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# Comparative Empiricism and Police Investigative Practices

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## **I. Introduction**

Ten years ago I canvassed differences between European and American law enforcement practices (specifically, with respect to search and seizure and interrogation) and evaluated empirical research that might help determine the relative impact of these differences.<sup>1</sup> This article is an update of that effort. Since 2000,

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<sup>1</sup> Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Regulation*, 22 MICH. J. INT'L L. 423 (2001).

legal developments have been numerous, especially in connection with the regulation of interrogation in Europe.<sup>2</sup> The past ten years have also produced a considerable amount of research evaluating the effectiveness of specific police investigative practices.<sup>3</sup> This article exposes how much we still do not know after a decade of additional research and describes a type of empirical work—what I call “comparative empiricism”—that can fill the gap.

Comparative empiricism is an empirical assessment of the relative effectiveness of different nations’ regulatory regimes. In the law enforcement context, this type of assessment may turn out to be extremely useful. Indeed, it might be the only realistic means of determining which combination of regulatory mechanisms will best protect against government over-reaching, without unduly stymying good police-work. Domestic research that attempts to explore differing methods of limiting police discretion either occurs in experimental settings that undermine generalizability or is constrained by national laws that prohibit or limit the ability to manipulate investigatory rules. In contrast, the significant country-by-country differences in police regulation, combined with the relatively consistent demands of police work across countries, provide a naturalistic setting for testing the effectiveness of a wide array of rules. In particular, comparative empirical work that uses the same metric for gauging effectiveness—this article proposes “hit rates” for searches and seizures and confessions, and clearance rates for interrogations—can provide a unique source of information to policymakers.

Part II discusses the relevant positive law. Part III describes the most recent research studying the effects of that law. Part IV lays out an empirical agenda.

## **II. American and European Regulation of Investigative Practices**

The focus of this article will be search and seizure and interrogation, the two most prominent methods of obtaining incriminating evidence. The discussion will emphasize those rules that provide the starkest contrasts between the United States and other countries and that have been the subject of empirical study.

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<sup>2</sup> See *infra* Part II.

<sup>3</sup> See *infra* Part III.

The discussion of European law will draw primarily from the law in the United Kingdom, Germany, and France, as well as from decisions of the European Court of Human Rights (ECtHR).

### A. Search and Seizure Law

One important difference between European law and American law in the search and seizure domain is that American police who want to search a home are more likely than European police to need a search warrant based on individualized suspicion, issued by a judicial officer. In the United States, a warrantless search of a house may occur only if police obtain consent, are in hot pursuit of a suspect, or have reasonable suspicion to believe confederates of a person arrested in a home are on the premises.<sup>4</sup> Furthermore, police are encouraged to seek warrants by *United States v. Leon*,<sup>5</sup> which held that reasonable good faith reliance on a warrant that turns out to be defective does not require exclusion of any evidence that is found. In the United Kingdom, on the other hand, police can conduct a warrantless search of the entire home incident to arrest as well as during some period of time both before and after the arrest.<sup>6</sup> As a result, under 15% of premise searches in the United Kingdom are authorized by warrant.<sup>7</sup> The proportion of searches based on American-style warrants in France and Germany is probably even lower. In France on those few occasions when a warrant is required, a judicial officer, or in some cases a prosecutor, issues a “rogatory commission,” which need not be based on any particular level of suspicion or specify the place to searched or item to be seized.<sup>8</sup> In Germany, warrants are not required if there is “danger in delay,” a concept defined much

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<sup>4</sup> See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS*, chs. 6, 7, 12 (5th ed. 2008).

<sup>5</sup> 468 U.S. 896 (1984).

<sup>6</sup> David J. Feldman, *England and Wales*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 149, 157 (Craig Bradley ed., 2d ed. 2007) (“the constable may search any premises where the person was when, or immediately before, he was arrested. . .”).

<sup>7</sup> VAUGHN BEVAN & KEN LIDSTONE, *A GUIDE TO THE POLICE AND CRIMINAL EVIDENCE ACT OF 1984*, at 445-46 (1985) (also finding that about 55% of warrantless house searches were incident to arrest).

<sup>8</sup> Richard S. Frase, *France*, in *CRIMINAL PROCEDURE* 201, 211 (during investigation of a flagrant offense police may “enter and search the domicile of all ‘persons who appear to have participated’” without a warrant). *Id.* at 211-12 (rogatory commissions “are far less confining than an Anglo-American search warrant.”).

more broadly than the American “hot pursuit” exception to the warrant rule.<sup>9</sup> Only about 10% of home searches in Germany are conducted with a warrant,<sup>10</sup> although police must usually obtain judicial confirmation of the search within two or three days of the search.<sup>11</sup>

Thus, warrantless home searches are relatively more common in Europe. At the same time, some European jurisdictions impose constraints on home searches that American doctrine does not. For instance, in the United Kingdom consent to search a home must be in writing.<sup>12</sup> In France and Germany, either the resident or some other neutral third party must observe the search.<sup>13</sup>

A second, more subtle difference between American and European rules occurs in connection with street stops. In every country under consideration here police may stop and question an individual who is acting suspiciously. In the United States, such a stop must be based on “articulable” suspicion, can evolve into a frisk if there is a reasonable suspicion the person is armed, and must end within five minutes or so unless probable cause to arrest develops.<sup>14</sup> In France, the same general power exists, but police are also permitted to engage in an “identity check” procedure, which permits detention for up to four hours if, after a reasonable suspicion stop, the individual refuses to provide or is unable to furnish identification.<sup>15</sup> In the United Kingdom, provisions that went into effect between 2003 and 2005 require officers to make a record of every stop and search, which must indicate the reason for

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<sup>9</sup> Thomas Weigend, *Germany*, in CRIMINAL PROCEDURE 243, 249-50, n. 29 (“police often assume that there is ‘danger in delay,’” including when attainment of an arrest warrant but not a search warrant). However, a recent German Constitutional Court decision may have tightened this exception. See STEPHEN C. THAMAN, COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH 57 n.89 (2d ed. 2008).

<sup>10</sup> Weigend, *supra* note 9, at 250 n. 34.

<sup>11</sup> THAMAN, *supra* note 9, at 57.

<sup>12</sup> *Id.* at 54.

<sup>13</sup> Frase, *supra* note 8, at 211; GERMAN CODE OF CRIMINAL PROCEDURE 106 (Horst Neibler trans., 1973).

