiring the fourth amendment were not criminal cases but tort cases seeking damages for invasion of lawful interests. General warrants to search were despised in Britain and had prompted the leading case of *Entick v. Carrington*,[189] a successful trespass action for damages. Similar writs of assistance were used in America to enforce the British mercantile system and when Independence came, the *Entick* case was remembered by the drafters of the fourth amendment.[190]

Writs of Assistance were authorized in Canada until December, 1985.[191] The Writ, unlike a search warrant,[192] was granted only for searches related to drugs and customs.[193] It was valid for as long as the person to whom it was granted remained an officer and could be used repeatedly without subsequent court applications. One provincial appellate court had held searches authorized by such writs to be constitutionally invalid and of no force or effect. Even though the search was in contravention of section 8, section 24(2) was the basis for not excluding the evidence.[194]

The support for the exclusionary rule generally can be categorized into three themes. The first is its effectiveness: other remedies (criminal, administrative or civil) have failed to secure compliance by the police with constitutional provisions. The second is its insu-

187 1 W. LAFAVE & J. ISRAEL, *supra* note 16, at 137.

188 Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53 (1981).

189 95 Eng. Rep. 807 (K.B. 1762).

190 *Boyd*, 116 U.S. at 626-27. *See* Brent, *Illegally Obtained Evidence: An Historical and Comparative Analysis*, 48 SASK. L. REV. 1, 19-20 (1983-84).

191 CAN STAT. ch. 19, §§ 190, 191, 196, 200 (1985).

192 Criminal Code, *supra* note 85, § 443.

193 *See* Customs Act, CAN. REV. STAT. ch. C-40, § 145 (1970); Excise Act, CAN. REV. STAT. ch. E-12, § 78 (1970); Food and Drugs Act, CAN. REV. STAT. ch. F-27, § 37(3) (1970); Narcotics Control Act, CAN. REV. STAT. ch. N-1, § 10(3) (1970).

194 R. v. Noble, 14 D.L.R.4th 216 (Ont. Ct. App. 1984).

lation: condonation or participation in illegality taints the court's dignity as the agent and custodian of liberty. The third is its public relations value: admissibility of illegally obtained evidence breeds public contempt for the law.

The exclusionary rule is designed to remove the police's incentive to violate the law by barring the use of illegally obtained evidence. Nevertheless, the present reliance on deterrence as the rule's rationale has resulted in an attack on its effectiveness as a deterrent and the assertion that the exclusionary rule results in the growth of serious crime. The latter idea has been dismissed as "fantasy or deception" by one commentator.[195] Although there have been a large number of American empirical studies to test the usefulness of the exclusionary rule, the findings are inconclusive.[196]

Since *Mapp* it has been virtually impossible to gather data on the relative effectiveness of alternative measures in deterring fourth amendment violations. "The actual research task is factually hopeless," decried one commentator.[197] Defining the method of evaluation and the criteria of success entails choosing which circumstantial and indirect measures should be documented to yield a valid inference about pre- and post-rule illegal searches. The design for a study has to be quantitative, a formidable problem because nonevents (not conducting a search) have to be quantified. The hope that the fourth amendment can be enforced "by exclusion of reliable evidence from criminal trials was hardly more than a wistful dream," concluded the Chief Justice in his dissent in *Bivens v. Six Unknown Named Agents*.[198] Given the inconclusiveness of results,

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195 Schlag, *supra* note 140, at 891.

196 *See* Morris, *supra* note 140, at 652-56; Posner, *supra* note 187, at 54-58; Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781, 781-82 (1979). The major studies include: COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (1979); U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against Precipitous Conclusions*, 62 KY. L.J. 681 (1973-74); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, WIS. L. REV. 283 (1965); Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 A.B.F. RES. J. 585; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839 (1974); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); *Effect of* Mapp v. Ohio *On Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* U.S. v. Calandra, 69 NW. U.L. REV. 740 (1974).

197 Morris, *supra* note 140, at 656.

198 403 U.S. at 415 (Burger, C.J., dissenting).

Chief Justice Burger's suggestion of placing the burden of positive evidence on the rule's proponents is inappropriate.

Canadian and English empirical data, to the extent that they exist, have not received any general publicity. In Canada it is premature to attempt to draw conclusions about the effect of the new provisions, especially considering that there are very few supreme court decisions giving substantive interpretations and therefore direction to police authorities.[199] Nevertheless, the Canadian circumstances provide a unique opportunity for comparison of pre- and post-1982 practices, or even to note changes in police behavior as the supreme court provides definitions of the rights.

The deterrent rationale also relies on the premise that a conviction is important to the police. Police, however, may seek arrest and clearance of the crime as their goal rather than conviction of the suspect. Discretion within the system often allows police to deal with the case later without it ever being subjected to an open and public hearing. It is unknown how often the type of charge laid or the use of negotiated pleas of guilty to less serious offenses is attributable to either the police or the prosecutor acknowledging the possibility of excludable evidence.

One benefit of the American exclusionary rule is that it provides a venue—the suppression hearing—for discovery and allows close scrutiny of police practices in individual cases.[200] The accused's complaint can be made public and the judiciary forced to compare police behavior with legal standards. This process often affects the substantive law of the right involved and has been the impetus for the great expansion of rights analysis in the United States. In practice, however, many violations are hidden by discretionary plea bargaining and never reach open court.

There are many remedies and enforcement mechanisms provided for important legislated rights, such as contract, housing and employment, which are beyond the Constitution's reach. The judicial isolation of the exclusionary rule in the United States, unlike the textual test of Canada's section 24, raises the question why the law treats various substantive fields differently. By enacting section 24, Canada seems to have accepted the judicial integrity theory for the exlusionary rule. In contrast, that rationale is no longer emphasized in the United States. Although it has not specifically been over-

199 *See generally* Stuart, Annotation to R. v. Collins, 33 C.R.3d 130, 134 (B.C. Ct. App. 1983).

200 Dawson, *supra* note 69, at 530.

ruled, it has certainly been overshadowed by the deterrence rationale.

In the United States, criticism of the exclusionary rule often has been a reaction to its use in trials of serious crimes, for example, the case in which the body of a murder victim was held inadmissible as evidence against the suspect because of some official misbehavior.[201] In Canada, there has been little excitement about the rule, mostly because there has been limited activity in serious or outrageous cases involving either an offended society or an offensive crime.

To some degree the public concern about excluding real, reliable evidence may reflect the influence of modern technology. For example, the entire world was able to watch on television the shooting of President Reagan and the capture of his assailant. If for any reason the evidence seen by the public eventually was excluded at trial, a person could rightfully ask how realistic the system is in determining guilt. The legal artificialities, or fictions, may be undergoing major revision in the context of the modern world.

Argument in the United States over limitations to the rule is based on the premise that it is an absolute remedy and leaves the real limitations to the definition of the preconditioning rights. Section 24 in Canada allows the suggested American limitations to be considered as factors for the test of bringing the administration of justice into disrepute. Suggestions that the exclusionary rule not apply to serious cases, therefore, have met objection on the grounds that that would allow police to ignore the fourth amendment.[202] It is this distinction between right and remedy, explicit in the framework of Canada's section 24, which will make the exclusion considerations there focus on their own merits. In Canada it is not open to the courts to exclude evidence in order to discipline police, but only to avoid having the administration of justice brought into disrepute.[203] The test is not one of discretion but of meeting standards as a matter of law. The presence of section 24(2) will no doubt save Canada the American codevelopment of exclusionary rules in different areas with different considerations. Instead, all cases will ana-

201 Brewer v. Williams, 430 U.S. 387 (1977) (evidence of murder victim excluded as fruit of defendant's deprivation of right to assistance of counsel), *sub nom. on remand*, Nix v. Williams, 104 S. Ct. 2501 (1984) (evidence of same body not excluded on ultimate or inevitable discovery exception to exclusionary rule). *See also* Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962).