<sup>14</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (authorizing frisks on reasonable suspicion); *Florida v. Royer*, 460 U.S. 491 (1983) (fifteen minute detention in a small room based on reasonable suspicion violates the Fourth Amendment).

<sup>15</sup> Frase, *supra* note 8, at 209-10. In *Hübel v. Nevada*, 542 U.S. 177 (2004), the U.S. Supreme Court upheld a statute permitting an arrest for failure to identify oneself if the police reasonably expect criminal activity is afoot, but few states have such statutes.

the stop, its outcome, and the ethnicity of the stopped individual, who must receive a copy of the report.<sup>16</sup> Although a few police departments in the United States have adopted or been forced to adopt similar reporting procedures,<sup>17</sup> stops in most American jurisdictions are not documented.

A final key difference between European and American search and seizure law has to do with the manner in which these rules are enforced. While exclusion is the usual response to an illegal search and seizure in the United States,<sup>18</sup> that remedy is rarely resorted to in Europe. In the United Kingdom, exclusion occurs only if the police illegality was egregious,<sup>19</sup> in Germany only if the invasiveness of the action outweighs the importance of the evidence or the seriousness of the crime,<sup>20</sup> and in France only in connection with a limited number of technical violations.<sup>21</sup> European jurisdictions tend to rely on administrative penalties to enforce search and seizure rules.<sup>22</sup> This tendency was bolstered by the European Court of Human Rights decision in *Khan v. United Kingdom*,<sup>23</sup> which held that a failure to exclude illegally seized

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<sup>16</sup> Feldman, *supra* note 6, at 151. Identifying information is not included, however. See Crime Security Act, ch. 17, §56 (Eliz.) (2010).

<sup>17</sup> See CIVIL RIGHTS BUREAU, OFFICE OF ATT'Y GEN. STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES (1999) [hereinafter NEW YORK REPORT] (mandating reporting requirements).

<sup>18</sup> See WHITEBREAD & SLOBOGIN, *supra* note 4, ch. 2.

<sup>19</sup> Feldman, *supra* note 6, at 163 ("English law has no general exclusionary rule for improperly obtained evidence" but illegally seized evidence might be excluded if its admission "would make the proceedings unfair.").

<sup>20</sup> Weigend, *supra* note 9, at 251-52 (exclusion depends on the "grievousness of the violation," "the importance of the individual interest," "the relevance of the evidence and the seriousness of the offense."); Mohr Siebeck, *Truth or Process?: The Use of Illegally Seized Evidence in a Criminal Trial*, in GERMAN NAT'L REPORTS TO THE 18<sup>TH</sup> INT'L CONG. OF COMPARATIVE LAW 688-93 (2010) (noting that exclusion is most likely to occur in connection with wiretapping and other very serious intrusions).

<sup>21</sup> See Frase, *supra* note 8, at 212; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 542, 586 (1990) ("[I]t might be argued that French rights are worthless because of the narrow scope of exclusionary remedies available in that country.").

<sup>22</sup> See Frase, *supra* note 8, at 213-14; see also John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1554-55 (France); *id.* at 1563-64 (Germany).

<sup>23</sup> *Khan v. U.K.*, 31 Eur. Ct. H.R. 45 (2001).

evidence does not automatically render a trial unfair under the European Convention on Human Rights (the Convention).

### *B. Interrogation Law*

Virtually all western democracies grant suspects a right to remain silent when questioned by the police. Differences surface, however, in connection with how the right is implemented. In the United States, police must give the famous *Miranda* warnings informing suspects that they have a right to remain silent and a right to counsel both before and during interrogation.<sup>24</sup> In France, in contrast, until very recently the suspect was not told of the right to remain silent and had a very limited right to counsel.<sup>25</sup> In the United Kingdom and Germany suspects have for some time been apprized of their right to remain silent. But in both countries a suspect is also informed that exercise of that right may, in the words of the British statute, “harm your defense if you do not mention when questioned something which you later rely on in court,” and in both questioning may continue after assertion of the right.<sup>26</sup> Suspects must also be told of their right to counsel before interrogation in both the United Kingdom and Germany,<sup>27</sup> but only in the former country is there a right to counsel during interrogation,<sup>28</sup> and advisement of this right may be delayed if officials decide that its exercise would lead to “interference” with obtaining evidence.<sup>29</sup>

In the past decade, the European Court of Human Rights has handed down a number of decisions to the effect that questioning in the absence of an attorney violates the Convention. But most of these cases involved vulnerable suspects (e.g., juveniles,

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<sup>24</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>25</sup> See Frase, *supra* note 8, at 216 (pre-2011 law).

<sup>26</sup> Feldman, *supra* note 6, at 167 (English law); Weigend, *supra* note 9, at 256, 258 (German law). But see Siebeck, *supra* note 20, at 699-700, n. 122 (indicating that in Germany the only disadvantage that can be mentioned at sentencing is the fact of a “stubborn denial” during interrogation).

<sup>27</sup> See Weigend, *supra* note 9, at 256 (German law); see also Feldman, *supra* note 6, at 168 (English law).

<sup>28</sup> In Germany, “[t]he majority view does not recognize a right of the suspect to have (even retained) counsel present *during* police interrogations.” See Weigend, *supra* note 9, at 258.

<sup>29</sup> Feldman, *supra* note 6, at 168.

alcoholics);<sup>30</sup> neither the European Court's decisions nor the European Union's initial proposals on the issue guaranteed counsel during interrogation.<sup>31</sup> Recent developments in France, however, indicate that the Court's decisions will be interpreted broadly, at least in that country. As of April 15, 2011, French suspects must be told of their right to silence *and* must be provided with a lawyer throughout interrogation.<sup>32</sup>

Furthermore, as in the search and seizure context, European rules place other types of constraints on the police that do not exist, at least on a uniform basis, in the United States. In the United Kingdom, cautions are required as soon as the individual becomes a suspect rather than, as they are in the United States, delayed until the person is put in custody.<sup>33</sup> Furthermore, England requires taping of all questioning in the stationhouse and places limitations on the duration and timing of interrogation,<sup>34</sup> rules that are not required by the U.S. Supreme Court and are found statewide in only a few American jurisdictions.<sup>35</sup> In both the United Kingdom and Germany, affirmative misrepresentations about the evidence are barred,<sup>36</sup> and in Germany attempts to obtain

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<sup>30</sup> See Annemarieke Bejier, *False Confessions During Police Investigations and Measures to Prevent Them*, 18 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 311, 332-36 (2010).

<sup>31</sup> *Id.* at 344.