202 1 W. LAFAVE & J. ISRAEL, *supra* note 16, at 140-41.

203 *Collins*, 148 D.L.R.3d at 49.

lyze criteria which may or may not bring the administration of justice into disrepute and be internally comparable.

III. Other Remedies

Under English common law, liberties have been protected to a great degree within the political system by public opinion, media pressure and the influence of Members of Parliament. In the judicial sphere, protection has been through tort (trespass against a personal or property right even if unaccompanied by actual damage), the right to a jury in common law actions and serious criminal accusations, the principle that all persons are equally subject to the jurisdiction of the court (subject to standing and sovereign immunity questions) and the rule of construction that statutes be interpreted not to interfere with vested rights. A person is entitled to unimpeded access to the courts for enabling the enforcement of civil rights through these traditional means.[204]

In the Canadian Constitution, section 24(1) gives explicit authority to the court to grant "such remedy as the court considers appropriate and just in the circumstances."[205] That section does not seem to create any remedies, but does acknowledge that all the traditional ones are available. The remedy of section 24 must be granted by a "court of competent jurisdiction" and, although this phrase is still the subject of some controversy, the weight of authority is that section 24 does not create courts of competent jurisdiction but merely vests additional powers in courts which are already competent and independent of the Charter.[206]

One quasi-judicial remedy involves administrative or internal disciplinary proceedings. In *Bivens*, Chief Justice Burger suggested that the exclusionary rule be replaced by a statutory remedy entailing a special tribunal with damages jurisdiction.[207] Numerous attempts and proposals have been made to create nonpolice or internal police review tribunals to hear evidence, award damages and make remedial orders (usually of a disciplinary nature) but politically this idea apparently is dead.[208] The lack of public scrutiny

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204 Magna Carta, ch. 29; *see also* United Nation's *Universal Declaration of Human Rights*, G.A. Res. 217, 3 U.N. GAOR at 73, Art. 8 (1948); *European Convention for Protection of Human Rights and Fundamental Freedoms*, Art. 3.

205 Constitution Act, 1982, § 24(1).

206 *See* R. v. Crate, 1 D.L.R.4th 149 (Alta. Ct. App. 1983); Re Ritter and the Queen, 7 D.L.R.4th 623 (B.C. Ct. App. 1984); R. v. Morgentaler, 14 D.L.R.4th 184, 190 (Ont. Ct. App. 1984).

207 *Bivens*, 403 U.S. at 422-23 (Burger, C.J., dissenting).

208 K. Davis, Discretionary Justice (1969); K. Davis, Police Discretion (1975); Dawson, *supra* note 69, at 530-32; *see also* Caplan, *The Case for Rulemaking by Law Enforce-*

and securing of police cooperation which are needed for such a system to work create problems with this type of system. The model does recognize a deterrent factor often overlooked in discussions of the exclusionary rule: police behavior is largely in compliance with internal norms and officers will accept as legitimate only internal disciplinary sanctions.

There is an array of other creative procedural and related remedies which might be appropriate, especially considering the inexplicit nature of section 24(1). For instance, Canadian courts have reduced sentences as a remedy,[209] or given a right of appeal where none existed before.[210]

In England, it is uncertain and contentious whether there is general judicial discretion to stay a criminal prosecution when it has been held an abuse of process.[211] In Canada, such a residual discretion has been only recently confirmed.[212] Interestingly, the tests developed in both countries are concerned with the abuse of the process of *the court*. The remedies all have the same result and probably are not different in law.[213] They are discretionary and based on the inherent jurisdiction of a court to control its own process. It may be that in Canada there is room to extend the doctrine to abuse of *the constitution*, or argue that such abuse is of the court process.

These remedies usually do not apply to police investigative procedures, but instead to the judicial proceedings. If there is such abuse the court may grant acquittal or judicial stay as a remedy. The defendant may see no practical difference but the distinction involves the function of the judge: as judge of cases presented to the court or as decisionmaker over what cases are permitted to come before the court.

Another issue is the type of abuse which must be present. The usual characterization is an "oppressive" or "oppressive or vexatious" prosecution.[214] An alternative remedy in most cases might be a provision for awarding costs. Since this doctrine indeed exists now in Canada, it is superfluous to adopt it as a special constitutional remedy. "It would be preferable to continue to develop ordi-

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ment Agencies, 36 LAW & CONTEMP. PROBS. 500 (1971); Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909 (1969).

209 R. v. Johnson, 21 M.V.R. 28 (Alta. Prov. Ct. 1982); R. v. Sybrandy, 9 W.C.B. 329 (Ont. Prov. Ct. 1983).

210 *See* R. v. Lee, 69 C.C.C.2d 190 (B.C. Sup. Ct. 1982).

211 D.P.P. v. Humphrys, [1976] 2 All. Eng. Rep. 497 (H.L. 1976).

212 R. v. Jewitt, 20 D.L.R. 4th 651, 658-59 (Can. 1985).

213 The remedies are dismissal, quashing the indictment or judicial stay of proceedings.

214 *See Jewitt*, 20 D.L.R.4th at 667-68; *Amato*, 140 D.L.R.3d 405, 435, 444-45.

nary criminal law concepts, such as 'abuse of process,' and to save the constitution for cases where it is actually needed, such as to strike down legislation."[215]

A. COMPENSATION

Actions for damages arising from a breach of rights can be traced at least to 1703 when the English House of Lords decided that damages were an appropriate remedy for violation of the right to vote, even though the actual damage suffered was difficult to prove.[216] Chief Justice Holt stated that there was a deterrent aspect: "To allow this action will make publick [sic] officers more careful to observe the constitution of cities and boroughs."[217] Now, in the United States "common law torts embrace invasions of every sort of interest that might reasonably be thought protected by the Fourth Amendment."[218] Judge Posner asserts that violation of any such lawful interest can be redressed by torts such as conversion, false arrest and imprisonment, trespass to land and chattels, assault, battery, infliction of emotional distress and invasion of privacy.[219] Judge Posner's premise is that the interest a criminal has in avoiding punishment for his crime is not protected by the fourth amendment, and therefore, tort and the exclusionary rule are alternative remedies rather than additive ones.[220] As a result, a criminal should not be compensated for punishment for a crime of which he was guilty because that is not a lawful interest.

Goals of the tort system include deterrence, affirmation of the plaintiff's right, punishment and compensation. There are also problems, however, with the tort remedy. The individual litigant is forced to bring a constitutional tort action independent of any government and this creates difficult economic[221] and psychological decisions. Compensation depends solely on the defendant's resources. Furthermore, there are the questions about which governmental bodies can be effectively joined as defendants and what are the limitations of sovereign immunity. There is some belief that

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215 *Jewitt*, 20 D.L.R.4th at 659.

216 Ashby v. White, 92 Eng. Rep. 126 (1703).

217 *Id.* at 137.

218 Posner, *supra* note 188, at 53 n.15; *see also* Carlson v. Green, 446 U.S. 14 (1980) (a constitutional violation by a government agent gives rise to a cause of action even in the absence of a statutory right).

219 Posner, *supra* note 188, at 53.

220 *Id.* at 49-50.

221 Counsel fees may be allowed, 42 U.S.C.A. § 1988 (West 1981 & Supp. 1985), although this has recently been limited by Webb v. Bd. of Education of Dyer County, 105 S. Ct. 1923 (1985).

juries are more likely to believe the law enforcement official than the plaintiff and, together with the defense of acting in reasonable good faith,[222] this limits the viability of tort remedies. One commentator has questioned the ability of tort remedies to effectively protect constitutional rights.[223]

A more recent observer, however, believes that an effective tort remedy has been unavailable only because sovereign and official immunity doctrines sometimes have been a barrier and also because courts have been unimaginative in valuing intangible losses; he concludes that recent developments in tort law have overcome these problems.[224] Nevertheless, there remains a major difficulty, that of illegal treatment by police of particular groups in the population. This behavior may produce large damages when aggregated over a large number of persons, yet be too small to give any one person an incentive to sue. One possible solution is to set a minimum liquidated damage figure to which any plaintiff is entitled.

The tort remedy has advantages that the exclusionary remedy does not offer.[225] Tort compensates the innocent victim as well as those accused of a criminal offense. There is an element of proportionality which varies the damages with the constitutional violation. Also, because the tort sanction is directed at the individual violator, there is a specific deterrence not present with the exclusionary rule.

Because the tort action results in a direct transfer payment, there is no deadweight loss in the economic analysis model and damages can be calibrated to yield a desired level of deterrence.[226] From an economic analysis, the tort approach solves the overdeterrence of the exclusionary rule, but leaves a residual overdeterrence problem in the imbalance of compensation to the police. "[Z]ealous police officers bear the full social costs of their mistakes through the tort system but do not receive the full social benefits of their successes through the compensation system."[227] This problem could be solved by immunizing the officer, but not the agency employing him, for misconduct committed in good faith. The agency then has an incentive to prevent misconduct by its officers.

There is one area where Posner concedes the tort remedy will not work and that the exclusionary rule is optimal despite its inher-

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222 *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

223 Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

224 Posner, *supra* note 174, at 638-39.

225 Stewart, *supra* note 113, at 1387.

226 Posner, *supra* note 174, at 639-40.

227 *Id.* at 640.

ent overdeterrence—the coerced confession or involuntary guilty plea. If there is an unreliable coerced confession and the other evidence is insufficient to convict, then the appropriate damages are the costs of punishment unlike in search and seizure cases where the evidence is reliable. It is consequently cheaper and more efficacious to use exclusion in the criminal trial as the remedy. If the confession is coerced but reliable, however, then the exclusionary rule overdeters. Therefore, argues Posner, the fifth amendment should be limited by the factor of reliability and the tort remedy limited to the defendant's lawful interests.

Posner's analysis has been criticized on the grounds that such economic analysis is not applicable to the exclusionary rule and that it does not appreciate the exclusionary rule's "empirical reality."[228] Professor Morris argues that Posner uses "overdeters" in the economic sense of private cost (and social cost) imposed on the government greatly exceeding the social cost of the misconduct, but fails to identify any underlying justifications behind his policy.[229] He claims that economic efficiency is not the justification because there is no reason we should adopt that as a social policy.[230] Morris dismisses Posner's analysis as hypothetical, arbitrary and of doubtful utility.

In the United States, traditional tort remedies for damages are available in state courts. Also, tort as a federal remedy against state officials was created by 42 U.S.C. § 1983:

> Civil action for deprivation of rights—
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof of the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[231]

Congress passed section 1983, originally section I of the Civil Rights Act of 1871,[232] in response to reports of lawlessness in the south directed at blacks and at those whites who assisted them. This

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228 Morris, *supra* note 140, at 663-67. Morris asserts that the Paretian superiority used by Posner has a critical concept of individual preference rankings and that this is an important distinction from total-utility theories.

229 *Id.* at 661.

230 *Id.* at 661, 667.

231 42 U.S.C. § 1983 (1983 & Supp. 1984).

232 Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 ("Ku Klux Klan Act"), founded on federal power under U.S. CONST. amend XIV, s. 5.

statute allows a complainant to use the federal court system in place of the state system and provided an alternative to inadequate state law.[233] A related type of action against conspiracies of private citizens who frustrate the exercise of constitutional rights and liberties is 42 U.S.C.A. § 1985(3). Although section 1983 is not available against federal officials, a *Bivens*-type action, in which the plaintiff can sue federal officials directly in tort under the fourth amendment, can be instituted.

Cases under section 1983 have tested almost every conceivable relationship between government and the citizen, although the emphasis has been on racial, ethnic and sexual discrimination.[234] The section creates a private right of action to redress violations of constitutional rights committed by persons acting under color of state law. Therefore, the distinction between state and private action is important[235] as is the difference between the establishment of a cause of action and the appropriateness of the remedy.[236] There has been a dramatic increase in section 1983 actions since the early 1970's,[237] especially for discrimination in education, use of public facilities and accommodation. In the criminal rights area, subject matter for suits has ranged from unlawful shootings,[238] assault,[239] failure to take reasonable measures to protect personal safety (especially in racial disorders), and denial of equal protection of the law,[240] although failure to advise of a right to counsel and silence has been held not to create a basis.[241]

Acts of public officials, including law enforcement officers, performed in good faith and in the exercise of powers conferred on them by the state generally do not afford a basis for an action.[242] This reasonable good faith defense generally has been considered a major limitation on section 1983, although a research study found it

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233 *See* Monroe v. Pape, 365 U.S. 167 (1961).

234 The commentary on section 1983 is exhaustive. *See, e.g.*, Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486 (1969).

235 *See* T. EISENBERG, CIVIL RIGHTS LEGISLATION CASES AND MATERIALS 68-74 (1981 & Supp. 1983); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 18.1-18.7 (1978 & Supp. 1979).

236 Whitman, *supra* note 234.

237 Project, *supra* note 196, at 781-82.

238 Glover v. City of New York, 401 F. Supp. 632 (E.D.N.Y. 1975).

239 Monroe v. Pape, 365 U.S. 167 (1961).

240 Huey v. Barloga, 277 F. Supp. 864 (N.D. Ill. 1967); *see also* Smith v. Ross, 482 F.2d 33 (6th Cir. 1973).

241 Boulware v. Battaglia, 344 F. Supp. 889 (D. Del. 1972), *aff'd*, 478 F.2d 1398 (3d Cir. 1973).

242 Harlow v. Fitzgerald, 457 U.S. 800 (1982); Pierson v. Ray, 386 U.S. 547 (1967).

to be of limited significance and overstated as a theoretical detriment to civil actions.[243] Also, legislative, judicial and prosecutorial immunities limit the scope of applicability; proof of specific intent, however, is not required.[244]

Although section 1983 provides a concurrent action to an ordinary state court suit, there are several reasons for a plaintiff to choose the federal court.[245] Federal judges are often more familiar with claims involving civil rights and less sensitive to local political pressures. Also, discovery rules in federal courts are usually more liberal and in many areas, federal court dockets are shorter than those in state courts.

In *Carey v. Piphus*, the Supreme Court examined how to determine damages under section 1983 for a constitutional breach and suggested that the elements of damages will vary with the constitutional right at issue.[246] The Court held that the right to procedural due process is absolute and even if there are no compensatory elements, that the courts should award nominal damages, and could award punitive damages, to deter or punish violations.[247]

Section 1983 actions, however, have potential drawbacks. A Yale field project concluded that juries—critical decisionmakers in section 1983 suits—are not impartial because many jurors disfavor plaintiffs and favor police defendants,[248] but the study may not have fully appreciated the subtlety of this juror reaction.[249] It may be that the importance in the public view, as represented by the jury, of the litigated rights in a specific set of circumstances was not as great as the researchers supposed. Juries not only determine liability but they set standards. The absence of juries in deciding the applicability of the exclusionary rule in criminal procedure to evidence is an important contrast to the civil litigation scheme. A jury is able to bring contemporary social factors into the legal framework. There is little doubt that a plaintiff needs clean hands to recover reasonable damages and this factor often is not present if the plaintiff was involved in illegal activity. Thus the moral aspects of the case are a factor, especially when a jury is involved.