<sup>32</sup> See Jackie Hodgson, *Storming the Bastille . . . Or at least the Police Station*, JACKIE HODGSON'S BLOG (May 2, 2011, 9:04 PM), <http://blogs.warwick.ac.uk/jackiehodgson/>. Initial reports indicate that 60% of suspects are requesting lawyers and that French courts are excluding confessions obtained from suspects whose requests are not honored. *Id.*; see generally Jacqueline Hodgson, *Safeguarding Suspects' Rights in EU Criminal Justice: A Comparative Perspective*, NEW CRIMINAL L. REV. (forthcoming 2011).

<sup>33</sup> Feldman, *supra* note 6, at 167 (suspects must be given cautions when police "have reasonable grounds to suspect that the interviewee has committed an offence"). Furthermore, if a suspect asks for counsel, one is actually provided—unlike in the United States. However, two-thirds of English suspects waive the right to counsel and since counsel is not permitted to foreclose questioning, the right is less robust than in the United States. See Craig Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT'L LAW J. 289-90 (2009).

<sup>34</sup> Feldman, *supra* note 6, at 167.

<sup>35</sup> See Thomas P. Sullivan, *Electronic Recording of Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131-33 (2005) (describing U.S. practices regarding videotaping).

<sup>36</sup> Feldman, *supra* note 6, at 169 (describing English statutory provisions



statements through placing an informant in the suspect's cell are also impermissible.<sup>37</sup> In contrast to U.S. Supreme Court opinions that allow police to lie about the evidence in their possession,<sup>38</sup> the subject matter of the investigation,<sup>39</sup> and (at least prior to charging) the identity of the inquisitor.<sup>40</sup>

European countries are much more likely to exclude illegally obtained statements than evidence obtained through illegal searches and seizures.<sup>41</sup> However, unlike in the United States, in the United Kingdom suppression is not required for inadvertent or insubstantial violations of interrogation rules or if the breach did not affect the suspect's decision to confess.<sup>42</sup> In Germany and France, evidence found as a result of illegally obtained statements, such as weapons or contraband, is generally not excluded (a practice upheld by the European Court of Human Rights),<sup>43</sup> whereas such evidence is often suppressed in the United States as "fruit of the poisonous tree."<sup>44</sup>

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prohibiting "incentives to confess" and a case excluding a confession where evidence was misrepresented); John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIM. 325, 331 n.27 (1993) (suggesting that deceptive techniques are rare in Great Britain); Weigend, *supra* note 9, at 258 (In Germany, "[t]ricks and fraudulent tactics of the police to make a suspect talk are generally discouraged by the courts" although "withholding of available information" is acceptable.).

<sup>37</sup> Weigend, *supra* note 9, at 259 ("[P]lacing a detained suspect in a cell together with a police informer instructed to elicit incriminating information is unlawful 'coercion.'").

<sup>38</sup> See *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (admitting statements made by suspect who was told, falsely, that his co-defendant had confessed); see *Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (stating that police fabrication about finding the suspect's fingerprints at the scene of the crime "has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule").

<sup>39</sup> See *Colorado v. Spring*, 479 U.S. 564, 574-75 (1987) (admitting statement about a homicide by a suspect who was told by police he was going to be asked questions about a firearms crime).

<sup>40</sup> See *Illinois v. Perkins*, 496 U.S. 292 (1990) (holding that suspect in jail was not "in custody" when questioned by a cellmate, but leaving open the question of whether the deception violated "due process").

<sup>41</sup> Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001); see also *supra* note 32 and accompanying text.

<sup>42</sup> Feldman, *supra* note 6, at 171-72.

<sup>43</sup> *Gafgen v. Germany*, App. No. 22978/05, Eur. Ct. H.R. 51-53 (2008).

<sup>44</sup> Compare Weigend, *supra* note 9, at 261 ("evidence derived from unwarned or coerced statements has . . . been held admissible . . .") with *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (recognizing "fruit of the poisonous tree" doctrine).

### III. The Lessons of Empirical Research

The foregoing discussion identified a number of areas in which American and European police investigative rules diverge, six of which raise issues that have been the focus of empirical research in the United States, Europe, or both: (1) the protection provided by warrants; (2) reporting requirements for stops on the street; (3) the deterrent effect of exclusion in search and seizure cases; (4) the effect of pre-interrogation warnings and variations thereon; (5) the impact of deception during interrogation; and (6) the impact of a taping requirement for interrogations. That research is briefly discussed here.

#### A. Warrants

The assumption behind the warrant requirement is that judicial oversight will improve the probability that evidence will be discovered.<sup>45</sup> Research testing this proposition is thin. In my earlier work, I suggested that because the known suppression rate in cases involving warrants was similar to the suppression rate for all contested searches (12% to 14.6%), the added protection provided by warrants might not be substantial.<sup>46</sup> However, because it does not provide any information about *uncontested* searches, this comparison only tells us something about how often judges and police get it wrong, not how often they get it right.

A better test of the latter proposition would compare the success rate of searches with and without warrants. From the United States, we have studies on the success rates of warrant-based home searches; these range from 46% to 91%, with an average of over 70%.<sup>47</sup> But there are no data, from the United

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<sup>45</sup> See, e.g., *Johnson v. United States*, 333 U.S. 10, 14 (1948) (The warrant requirement ensures that inferences will “be drawn by a neutral and detached magistrate instead of . . . by the officer engaged in the often competitive enterprise of ferreting out crime.”).

<sup>46</sup> Slobogin, *supra* note 1, at 431.

<sup>47</sup> RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* 38 tbl.21 (Nat’l Ctr. for State Courts, 1985). This study actually reported a hit rate of 84 to 97%, but in all seven jurisdictions studied a certain number of returns were not provided for warrants that were issued; on the assumption that the lack of a return meant that no evidence was found, the resulting hit rates were 46% to 91%. In a study of San Diego narcotics search practices the hit rate was 65% for home warrants that were executed. Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 249-50

States or elsewhere, on the extent to which warrantless home searches produce evidence. The only empirical work that comes close to providing that information was conducted in the United States in connection with searches of cars. Under U.S. law, searches of cars generally do not require a warrant, but they still often must be based on probable cause.<sup>48</sup> Yet the available U.S. data indicate that the success rate for probable cause searches of cars ranges from 35% to 52%, much lower than the hit-rate range for warrant-based searches of homes.<sup>49</sup> Given this differential, it may well be that the extra effort associated with obtaining a warrant creates a greater incentive, perhaps a significantly greater incentive, for the police to be sure the search will produce evidence.<sup>50</sup>

Of course, even if warrant-based searches produce higher success rates, they may not be optimal if they stall a large number of legitimate investigations. The hassle connected with obtaining a warrant can be substantial, although the advent of telephonic warrants alleviates that burden somewhat.<sup>51</sup> To what extent does the extra step of seeking a warrant deter police from searching homes for which there is in fact probable cause, thus resulting in lost evidence and lost convictions? Might not an *ex post* sanction (like exclusion or damages) be a more efficient way of

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(2000). See also Michael A. Rebell, *The Undisclosed Informant and the Fourth Amendment: The Search for Meaningful Standards*, 81 YALE L.J. 703, 723 (1972) (reporting a hit rate for warrant-based homes searches of 64% and 70% in two different years in Connecticut).

<sup>48</sup> See *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>49</sup> See Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 700 tbl.14 (2002) (reporting that 52.5% of probable-cause searches of cars yielded drugs, although also reporting that only a little under 10% produced significant quantities of drugs); JOHN C. LAMBERTH, SAN ANTONIO RACIAL PROFILING DATA ANALYSIS STUDY, FINAL REPORT FOR THE SAN ANTONIO POLICE DEPARTMENT 48 tbl.8 (2003), available at [http://www.sanantonio.gov/SAPD/pdf/LamberthSanAntonioRpt\\_2003.pdf](http://www.sanantonio.gov/SAPD/pdf/LamberthSanAntonioRpt_2003.pdf) (showing hit rates for probable cause car searches of 34.9% for blacks and 40.1% for whites).

<sup>50</sup> See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 926 (1986); see also Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 926 (2009).

<sup>51</sup> One study found that telephonic warrants—issued by a magistrate over the phone—reduced the time needed to obtain authorization for a search from three to four hours to one and one-half hours (and usually produced more information than written affidavits in similar cases). VAN DUIZEND ET AL., *supra* note 47, at 85–87.

incentivizing police to develop sufficient justification for searches of the home? These questions are not answered by empirical work. Perhaps the best that can be said, based on the available research—in particular, research exploring electronic surveillance of organized crime and other serious offenses—is that if the government really wants particular evidence and the only way to obtain it legally is through a warrant process, it will devote the time and resources necessary to obtain one.<sup>52</sup>

### B. *Street Stops*

In the past decade a number of studies have investigated the hit rate of police stops and subsequent risks. During a two-year period in the late 1990s, a New York police Street Crimes Unit made 45,000 stops, 20% of which resulted in an arrest or criminal charges.<sup>53</sup> A second study of policing, after the city adopted “aggressive patrolling,” looked at more than 500,000 stops, 20% of which involved pat downs or more coercive action, but only 10% of which resulted in arrest, mostly for drug offenses.<sup>54</sup>

A hit rate of 10% is not particularly impressive, especially since it is based on police reports about their own actions and thus might under report the number of stops that take place (which will inflate the hit rate). Prosecutors might respond that police are only required to have reasonable suspicion for such stops, a quantum of suspicion well below the more likely than not standard implied by probable cause.<sup>55</sup> But other evidence suggests that, at least in high crime areas, a one-in-ten success rate is not much better than the crime detection rate that would be produced by simply stopping everyone, at least if the stops take place in “high crime” areas.<sup>56</sup>

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<sup>52</sup> See Max Minzner & Christopher M. Anderson, *Do Warrants Matter?*, CARDOZO L. SCH. LEGAL STUD. RES. PAPER SERIES 20–21 (Paper No. 212, 2007), available at <http://ssrn.com/abstract=1073142> (study of wiretap warrants indicating that law enforcement is willing to expend the most resources on investigations of serious crimes.).

<sup>53</sup> Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 50.

<sup>54</sup> GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES 39, 43 (2007).

<sup>55</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>56</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000) (4.7% of the cars stopped at a roadblock set up in a high crime area produced evidence of drug-related crime and another 4.2% of the cars contained evidence of non-drug related crime).

The conjecture that police officers conducting stops often follow a discriminatory selection policy is bolstered by a third study of 175,000 pedestrian stops by New York City police, which found that persons of African and Hispanic descent were stopped more frequently than whites, even after controlling for precinct variability and race specific estimates of crime participation.<sup>57</sup>

This latter finding is also important because it suggests that requiring police to report their stops doesn't keep them from targeting people of color. However, research in the United Kingdom indicates that a robust reporting requirement of the type instituted there—which, it will be recalled, involves not only filing the report but giving a copy to the target—might have a felicitous effect. Joel Miller's study of "disproportionality" found that once London, which accounts for 40% of all stops in the United Kingdom, is taken out of the analysis, stops of minority individuals went into a "much sharper and consistent decline" after the reforms were instituted, with only a small drop in arrest rates over the long-term.<sup>58</sup>

### C. Exclusion

The United States is the only country in the world that routinely excludes evidence obtained through an illegal search and

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<sup>57</sup> Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813-16 (2007). Another study, conducted in Richmond, Va., found that initial stops were based on variations in crime rate rather than race, but that subsequent searches disproportionately affected African-Americans. Matthew Petrocelli, Alexander Piquero & Michael R. Smith, *Conflict Theory and Racial Profiling: An Empirical Analysis of Police Traffic Stop Data*, 31 J. CRIM. JUST. 1, 8-9 (2003). Finally, an analysis of data on vehicle stops in Maryland concluded that although 63% of those stopped were African-American, the hit-rate associated with those stops was virtually identical to the hit rate for whites (34 to 32%), but three times that of the hit rate for Hispanics (11%). Nicola Persico & Petra E. Todd, *The Hit Rate Test for Racial Bias in Motor Vehicle Searches*, 25 JUST. Q. 37, 48-49 (2008).

<sup>58</sup> Joel Miller, *Stop and Search in England: A Reformed Tactic or Business as Usual?*, 50 BRIT. J. OF CRIMINOLOGY 954, 964-65 (2010) (reporting arrest rates of 11-14% pre-reform and 11-12% post-reform). At the same time, Miller found that disproportionality increased in London and two other major metropolitan areas after the reforms. Miller speculated that this increase was due to enhanced counter-terrorism efforts in these areas or greater resistance on the part of large urban police forces to efforts at changing well-engrained practices. *Id.* at 969-70.

seizure.<sup>59</sup> One rationale for doing so—the primary one according to today’s Supreme Court—is that exclusion deters bad faith violations by the police.<sup>60</sup> There is no doubt that exclusion creates some disincentive to engage in illegal actions. The important empirical question is whether alternative sanctions come closer to achieving an optimal balance between deterring police misconduct and effective law enforcement.