The study also discovered that adverse verdicts have a minimal

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243 Project, *supra* note 196, at 803-04.

244 Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

245 Monroe v. Pape, 365 U.S. at 183; Project, *supra* note 196, at 782 n.4.

246 Carey v. Piphus, 435 U.S. 247, 258-59 (1978) (case involved students who were suspended without procedural due process).

247 *Id.* at 266-67.

248 Project, *supra* note 196.

249 *Id.* at 800. The incidents cited as "bias" seem to be juror reactions based on considerations of police duties, supervision, etc.

effect on defendants because police departments are insulated from the consequences.[250] The rare liability of government bodies, which are liable only when their *policies* violate the Constitution,[251] and the absence of punitive damages against them[252] weakens the deterrent value. Professor Whitman also concludes that the sporadic suits do not allow tort to be an effective deterrent because they place a serious burden on individual plaintiffs and do not address underlying problems.[253] In comparing damages with injunctive relief, Whitman suggests that courts should award damages only where necessary to serve a final purpose of punishment.[254] A court award made against an individual who appears responsible, coupled with the question about who actually pays the damages, may not promote general conduct which avoids future violations.

One commentator suggested that a tort action would be more attractive and useful as a significant remedy if the courts imposed liquidated or inflated penalties.[255] These penalties also might serve to weight the importance of the right and circumstances involved in the violation. In addition, governmental liability would provide financial responsibility and a deterrent at the level where police policy is made. Professor Foote is optimistic about the potential significance of tort especially because it is one remedy where the "initiative for enforcement [is] in the hands of injured persons who are offered a selfish motive for prosecuting the actions . . . .[256] On the other hand, large and frequent damage actions may cause the government to be too cautious and may discourage conscientious persons from accepting government positions.

The courts in Canada always have had the power to award exemplary and punitive damages in addition to the strictly compensatory type.[257] Now section 24(1) provides a framework in which to seek compensation alone or together with other remedies.[258] Presumably a plaintiff can invoke section 24 by itself in an ordinary tort

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250 *Id.* at 810-12.

251 *See* Polk County v. Dodson, 454 U.S. 312 (1981); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978).

252 City of Newport v. Fact Concerts Inc., 453 U.S. 247 (1981).

253 Whitman, *supra* note 234, at 70.

254 *Id.* at 42, 48-52.

255 Foote, *supra* note 223.

256 *Id.* at 516.

257 *See* Rookes v. Barnard, [1964] 2 W.L.R. 269, 328 (H.L.); Gibson, *supra* note 98. As to damages in Canada, see generally S. WADDAMS, THE LAW OF DAMAGES (1983).

258 *See* Manning, *Constitutional and Statutory Created Torts and Liability for Breach thereof*, in LAW SOC'Y OF UPPER CANADA, TORTS IN THE 80'S (1983); Weiler, *The Control of Police Arrest Practices: Reflections of a Tort Lawyer*, in STUDIES IN CANADIAN TORT LAW (A. Linden ed. 1968).

action or in a criminal action where the court is competent to provide damages, although the applicant takes a risk if all damage claims are not asserted in one action.[259]

B. EQUITABLE RELIEF

Since the judicial development of the prerogative writs of *habeas corpus* and *mandamus*, the courts have used the equitable remedies of declaratory and injunctive relief to protect civil liberties. For instance, the traditional method of enforcing fourteenth amendment rights is by way of mandatory and prohibitive injunctive relief.[260] In the United States, applicants have received broad relief against government officials involving questions of racial desegregation, voting reapportionment, and, more recently, hospital and prison administration.[261] In *Brown v. Board of Education*,[262] the Court took unto itself the responsibility for dealing with a vast social problem by desegregating schools, an action which affected millions of school children. Such administrative injunctions have created a broad area of institutional reform litigation and the scope of the judicial response, either to order reform or to order the particular institution closed until it meets judicially interpreted constitutional standards, has created controversy.[263]

Equitable relief, like damages, is available to applicants in federal courts for state violations under section 1983.[264] In the criminal process, courts have used injunctive relief to protect against self-incrimination[265] and to ensure the right to counsel,[266] but injunctions have been unavailable when constitutional rights have not been infringed or where the traditional requirements of injunctions have been lacking.[267] The courts also have used injunctive actions to expunge arrest records when an arrest violates the fourth amendment, although they have disagreed on the appropriate remedy.[268]

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259 *See* Cahoon v. Franks, 63 D.L.R.2d 274 (Can. 1967) (damages resulting from a single wrong must be assessed in one proceeding).

260 *See* Davis v. Passman, 442 U.S. 228 (1979); O. FISS, THE CIVIL RIGHTS INJUNCTION (1978); O. FISS, INJUNCTIONS (1972).

261 *See* T. EISENBERG, *supra* note 235, at 378-89.

262 347 U.S. 483 (1954).

263 *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977).

264 *See also* Doran v. Salem Inn Inc., 422 U.S. 922 (1975); Allee v. Medrano, 416 U.S. 802 (1974); 42 U.S.C. §§ 1997a(a) and 1997c (1983 & Supp. 1984).

265 Chandler v. Garrison, 286 F. Supp. 191 (E.D. La. 1968).

266 Bramlett v. Peterson, 307 F. Supp. 1311 (M.D. Fla. 1969).

267 Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

268 *Compare* Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972) (available for mass arrest of demonstrators) *with* Hammons v. Scott, 423 F. Supp. 618 (N.D. Cal. 1976) (not

In *Rizzo v. Goode*, the plaintiff sought equitable intervention for a pattern of illegal and unconstitutional mistreatment of a minority group of citizens by police officers and a remedial injunction was originally granted.[269] The district court's injunction significantly reorganized the internal procedures of the Philadelphia police department by ordering police administrators to revise manuals so that police powers were made clear to officers, and also to upgrade the internal disciplinary system.[270] The United States Supreme Court reversed that decision, stating that in federal cases of equity, the nature of the violation determines the scope of the remedy and where the administration played no affirmative part in the violations, equitable relief was inappropriate.[271] Also, "principles of federalism" did not permit federal district courts to inject themselves "by injunctive decree into the internal disciplinary affairs of this state agency . . . ."[272] The Court conceded that such relief could be granted in "the most extraordinary circumstances."[273]

Judicial control over the internal affairs of municipal police and prosecutors has been curtailed by the United States Court of Appeals for the Seventh Circuit.[274] In a class action, the petitioners alleged that the Chicago police maintained a double file system on suspects and that during discovery proceedings only the central file information, and not the unofficial street file contents, were transmitted. The court held that it could not invade the province of public officials who had jurisdiction to draft policies and internal guidelines and it restricted a preliminary injunction requiring production of the street files.

Courts have developed a complex body of law to determine the appropriateness of injunctive and declaratory relief.[275] The violation must be clear and the injunction can go only as far as necessary for protection of the claimed right. Relief is restricted to situations where neither the exclusionary rule nor money damages are appropriate; when there is a threat of imminent harm from continuing constitutional violations in the way of a clear pattern or stated policy of continuing police action of the type under complaint. In many cases a non-monetary award is more appropriate than money dam-

available since no fourth amendment right). The courts usually have balanced the future use of the arrest record.