Thomas Davies’ 1974 review of research in the United States on this topic, looking at studies examining police behavior before and after the exclusionary rule was adopted nationwide in 1961, concluded that because of methodological difficulties “there is virtually no likelihood” that “relevant statistics” regarding the effectiveness of the rule will be forthcoming from that source.<sup>61</sup> But interviews with police operating under the exclusionary rule indicate that many of them routinely conduct searches or seizures they know or suspect are unconstitutional,<sup>62</sup> and tests examining knowledge among American police of search and seizure law, which one would hope the rule would enhance, indicate that as a group they do no better than chance in answering questions about Fourth Amendment doctrine.<sup>63</sup> Thus, I concluded ten years ago that the rule may not be particularly good at deterring police misconduct.<sup>64</sup>

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<sup>59</sup> See, e.g., *United States v. Calandra*, 414 U.S. 338, 347 (1973).

<sup>60</sup> *Id.* (“the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures”).

<sup>61</sup> Thomas Y. Davies, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740, 763-64 (1977).

<sup>62</sup> Ronald L. Akers & Lonan Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENT. RES. BULL. 1 (1986) (Interviews of police in two mid-size jurisdictions indicating that 19% conducted searches of “questionable” constitutionality at least once a month and 4% said they conducted searches they “knew” to be unconstitutional once a month.).

<sup>63</sup> See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J. L. REFORM 311, 332-33 (1991); see also Eugene Michael Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer’s Perspective*, 10 PAC. L.J. 33, 47 (1979); Timothy Perrin et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 727 (1999).

<sup>64</sup> See Slobogin, *supra* note 1, at 432-35.

Relying on the hit rate research described in the preceding two sections, Don Dripps has come to similar conclusions, at least outside the home search scenario. In the latter situation, he suggests that, given the above reported hit rates—well above the 50% level that probable cause would seem to imply—the combination of the rule and the warrant requirement either over deters or amounts to optimal deterrence, given the special sanctity associated with the home.<sup>65</sup> However, he also argued that the hit rates in other areas of police investigation, particularly in connection with police stops (where the hit rate should arguably be well above 10%) but also with respect to searches of cars (where the hit rate should be close to 50%), suggest that the rule is to some degree an under deterrent.<sup>66</sup>

More importantly, this analysis doesn't tell us whether we might come closer to optimal deterrence through some other sort of mechanism. Perhaps administrative sanctions of the type purportedly imposed in Germany or reporting requirements of the type now required in the United Kingdom would produce hit rates even more congruent with search and seizure requirements.<sup>67</sup> Another option worth exploring would be a damages regime that requires officers to pay for bad faith illegalities (thus maximizing individual deterrence) and departments to pay for good faith violations (thus maximizing training incentives).<sup>68</sup>

These alternatives would also have to be investigated in terms of their impact on crime control. Early studies show that the exclusionary rule results in a lost conviction rate of between 1.5% and 7% depending on the type of crime,<sup>69</sup> and econometric research conducted since 2000 suggests that the rule increases the crime rate significantly.<sup>70</sup> An oft-made retort to these types of

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<sup>65</sup> Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L. J. 743, 770 (2009).

<sup>66</sup> *Id.* at 777 (street stops); *id.* at 773 (car searches).

<sup>67</sup> See Miller, *supra* note 58.

<sup>68</sup> See generally Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 ILL. L. REV. 363, 368-84 (discussing behavioral theory and its effects on the exclusionary rule).

<sup>69</sup> See *Leon v. United States*, 468 U.S. 897, 907 n.6 (1984) (summary of data).

<sup>70</sup> See Raymond A. Atkins & Paul Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J. L. & ECON. 157,

reports is that any other deterrent—say the damages regime described above—that is equal in effectiveness to the rule would lose as many convictions because the police would not undertake the search in the first instance.<sup>71</sup> In contrast to administrative or civil remedies, however, the rule conspicuously advertises lost convictions, either by letting a known criminal go free or by forcing the legal system to go through a charade trial conducted by lawyers and presided over by a judge who must keep the jury ignorant of the illegally obtained evidence.<sup>72</sup>

There are other costs to the rule as well. The dominance of the rule in the United States means that most search and seizures claims are made by guilty people.<sup>73</sup> Judges naturally resist expansive search and seizure protections when they know dismissal of charges is the likely result.<sup>74</sup> The rule's dominance has probably also led to the atrophy of alternative remedies, meaning that innocent people have little recourse despite the fact that, as we know from the hit rate data, well over half of those who are subject to searches and seizures outside the home are clean at the time of the search.<sup>75</sup> Better information about whether other remedies for illegal searches and seizures are in fact “futile,” as the Supreme Court has asserted,<sup>76</sup> would be very useful.

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173 (2003) (Following *Mapp*, “crime rates rose sharply as compared with the crime rates of cities that had already excluded unlawfully obtained evidence, an effect that continued to increase over time.”).

<sup>71</sup> Yale Kamisar, ‘Comparative Reprehensibility’ and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 47 n.211 (1987) (citing John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974)).

<sup>72</sup> See Slobogin, *supra* note 68, at 436–37.

<sup>73</sup> See *id.* at 403.

<sup>74</sup> See *id.* at 400–05 (noting that the rule associates the Fourth Amendment with criminals and discussing how the representativeness and availability heuristics probably skew judicial decision-making in this area).

<sup>75</sup> See *id.* at 385–86 (marshaling evidence that civil suits “are few and far between” and “seldom completely successful”); cf. Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: AN INT’L J. OF POLICE STRATEGIES AND MGMT. 352, 363 (2003) (study of police attitudes in Cincinnati concluding that “officer-initiated aggressive behaviors . . . do not seem to be deterred to any substantial extent by concerns about civil liability.”).

<sup>76</sup> *Mapp v. Ohio*, 367 U.S. 643, 652 (1961).



#### D. Interrogation Warnings

In my earlier work, I described research indicating that a large percentage of the American population knew about the *Miranda* warnings, that police conducted fewer interrogations post-*Miranda*, and that the confession rate dropped between 4% to 9% after *Miranda*, all of which suggests that the warnings alleviate interrogation coerciveness by making clear silence is an option.<sup>77</sup> However, research conducted both before and after that article was published also indicates that upwards of 80%, and perhaps as many as 96%, of all U.S. suspects waive their rights and that 45% to 65% of interrogated suspects still make incriminating statements.<sup>78</sup> Apparently, few of those subjected to interrogation choose to remain silent, even though that is likely the most prudent course, at least until one has conferred with an attorney.