269 Rizzo v. Goode, 423 U.S. 362 (1976).

270 *Id.* at 369-70.

271 *Id.* at 378-79.

272 *Id.* at 380.

273 *Id.* at 379. *See also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

274 Palmer v. City of Chicago, 755 F.2d 560 (7th Cir. 1985).

275 Edelman v. Jordan, 415 U.S. 651 (1974); Younger v. Harris, 401 U.S. 37 (1971).

ages because it changes official behavior, while having fewer disruptive side effects.[276] A major practical limitation of equitable relief is the necessity of framing a useful yet clear injunction of what is prohibited and what is permitted. One advantage, though, is that a mandatory injunction directs future conduct rather than apportions blame for past conduct. It does not, however, punish the wrongdoer or provide compensation to the individual whose rights were violated.

In Canada, section 24(1) allows injunctions but contains within it a possible limitation, the words "have been infringed."[277] The courts have construed this language to exclude impending infringements and have limited standing to cases where the applicant's rights already have been infringed.[278] Nevertheless, Professor Gibson contends that the drafting history indicates that impending violations were intended to be included.[279] One of the first Charter cases to be considered by the Canadian Supreme Court, *Hunter v. Southam Inc.*, commenced by way of an application for an injunction to prohibit a search, although the issues regarding the appropriateness of an injunction for constitutional enforcement were not considered by the highest court.[280]

The recent innovation in Canadian courts of a "Mareva injunction," a pretrial action to prevent the destruction of evidence,[281] may help develop the usefulness of this type of remedy. The obstacles in Canada to civil rights injunctions are the historical reluctance of Canadian courts to make orders requiring continuous detailed supervision and the Crown's historic immunity from injunctive relief. The latter problem, however, is often alleviated by declaratory relief, which usually results in changes of official policy to coincide with the court's direction. Although a declaration may not eliminate the financial loss, it does affirm the right violated.[282]

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276 Whitman, *supra* note 234, at 41-42.

277 *See generally* R. SHARPE, INJUNCTIONS AND SPECIFIC PERFORMANCE (1983).

278 Saumur v. Atty.-Gen. of Quebec (No. 2), 45 D.L.R.2d 627 (Can. 1964) (standing denied until actually prosecuted).

279 Gibson, *supra* note 98, at 498-99.

280 Hunter v. Southam, Inc., 11 D.L.R.4th 641 (Can. 1984).

281 H. HANBURY & R. MAUDSLEY, MODERN EQUITY 149-53 (11th ed. 1981); McAllister, *The Mareva Injunction in Ontario*, 2 ADVOC. SOC'Y J. 1-3 (Feb. 1983); Rogers, *Civil Procedure—Interlocutory Remedies—Mareva Injunction—Canadian Developments*, 61 CAN. B. REV. 882 (1983).

282 Atty.-Gen. of Quebec v. Quebec Association of Protestant School Boards, 10 D.L.R.4th 321 (1984).

C. CRIMINAL SANCTIONS

Most behavior that violates the constitution also probably violates the criminal law.[283] In the United States, most crimes come under state legislative power, but the federal government has also created two specific criminal constitutional offenses codified as 18 U.S.C. § 241 and § 242:[284]

> Conspiracy against rights of citizens—
>
> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.[285]

> Deprivation of rights under color of law—
>
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District or the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.[286]

These offenses pertain both to federal and state officials.[287]

Even though the duty of keeping the peace and providing criminal sanction is usually a local and not a federal concern, as late as 1967 the United States Senate acknowledged that "[i]n some places, however, local officials either have been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases—even where the facts seem to warrant."[288] The two jus-

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283 *See generally* T. EISENBERG, *supra* note 235, at 391-422; G. GUNTHER, CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 594-96 (3d ed. 1981).

284 Sections 241 and 242, originating in 1870 and 1866 respectively, were concerned with the voting rights and emancipation of slaves. Their continuing impetus is racially motivated violence. *See* United States v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979); *aff'd* 644 F.2d 187 (3d Cir. 1980); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974).

285 18 U.S.C. § 241 (1982 & Supp. 1984).

286 18 U.S.C. § 242 (1982 & Supp. 1984).

287 Screws v. United States, 325 U.S. 91 (1945).

288 S. REP. No. 721, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 1837, 1840.

tifications for continued federal intervention were seen as the often inadequate and ineffective protection and prosecution on the local level, and that the racial violence most often was used to deny affirmative federal rights and therefore should be remedied by federal action.

The United States government has used sections 241 and 242 to prosecute violations on the grounds of an arrest without cause or an arrest based on an illegal, groundless or fictitious warrant.[289] The courts have applied these statutes to a murder by law enforcement officials;[290] threatening, maltreating and unlawfully assaulting a victim lawfully in police custody;[291] beating a suspect for the purpose of forcing a confession, whether or not one resulted;[292] causing a dog to bite a suspect;[293] and a deputy sheriff subjecting citizens to indignities because of their membership in a religious sect, then failing to protect them from group violence.[294] In perhaps its most notorious use, the D.C. Court of Appeals upheld the use of section 241 in prosecuting the illegal break-in of the Watergate scandal.[295]

The most important interpretation of section 242 is in *Screws v. United States*,[296] where the Supreme Court emphasized that only a willful deprivation of a constitutional right may serve as a basis for such a criminal prosecution. Although this holding is obviously correct, it may dilute the effectiveness of this remedy. The specific intent requirement of section 241 was examined recently in *United States v. Ehrlichman*.[297] Section 241 does not require an actual awareness on the part of the conspirators that they are violating constitutional rights; it is enough if they interfere with rights which as a matter of law are clearly and specifically protected by the Constitution.[298] Acting under the orders of supervisors is not a defense.[299]

289 United States v. Ramey, 336 F.2d 512 (4th Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); Brown v. United States, 204 F.2d 247 (6th Cir. 1953).

290 Screws v. United States, 325 U.S. 91 (1945).

291 United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

292 Williams v. United States, 341 U.S. 97 (1951).

293 Miller and Vallee v. United States, 404 F.2d 611 (5th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969).

294 Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

295 United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976); United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977); United States v. Liddy, 542 F.2d 76 (D.C. Cir. 1976).

296 325 U.S. 91 (1945).

297 546 F.2d 910 (D.C. Cir. 1976).

298 *Id.*

299 United States v. Konovsky, 202 F.2d 721 (7th Cir. 1953); United States v. Shafer, 384 F. Supp. 496 (N.D. Ohio 1974).

The vagueness of the two sections in their definition of constitutional rights has been one recurring problem.[300] In 1968, Congress attempted to respond to this complaint by adding section 245, which more specifically enumerated "federally protected activities" and made interference with them a crime.[301]

Another major concern in the United States is the source of Congressional power and its reach, which involves two sub-issues: immunity and private action. Courts have determined that a state judge could be convicted[302] and police officers who gave perjured evidence could be prosecuted under section 242, although both the judge and the officers may have been immune under section 1983.[303] One circuit even held that the section applied to a public defender who demanded fees from his indigent defendants by threatening inadequate legal representation.[304] The reach of Congress over private actions turns on the phrase "color of law" in section 242 and its power to act under either the thirteenth or fourteenth amendment. The Supreme Court, in *United States v. Price*, has stated that color of law includes a willful participant in joint activity with the state or its agents, whether or not the person is a state official.[305] When a deputy sheriff released three men from a Mississippi county jail, intercepted them later on the highway and then took them to a deserted area where he and fifteen persons assaulted and murdered them, the Court deemed it joint activity.[306] This issue is not a concern in Canada, where the federal government holds plenary power over criminal law and procedure and can pass legislation concerning both state and private action.[307]

Canada has not enacted any particular criminal sanction for violation of the matters included in the Constitution Act, 1982. Yet section 115(1) of the Criminal Code may allow prosecution for violations of constitutional rights:

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300 *See* United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

301 Interference with Federally Protected Activities, Pub. L. No. 90-284, § 245, 82 Stat. 73 (1968). The federally protected activities include voting, participation in and enjoyment of government services, employment and education.

302 Dennis v. Sparks, 449 U.S. 24 (1980).

303 Briscoe v. Lahue, 103 S. Ct. 1108 (1983).

304 United States v. Senak, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973).

305 United States v. Price, 383 U.S. 787 (1966).

306 *Id.* at 794-95.

307 In the United States, only a United States Attorney can bring a prosecution under sections 241 and 242. *See* United States ex rel. Savage v. Arnold, 403 F. Supp. 172 (E.D. Pa. 1975). In Canada, there still remains a right of private prosecution although in practice it is rarely used and the Attorney General has a right to intervene. R. SALHANY, CANADIAN CRIMINAL PROCEDURE 186-87 (4th ed. 1984).

> 115. (1) Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offense and is liable to imprisonment for two years.[308]

The major issue is whether the Constitution Act, 1982 is "an Act of Parliament." It was a "Resolution" "adopted" by the Parliament of Canada and is a schedule to an Act of the United Kingdom Parliament.[309] Although prosecutions in Canada of federal criminal laws are by provincial Attorneys General,[310] this particular offense allows, by subsection 2, prosecutions to be instituted and conducted by the Government of Canada. Thus, the section is protection from criticism that provincial governments are not vigilant in their enforcement against local police forces.

The primary benefit of criminal prosecution appears to be deterrence. In practice, a criminal conviction for a police officer probably would mean loss of employment. The absence of a specific criminal offense—the most traditional way of enforcing social policy for willful violation of the Canadian constitution—casts doubt upon the government's avowed role in guaranteeing and protecting constitutional rights.

IV. Evaluating the Remedies

A. Substance in Evaluation

Although a written constitution does not "partake of the prolixity of a legal code,"[311] one of its major goals is the designation of individual freedoms and liberties, which has important implications for public standards and for the rule of law. A right is referred to as a constitutional right in the United States and Canada because it appears in the written constitution (regardless of its content), while in Canada before April 17, 1982, a constitutional right could be considered as the content of a rule, regardless of its form.[312] Now that constitutional rights are a fundamental and pivotal aspect of criminal procedure in both countries, society must recognize the basic goals of the criminal justice system. These include minimizing erro-

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308 Can. Rev. Stat. ch. C-34, § 115(c) (1970).

309 Canada Act 1982, *see supra* notes 2 & 49.

310 *See supra* note 26.

311 M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

312 *See* E. Wade & A. Bradley, Constitutional Law 2-7, 479-582 (8th ed. 1970). Canada has not abrogated rights recognized before April, 1982. Constitution Act, 1982, § 26. *See also* U.S. Const. amend. IX.

neous convictions by making fact-finding reliable and accurate, minimizing the burdens on the accused and on litigation, convicting the guilty, retaining respect for the dignity of the individual, maintaining an appearance of fairness, and achieving equality in the application of the process.

The exclusionary rule fulfills several functions in this scheme. In the United States, its basis seems to be a mixture of judicial policy and the rules of evidence, although the judiciary is uncomfortable with the paradox of using illegally obtained evidence in the legal process. Therefore, it employs the exclusionary rule as a matter of ideology because the admissibility of evidence is the court's domain. Thus, the rule can be seen not as a remedy but as a reaction to an affront on the Constitution, which results in the court attempting to control its own process and to retain judicial integrity, not to manifest a governmental or personal interest. From this perspective, the court should not concern itself with deterrence or damages.

Anxiety over the exclusionary rule, as well as the constitutional tort, may be due to the belief that the judiciary is inappropriately extending the Constitution.[313] The controversy over the appropriateness of remedies should not be present to any important extent in Canada because the federalism factor is not acute. One of the main criticisms of the exclusionary rule—that it promotes disrespect for law and order by releasing criminals on technicalities—may simply be a reaction to the fact that the public is able to see who goes free and what evidence was withheld. For instance, the nature of the search and seizure right is now defined in both countries in terms of privacy. Whether there is a constitutional right to privacy of criminal activity may underline the aversion to the exclusionary rule and damages theory.

Certainly there is no lawful interest of privacy solely for the purpose of carrying on illegal activity. Posner has made a frontal attack on this issue, which appears to be almost ignored by other commentators.[314] Interpretation of rights often becomes a social reaction to the remedy. As the right becomes redefined, so must the remedy and its scope. If society balances individual rights, such as privacy, against the need for law enforcement, that latter need has to be considered in the modern light of terrorism, criminal threats to large segments of the population, commercialized illegal drug brokerage, and the existence of extremely destructive weapons.

Through all this winds the thread of the *symbol* of the Constitu-

313 Whitman, *supra* note 234, at 10.
314 *See supra* note 188, at 50-53.

tion, which may be an important factor to the supporters of an absolute reliance on the exclusionary rule. Some commentators seem preoccupied with the deterrence policy virtually to the exclusion of competing considerations such as proportionality. Apparently they feel that the erosion of such a severe penalty will also erode the rights it depends upon and are greatly concerned about police powers.[315]

The characterization of an appropriate remedy, then, is broader than a jurisdictional issue. If rights formulation is a reaction to government power and constraints, then remedies should be measured proportionately. Exclusion of evidence cannot be used against every exercise of discretion or federal review of state criminal proceeding. The nature of the violation determines the scope of the remedy, which should be framed to correct the condition that offends the Constitution by balancing individual and collective interests.[316] The alternatives to the exclusionary rule achieve some but not all of the necessary remedial functions. For instance, they are seldom appropriate to attack frequent violations motivated by zeal rather than malice.[317]

This conflict of efficiency with normative judgments pervades the analysis. Perhaps the issue is one of flexibility in the judicial system. England is inflexible against the exclusionary rule while the United States employs an inflexible rule of exclusion. Canada's position is one of compromise, constitutionalizing all existing remedies and providing some framework for choice.

B. FUNCTION IN EVALUATION

Each component in the constitutional rights model has as its goal the reaffirmation of values by denunciation of illegal acts. Nevertheless, the interests of the government, individual and judiciary are different. The government wants to ensure that the constitution is meaningful for all its citizenry. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[318] It can do this by affirming the importance of the constitution by punishing and

315 For example, a New York Times editorial, after dismissing considerations of a good faith exception to the exclusionary rule, asserted that police, prosecutors and judges "should be applied to obeying and enforcing the rule of law, not dancing around it." Editorial, *Let Facts, Not Faith, Guide the Police*, N.Y. Times, Jan. 2, 1983, at A26.

316 Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

317 *See* Stewart, *supra* note 113.

318 *Marbury v. Madison*, 5 U.S. (1 Cranch) at 163.

deterring violators. Thus, the government's interest is probably best carried out through criminal prosecution and providing equitable injunctive relief.