When the suspect is young or mentally disabled, this outcome is perhaps not surprising. For instance, one relatively recent study confirmed that people with mental retardation “simply do not understand their *Miranda* rights,” and that even those with IQs up to about eighty-five have real difficulty doing so.<sup>79</sup> Similarly, several studies have concluded that most juveniles under fourteen and many from fourteen to eighteen lack the linguistic skills necessary to comprehend and respond to the warnings.<sup>80</sup>

What is more surprising is research testing the ability of non-disabled adults to understand the warnings. In one recent survey of adult defendants and college students in the United States, 30% believed that silence could be used as evidence, 25.9% believed

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<sup>77</sup> Slobogin, *supra* note 1, at 447-48.

<sup>78</sup> George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: Embedded in Our National Culture?*, 29 CRIME & JUST. 203, 237, 247 (2002).

<sup>79</sup> Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 536, 590 (2002) (“The empirical research conducted in this study shows that contrary to *Miranda*’s core assumption, retarded people simply do not understand their *Miranda* rights. . . . The results of our study suggest that people who are not classified as retarded, but who have low IQs, also may not understand the warnings.”).

<sup>80</sup> See Alison D. Redlich & Saul D. Kassin, *Police Interrogation and False Confessions: The Inherent Risk of Youth*, 34 PSYCHOL. SCI. & THE LAW. 275, 283 (Bette L. Bottoms et al. eds., 2009) (describing research from Grisso, Peterson-Badali & Koegl, and from Redlich et al. to the effect “that juveniles aged 14 years and younger do not possess an adequate understanding and appreciation of their *Miranda* rights to the same degree as older teens and adults.”).

that a waiver must be signed to be valid, 52% thought that “off the record” comments were inadmissible, 12.8% believed that statements could be retracted, and 30.2% believed that once counsel is requested questioning could continue until counsel arrived.<sup>81</sup> These misunderstandings did not correlate with intelligence or experience.<sup>82</sup> In particular “years of ‘attained’ education had virtually no relationship to *Miranda* knowledge.”<sup>83</sup>

These findings help explain why confession rates have remained fairly steady despite *Miranda*. But however poorly understood, perhaps the warnings are better than nothing in terms of providing suspects with some defense against inquisitive police. Empirical data from the United Kingdom is informative on this issue. In that country the confession rate prior to 1986, when no cautions were required, ranged between 65% and 75%, figures that are higher—on average, 20% higher—than the post-*Miranda* confession rate.<sup>84</sup> From 1986 to 1994, when cautions were required and adverse inferences could *not* be drawn—the British regime that comes closest to mimicking *Miranda*—the confession rate went down to between 40% and 50%, a number comparable to the lower end of the post-*Miranda* confession rates reported in the United States.<sup>85</sup> After 1994, when cautions were given but the adverse consequences admonition was added, the confession rates went back up to between 55% and 58%.<sup>86</sup>

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<sup>81</sup> Richard Rogers, Jill E. Rogstad & Nathan D. Gillard, “*Everyone Knows Their Miranda Rights*”: *Implicit Assumptions and Countervailing Evidence*, 16 *PSYCHOL. PUB. POL’Y & L.* 300, 307-11 (2010).

<sup>82</sup> *Id.* at 312-13 (“[The] most salient finding is that years of “attained” education had virtually no relationship to *Miranda* knowledge.”).

<sup>83</sup> *Id.* at 312.

<sup>84</sup> Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 *HASTINGS L.J.* 1, 126-29 (1986).

<sup>85</sup> GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS: CONFESSIONS AND TESTIMONY* 324 (1992); John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 *BRIT. J. CRIMINOLOGY* 325, 335 (1993) (examining confession rates between 1989-90).

<sup>86</sup> See TOM BUCKLE ET AL., *THE RIGHT OF SILENCE: THE IMPACT OF THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT OF 1994*, at 30-35 (Home Office Research Study 2000) (55%); see also Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 *W. VA. L. REV.* 799, 829 n.129 (1998) (58%). But see Ian Bryan, *Shifting Images: Police-Suspect Encounters During Custodial Interrogations*, 17 *LEGAL STUD.* 215, 231-32 (1997) (comparing 400 pre-1994 interrogations with 248 post-

These rates must be taken with a grain of salt, since different researchers might well define the outcome measure (“confession”) differently.<sup>87</sup> Furthermore, even a denial of crime can provide incriminating information if it conflicts with well-established evidence, places the suspect at the scene of the crime, or in some other way facilitates the state’s case. Nonetheless, taking the data at face value, the right-to-silence warnings do seem to have a non-trivial, albeit relatively small impact on confession rates. At the same time, the confession rate under *Miranda* (45% to 65%) may not be appreciably different than the confession rate under the current English approach (55% to 58%), which adds the adverse consequences warning.<sup>88</sup> That finding might mean that the adverse warning has no significant effect on confessions. Or it could be explained by differences between European and American interrogation techniques, which is discussed next.

#### *E. Deception and Trickery During Interrogation*

Virtually all U.S. interrogation manuals advocate the use of minimization and maximization techniques during questioning, at least once police believe they have probable cause.<sup>89</sup> The minimization technique is designed to lull suspects into a false sense of security by blaming the victim, downplaying the seriousness of the crime, or suggesting face-saving excuses and sympathy.<sup>90</sup> The maximization technique involves exaggerating

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1994 interrogations in the U.K., and finding confession rates of 88.1% and 87%, respectively, indicating that adverse warnings did not raise confession rates.)

<sup>87</sup> See BUCKLEY ET AL., *supra* note 86 and accompanying text (citing different confession rates from different studies). For instance, a bad alibi or a statement placing the suspect at the scene of the crime can provide incriminating information to the police.

<sup>88</sup> Even the Bryan study, which reported significantly higher confession rates, found no difference between confession rates in a *Miranda*-type regime and in an adverse caution-type regime. See Bryan, *supra* note 86.

<sup>89</sup> Fadia M. Narchet et al., *A Quantitative Analysis of Classical and Modern Day Police Interrogation Manuals* (2004) (presented at the American Society of Criminology Conference in Nashville, TN) (reporting survey of thirteen interrogation manuals indicating: 100% of the manuals advocated some type of minimization technique; 80% suggested that police interviewers blame the victim; 92% suggested that the police offer face-saving excuses to the suspect; 92% were found to recommend maximization techniques; and 77% suggested the use of false evidence.)