The goal of a person who has had a constitutional right violated is compensation. In Canada, one of the major concerns about entrenching individual rights into the constitution was the effect on the role of the judicial vis-à-vis the legislative branch of government. Now the function of the American and Canadian courts in constitutional protection is the same—to define the meaning and scope of constitutional rights and to resolve the questions of constitutional protection of those rights. This is quite different from the Canadian judge's traditional role which was to provide a fair trial for the accused and was confined to the forensic process; the judge controlled neither the police nor the prosecuting authority.[319]

The judicial response has been the most active response in America. Even though the judiciary is constrained by institutionalism—being appointed and not democratically representative and only responsive to those small sets of problems which come before it—one commentator concluded that judicially enforced constitutional rights have not proved "fatally antidemocratic in nature" but have "enhanced the democratic quality of American society" by enforcing "pro-democratic rights."[320] The judiciary's decisionmaking, however, always has illustrated the tension between pragmatism and judicial fidelity to the Constitution. "What a judicially enforceable charter of rights like the United States' Bill of Rights really does is to give life to a continuous and somewhat cyclical process of judicial development that is guided, but not really constrained by the text."[321] The courts are affected by economic and social realities, and developments in technology.

One of the legally imposed restraints on case determination is the standing of the applicant. Contrary to Canadian practice, in the United States the party seeking relief must have an adversary interest in the outcome.[322] The Attorney General, in seeking equitable civil relief, lacks standing to advance the civil rights of third parties unless there is express statutory power.[323]

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319 *See, e.g., Sang*, 3 W.L.R. at 288.

320 Bender, *The Judicial Protection of Rights* in THE U.S. BILL OF RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 108-09 (W. McKercher ed. 1983).

321 *Id.*

322 *Supra* note 62. Governments in Canada can refer constitutional questions to the courts for advisory decisions.

323 *United States v. City of Philadelphia*, 482 F. Supp. at 1252. One advantage of the existence of both an exclusionary rule and statutory relief is that it has overcome the

The inherent contradiction in judicial lawmaking, that it should be stable yet responsive to changes in society, is aggravated by constitutionalizing rights in the United States and Canada. In one sense, the American approach to legislative history and extrajudicial evidence in constitutional interpretation reduces the impact of that contradiction. In Canada, the availability of multiple remedies and the textual tests may allow contemporary input. Generally, at least in academic and intellectual circles, the judiciary probably is regarded in high esteem for making changes that people believe are desirable.[324] Judicial interpretation takes on a special acuteness when a written constitution is involved and the Supreme Court of Canada, drawing upon its American counterpart, has recognized this in one of its recent judgments:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of government power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the constitution like a last will and testament lest it become one.'
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> [A] broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).[325]

The criticism that the exclusionary rule places an unreasonable burden on law enforcement officers to master the intricacies of rights jurisprudence raises the question of the extent to which the public perceptions of law and order should be allowed to play a role in defining the scope and enforcement of constitutional rights. It may be that the "stage of saturation" has been reached for the "pe-

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limitations of a dual court system where the defendant and the availability of jurisdiction have to be categorized.

324 "The belief [in the United States] is that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches of government." H. BLACK, A CONSTITUTIONAL FAITH 11 (1969).

325 *Hunter v. Southam Inc.*, 11 D.L.R.4th at 649-50 (emphasis in original).

riod of misuse" of the exclusionary rule.[326] Although there is nothing new about public opinion influencing the development of law,[327] it often has not been recognized as mass public opinion, but as elite or effective or influential opinion. Whatever public is relied upon, it is often transient, both in intensity and time, ill-informed and, when in group form, open to question as to the representativeness of the spokesperson.

In Canada, public opinion can take a legal form in constitutional development through the courts. The availability of private criminal prosecutions often has allowed pressure groups—as informed watchdogs—to institute actions in cases which have not moved the government.[328] In the United States, a similar but less influential role is performed by groups which support certain defendants or act as *amicus curiae*.

A rare insight into popular opinion is California's 1982 amendment of its state constitution, the "truth-in-evidence" voter initiative known as Proposition 8, which abolished California's extended exclusionary rule and made all "relevant evidence" admissible except where it violates the federal Constitution.[329] The courts of that state have interpreted exclusion as a remedy, not a right.[330] "The people have apparently decided that the exclusion of evidence is not an acceptable means of implementing [the substantive constitutional rights], except as required by the Constitution of the United States."[331] Neither the rights guaranteed nor the remedies allowed will have much meaning unless they have general popular support.

It is therefore surprising that the jury, relied upon as a constitutional[332] and democratic pillar in the criminal justice system, is not allowed to participate in either country in deciding whether a right has been violated. That matter is left as an issue for the judiciary alone. Popular input into legal decisionmaking is difficult to incorporate at any stage, but at least is present in limited form when a jury is involved. A jury tends not to be theoretical but brings with it the reality of modern social factors into the legal framework. A jury may be the better arbiter of contemporary rights and contemporary remedies. In criminal cases, the jury has no part in defining the

326 8 J. WIGMORE, *supra* note 64, § 2184a n.1.

327 A. DICEY, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 19, 20 (2d ed. 1914); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 127 (5th ed. 1956).

328 *See* M. FRIEDLAND, *supra* note 6, at 67-112.

329 CALIF. CONST. art. I, § 28(d).

330 People v. Daan, 36 Cr. L. 2188 (Cal. Ct. App. 4th Dist. 1984).

331 People v. Lance W., 36 Cr. L. 2411 (Cal. S. Ct. 1985).

332 U.S. CONST. amends V, VI, VII; Constitution Act, 1982, § 11(f).

scope of the alleged violated right, in deciding whether there was a violation, or in determining the appropriate remedy. Yet, in civil cases concerning similar rights, the jury is a critical decisionmaking body not only of the quantum of damages, but the standards required.[333] Much of the criticism of civil damage remedies, therefore, may be unjustified if that process is viewed as a popular standard-setting body.

In the United States, judicial deference to legislators is more often than not the rule.[334] The enforcement of constitutional rights has proceeded with both the acquiescence and the active cooperation of Congress, and Congress has not attempted to substantially limit the court's jurisdiction. For instance, by the time the Supreme Court enforced the exclusionary rule on the states, a majority of states already had adopted it for themselves. In the period between *Mapp* and *Calandra*, Congress' ability to modify the exclusionary rule was doubtful. Because *Calandra* declared the rule not to be constitutionally mandated, legislative action to modify the rule has been proposed both in Congress[335] and in the Supreme Court.[336]

There is no doubt that the exclusionary rule presents a dilemma, as both the United States and Canadian Supreme Courts have recognized.[337] In particular, the exclusion of real, reliable, physical evidence contradicts the truth-seeking function of the criminal trial. On the other hand, unbending application of an exclusionary rule may generate disrespect for law and the administration of it by the court. The balancing test used in the United States to determine the applicability of the exclusionary rule[338] creates additional problems. The costs and benefits of the exclusionary rule and their measurement appear to be elusive. The rule admittedly rests on social considerations which may be above such measurement.

C. APPLICATION OF UNITED STATES—CANADA COMPARISONS

In the first case under the 1982 Constitution to reach it, the Canadian Supreme Court drew upon American constitutional inter-

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333 *See* Project, *supra* note 196.

334 *See* Bender, *supra* note 320, at 114-19.

335 In the 99th Congress, S237 (The Exclusionary Rule Limitation Act of 1985) was introduced and referred to the Judicial Committee on January 22, 1985. In the 98th Congress, S283 and H4407 attempted to eliminate the rule; S101, S1764, and H2239 attempted to severely limit the rule, making it inapplicable if there is reasonable good faith belief that the search and seizure conformed with the fourth amendment.

336 *Bivens*, 403 U.S. at 423-24 (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring).

337 *Leon*, 104 S. Ct. at 3413; *Rothman*, 121 D.L.R.3d at 621-23.

338 *Leon*, 104 S. Ct. 3405.

pretation as an aid.[339] Ironically, the case itself involved an American applicant/intervenor.[340] The court considered its function in construing a written constitution: "The courts in the United States have had almost 200 years' experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts."[341] Reference was made to the discussions of judicial review in the American cases of *Marbury v. Madison*[342] and *M'Culloch v. Maryland*.[343]

In the Canadian criminal rights area, American cases frequently are cited. In its first examination of "unreasonable" in the context of section 8 search and seizure,[344] the Canadian Supreme Court drew upon American concepts of the right of privacy against state intrusion by adopting reasoning from *Katz v. United States*[345] and referring to *United States v. Rabinowitz*[346] in coming to its conclusion. The court noted, however, the differences in the search and seizure guarantees of the two countries:

> The [section 8] guarantee is vague and open. The American courts have had the advantage of a number of specific prerequisites articulated in the Fourth Amendment to the United States Constitution, as well as a history of colonial opposition to certain Crown investigatory practices from which to draw out the nature of the interests protected by that Amendment and the kinds of conduct it proscribes. There is none of this in s. 8. There is no specificity in the section beyond the bare guarantee of freedom from (unreasonable) search and seizure; nor is there any particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee.[347]

One appellant court justice has reviewed the dissatisfaction with the American exclusionary rule and concluded, in attempting to interpret what brings the administration of justice into disrepute, that: "The United States experience teaches us that excluding illegally obtained evidence tends to bring the administration of justice into

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339 Law Society of Upper Canada v. Skapinker, 9 D.L.R.4th 161 (Can. 1984).

340 The issue in the case was whether The Law Society Act of Ontario requiring all members to be Canadian citizens was inconsistent with § 6(2)(b) of the Constitution Act, 1982. The original applicant, Skapinker (a South African citizen), became a member of the Law Society during the litigation, and intervenor Richardson (an American citizen and member of the bar of Massachusetts) was allowed to continue the action.

341 *Skapinker*, 9 D.L.R.4th at 168.

342 5 U.S. (1 Cranch) 137 (1803).

343 17 U.S. (4 Wheat.) 316 (1819).

344 Hunter v. Southam Inc., 11 D.L.R..4th 641 (Can. 1984).

345 *Id.* at 652; *Katz*, 389 U.S. at 361.

346 339 U.S. 56 (1950).

347 *Hunter v. Southam Inc.*, 11 D.L.R.4th at 649.

disrepute, at least where there is not, on the part of the police, a contempt for constitutional rights. . . . Our Canadian experience does not teach us otherwise."[348]

Although many of Canada's constitutional provisions are similar to those in the United States, the Supreme Court of Canada has demonstrated that there are definite differences.[349] For example, section 23 (concerning language of education rights) is not a codification of an essential, pre-existing and more or less universal right. Therefore, it imposes a unique set of constitutional provisions peculiar to Canada. Here will be a search for history and foundation perhaps found nowhere else. The Canadian courts will have to recognize the differences, as well as the similarities, in the two systems.

There is a danger in referring to American exclusionary cases in the Canadian setting. Most obviously, the law governing illegally obtained evidence in the United States is diverse and in a state of major change. Due to the similarity in language used in the Canadian and American constitutions, Canadian courts often may reach to American decisions for aid in interpretation but they will have to recognize the differences of history, federalism and the legal and societal structures. American cases have different complexions depending on whether they develop from the damage, injunctive, criminal or evidence exclusionary context; yet in Canada, each case can be considered for all of these remedies. Canada, through its section 24 procedure, has attempted to keep right and remedy analysis separate and this may limit the use of American judgments which do not distinguish the two. Perhaps even more important is the constitutional federalism which has lurked behind every major American decision but which is not a Canadian issue. For example, if the exclusionary rule is not constitutionally mandated and an alternative to it is demonstrated as a more effective deterrent, the exclusionary rule may be abandoned and state influence reemerge. The primary difference in the use of the exclusionary rule is that in the United States it is viewed as a judicial remedy based on a deterrent, controlling supervision over law enforcement; whereas, in Canada, it appears to be based on a theory of a need for judicial integrity. Therefore, Canadian courts would do better to look at those American cases, now hidden behind the reigning theory that drew upon that rationale.

In the end, American cases, like British judgments, are referred

348 *Collins*, 148 D.L.R.3d at 52-53 (Seaton, J.).

349 Atty.-Gen. of Quebec v. Quebec Association of Protestant School Boards, 10 D.L.R.4th 321 (1984).

to by Canadian courts for their persuasive but not authoritative value. Reliance on them may give Canadian court judgments comparative richness, but in the long run can devalue Canada's judicial independence. As Justice Veit noted in *R. v. MacIntyre*:

> It seems to me in assessing the value of the American precedents, that from 1961 on in the United States such evidence would be excluded on the basis of their Constitution, that the *Constitution Act, 1982*, is very much the fruit of Canadian political maturity, that this is a tree which has been grown in our own backyard, not a plastic tree, in my view, that we bought in a store and put in our yard. It seems to me that we have to consider the roots from which this tree has grown up and that involves the Canadian and the Anglo-Canadian jurisprudence surrounding the words that eventually were chosen to be used in the Charter.[350]
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> [W]hile the result in the United States is a result which we can examine with interest and while the American experience can perhaps provide assistance, we should first look to our own Anglo-Canadian roots for an interpretation of the rights . . . .[351]

Instead, American methods can provide models for Canadian legal developments. The Canadian courts have not invoked the remedies which have been examined in this Article to any extent; the models of evaluating legislative history which the courts have developed for judicial review in the United States are just being introduced into Canada. Most importantly for Canada, though, are the American examples of mandatory injunctive relief and the criminal constitutional offense. Mandatory injunctive relief is the court's most obvious method of providing general public constitutional protection, and the enactment of an offense for constitutional violation is the legislature's best method. Canada, by developing such methods, although modelled on the American constitutional practice, can expand and enrich its legal system.

V. CONCLUSION

The recentness of Canada's 1982 constitution and the similarity of its language to that of the Constitution of the United States makes comparison of the two inevitable. American and Canadian constitutional developments have occurred separately and resulted in different concepts of federalism, court structures, authority over criminal law and remedies for the violation of constitutional individual rights. Judicial review of statutory law and governmental action is a new and awesome concept for many Canadians.

In the United States, reliance has been placed on statutes and

350 139 D.L.R.3d 602, 606 (Alta. Q.B. 1982).
351 *Id.* at 606-07.

the judicially developed exclusionary rule for protection of constitutional rights. Canada, on the other hand, has provided explicitly in the constitution an enforcement provision incorporating exclusion of evidence, which before 1982 had not been a legislated rule. Alternatives to the exclusionary rule—torts, injunctions and criminal sanctions—have been used extensively in the United States but are usually criticized for not having a deterrent function. They do have the advantage, however, of providing direct and proportional responses to the constitutional violation. In Canada, these types of remedies are provided for conjunctively in the constitution.

Canadian reliance upon American jurisprudence, although tempting, is limited by historic, legal and societal factors. Canada could accept, however, many methods of constitutional protection used in the United States, such as mandatory injunctive relief and a criminal sanction. The extent of those adoptions will depend on the importance accorded to the constitution and the manner in which the legislature and courts perceive their roles.

Canadian constitutional law no longer stops at domestic considerations; arguments will now be based partly on American constitutional law. This is an early stage of the constitutional process and it is of course impossible at the beginning of legal life under the Charter to tell how things will evolve over time. In many ways, Canada's new constitution will allow reexamination of the judicial role, the reach of legal remedies and the limits of law itself.