<sup>90</sup> Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 27-28 (2010).

the seriousness of the offense and making false claims about the available evidence.<sup>91</sup> These interrogation tactics appear to be widely used in the United States, at least when the suspect does not confess within a short period of time.<sup>92</sup>

Over the past couple of decades police in the United Kingdom and some other European countries have been moving away from these types of techniques.<sup>93</sup> Instead, many police are said to engage in “investigative interviewing,” which eschews deception.<sup>94</sup> Suspects are asked open-ended questions and then confronted with non-manufactured evidence if their statements are inconsistent with that evidence.<sup>95</sup>

A key question is the relative efficacy of these techniques in producing true positives (confessions from guilty people) and avoiding false negatives (erroneous confessions). The one field study on this topic involved two Australian samples subjected to either investigative or accusatorial techniques; full confessions were obtained at about an equal clip in both samples (22% to 24%, respectively) whereas partial admissions were much more commonly produced by the officers who used accusatorial techniques (16% to 50%).<sup>96</sup> Assuming all or almost all of these people were guilty of their charges, this preliminary study suggests that “American-style” questioning is somewhat more efficacious at obtaining true positives without a significant increase in false negatives.<sup>97</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 11-12.

<sup>93</sup> *Id.* at 73 (citing a recent transition from classic interrogations to investigative interviewing).

<sup>94</sup> *Id.* at 14.

<sup>95</sup> Andy Griffiths & Becky Milne, *Will It All End in Tiers? Police Interviews with Suspects in Britain*, in 31 INVESTIGATIVE INTERVIEWING, RTS., RES. & REG. 167, 170-74 (2009) (describing British efforts starting in the mid-1990s “to train every officer in England and Wales of inspector rank and below” in investigative interviewing, which permits challenging with actual evidence, but prohibits “judgemental or inappropriate” conduct “even where it seems obvious that the suspect is lying.”).

<sup>96</sup> David Dixon, *Interrogating Myths: A Comparative Study of Practices, Research, and Regulation*, available at <http://ssrn.com/abstract=1689358>.

<sup>97</sup> However, a meta-analysis of laboratory studies concluded that “accusatorial” methods yield an increase in both true and false confessions. Christian A. Meissner et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions*, Final Report, May, 2011, at 20 (on file with author).

More data about false negatives comes from the sizeable number of people in the United States whom DNA-testing has shown confessed to crimes they did not commit.<sup>98</sup> Although researchers have failed to produce a viable false confession rate, they have been able to pinpoint several risk factors for false confessions, which include youth, intellectual and memory impairment, drunkenness, certain psychiatric disorders, sleep deprivation, and interrogation lasting more than six hours.<sup>99</sup> Less clear from this research is whether minimization and maximization techniques used on a *non-vulnerable* suspect during an interrogation that is *not* prolonged produce false confessions.

The best laboratory study designed to answer this question found that 14% of the innocent participants subject to maximization techniques and 18% of the innocent participants subject to minimization tactics confessed.<sup>100</sup> But 6% of the innocent subjects who were *not* exposed to these tactics also confessed, suggesting that the costs of confessing in this study were not particularly high (which is not surprising given the ethical constraints on creating a situation analogous to the criminal interrogation setting).<sup>101</sup> Furthermore, the maximization technique increased true positives by 30% and the minimization technique increased true positives by 35%, which indicates that these ploys might well increase interrogation efficacy.<sup>102</sup>

In short, research suggests that particularly vulnerable populations, as well as individuals subjected to prolonged or harsh interrogation conditions, are at significantly increased risk of confessing falsely.<sup>103</sup> But the use of deception per se is not as clearly a risk factor for false positives.<sup>104</sup> Of course, there may be

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<sup>98</sup> See Kassin et al., *supra* note 90, at 3, 43.

<sup>99</sup> *Id.* at 19-22.

<sup>100</sup> Melissa B. Russano et al., *Investigating True and False Confessions with a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481-84 (2006).

<sup>101</sup> *Id.* at 483-84; cf. Robert Horselenberg et al., *False Confessions in the Lab: Do Plausibility and Consequences Matter?*, 12 PSYCHOL. CRIME & L. 61, 71-73 (2006) (finding that increasing the potential consequences of a confession in simulation research dramatically reduced the rate of false confessions).

<sup>102</sup> See Russano et al., *supra* note 100, at 484 tbl.1.

<sup>103</sup> See generally Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH. L. REV. 1275, 1291-92 (2007).

<sup>104</sup> See *id.*

normative reasons for prohibiting trickery during interrogations, and certain types of trickery may also become coercive.<sup>105</sup> But these types of concerns are not easily amenable to empirical investigation.

#### *F. Recording Interrogations*

The United Kingdom and many local jurisdictions in the United States require taping of all or part of the interrogation.<sup>106</sup> It is said that taping will not only expose police improprieties, but also prevent suspects from lying about the interview.<sup>107</sup> A further possible benefit of taping is that judges who view tapes and read transcripts will be better acquainted with the reality of interrogation, so that judicial decisions defining when confessions are voluntary will be more precise and meaningful.<sup>108</sup>

Most relevant here is the effect of taping on confession rates. I reported in my earlier work that empirical evidence from the United Kingdom indicates that taping has not reduced the confession rate and that almost 60% of American jurisdictions that use taping report an increased amount of incriminating information from suspects, probably because a better record of those statements exists.<sup>109</sup> No direct comparison of interrogations on- and off-camera has been conducted since that time.

However, a fair amount of recent research has investigated the best method of implementing a taping requirement. Studies carried out by Daniel Lassiter and his colleagues indicate that fact finders are much more likely to find a confession “voluntary” when the camera focuses solely on the suspect, as opposed to the suspect and the questioner.<sup>110</sup> Apparently, in the absence of information about the inquisitor’s demeanor and the interaction between that person and the suspect, confessions tend to be taken

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<sup>105</sup> See generally *id.*

<sup>106</sup> See *supra* text accompanying notes 34-35.

<sup>107</sup> William A. Geller, *Videotaping and Confessions*, in *THE MIRANDA DEBATE, LAW, JUSTICE & POLICING* 303, 307-09 (Richard A. Leo & George C. Thomas III eds., 1998).

<sup>108</sup> Christopher Slobogin, *Toward Taping*, 1 *OHIO ST. J. CRIM. L.* 309, 315-16 (2003) (noting that civil litigants insist on transcripts in analogous contexts).

<sup>109</sup> Slobogin, *supra* note 1, at 450-51.

<sup>110</sup> See G. Daniel Lassiter & Michael J. Lindberg, *Video Recording Custodial Interrogations: Implications of Psychological Science for Policy and Practice*, 38 *J. PSYCHIATRY & L.* 177, 184-85 (2010).

at face value.<sup>111</sup> Again, this research tells us very little about true and false positives, but it does suggest that relying solely on transcripts or notes makes analysis of interrogations very difficult.

#### IV. Where to Go From Here

Policymakers both here and abroad could benefit from solid empirical information about the efficacy of various approaches to regulating police investigations. To date, such information is scanty (the Appendix to this article summarizes what little is known and what could be discovered about the efficacy of searches, seizures, and interrogations). Here I propose several comparative studies that might rectify that situation. The advantage of comparative research is that it can provide a naturalistic evaluation of several different types of regulatory regimes that would be impossible or difficult to reproduce domestically given the uniformity of rules between jurisdictions.

Of course, any such comparisons must be accompanied by the major caveat that data about just one aspect of a system, such as how it carries out searches or conducts interrogations, may provide a misleading picture of how the entire system works. Conclusions based solely on evaluation of success rates associated with searches or interrogations could well mask the effect of other parts of the regulatory regime and police and judicial attitudes, and could vary significantly if variables such as crime rates or the types of crimes investigated cannot be held constant.<sup>112</sup> But regression analysis might be able to factor out at least some of these confounds. In any event, this type of comparative information would be a start toward understanding how well various combinations of rules governing police investigatory practices work.

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<sup>111</sup> See *id.*

<sup>112</sup> It is often said, for instance, that European police are more “professional” than American police, and thus can be trusted to obey the rules to a greater extent. John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549, 1555-56, 1563-69 (1978). A second difference, relevant to the interrogation setting, is that the right to silence at trial is severely circumscribed in Europe, thus perhaps creating additional incentives to talk to police. See, e.g., Frase, *supra* note 8, at 228. Empirical research can also test these propositions.

*A. Studies Relevant to Regulation of Searches & Seizures*

The foregoing discussion raises at least three distinct issues in connection with searches and seizures. The first is which combination of warrant and remedy rules produces an optimal regulatory approach toward searches of homes, the domain that, in any country, is entitled to the most protection. The hit rate data from the United States suggest that a relatively robust warrant requirement together with the exclusionary rule over-deters police, if we assume probable cause is the correct standard and that this standard should produce a 50% to 70% hit rate.<sup>113</sup> Thus, it would be very useful to obtain hit rate information for non-consensual house searches in the United Kingdom, Germany, and France, countries that are much less likely to require a warrant and rarely require exclusion. It would also be useful to obtain such data from Italy, a country that has a relatively stringent warrant requirement similar to the warrant rule in the United States, but that, like its northern neighbors, rarely excludes illegally seized evidence.<sup>114</sup>

The second issue raised by the foregoing discussion relates to stops and searches in the streets. All countries permit stops on some version of reasonable suspicion, and most allow further searches upon development of additional suspicion.<sup>115</sup> The potential for these types of actions to disrupt the lives of innocent people, particularly those of color, is high, but at the same time apparently every country believes they are necessary as a crime prevention technique. Considering these competing values, a hit rate of 10%, which may be typical for American police stops, might be too low, while a hit rate of 50% for stops and any subsequent frisks or searches—approaching what might be required for searches of homes—might require too much of the

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<sup>113</sup> When asked to quantify the level of certainty represented by the phrases “probable cause,” and “reasonable suspicion, 166 federal judges gave, as an average response, 45.78% and 31.34%, respectively. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327-28 (1982).

<sup>114</sup> Rachel A. Van Cleave, *Italy*, in CRIMINAL PROCEDURE 303, 315 (explaining that warrants are required for searches of residences except in “urgent situations”); *id.* at 321 (exclusionary provision “has little to no effect on the use of evidence obtained pursuant to an illegal search”).

<sup>115</sup> See generally Feldman, *supra* note 6 (describing various nations’ approaches to searches and seizures).



police for these relatively less intrusive actions. A procedure that produced a hit rate of 20% to 30% for stops and 40% to 50% for subsequent searches, while avoiding disproportionate impact on people of color, might be optimal.<sup>116</sup> More elaborate information about both hit rates and racial impacts associated with reporting requirements such as those implemented in the United Kingdom and the identity detentions used in France would be of great value in figuring out the optimal rules in this setting.

A third search and seizure issue that might be studied comparatively is the effect of different consent rules. The United Kingdom requires that before premises can be searched pursuant to consent homeowners must be informed of their right to refuse consent, and any consent given must be in writing.<sup>117</sup> France also requires that consents to home searches be in writing.<sup>118</sup> Of interest in determining the impact of these varying rules would be the consent rate and the hit rates of consent searches in the United Kingdom and France in comparison to the same rates in U.S. jurisdictions, where consent need not be in writing and those asked for consent need not be told of their right to refuse it.

Of course, use of hit rates only measures one aspect of investigative success. In social science terms, it provides a measurement of "Type I" error, or the extent to which a prediction that evidence will be found is erroneous. Type II error, or the extent to which a given regulatory regime discourages searches that would have resulted in discovery of evidence, is also important to measure.<sup>119</sup> Perhaps data could be collected from police on the number of searches they declined to carry out because of warrant, reporting, or consent requirements. Or perhaps some type of comparison can be made in terms of the number of house searches and stops that are made in countries with different regulatory regimes, holding crime rates and other pertinent variables constant. In reality, however, the false negative rate in the search setting probably cannot be measured even

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<sup>116</sup> See McCauliff *supra* note 113, at 1327-28 (quantifying reasonable suspicion).

<sup>117</sup> See *supra* text accompany notes 6-7.

<sup>118</sup> See *id.*

<sup>119</sup> Type I error is associated with "false positives" (an erroneous prediction that a search will produce evidence) and Type II error with "false negatives" (an erroneous prediction that a search will not produce evidence).

speculatively. Nonetheless, Type I error rates alone can be helpful. If they are the same across regulatory regimes, one could conclude that warrants and written consent are not crucial to protecting individual interests. If, on the other hand, regimes with such requirements have higher hit rates, we could tentatively conclude they do provide some protection, while remaining unclear as to the crime control cost of this protection.

### *B. Studies Relevant to Regulation of Interrogation*

Every country described in this article wants to avoid coerced confessions and, to that end, all require that suspects be told of their right to remain silent.<sup>120</sup> All of these nations also want to provide counsel to those subject to interrogation, albeit at different stages of the process and with varying understandings as to counsel's role.<sup>121</sup> At the same time, confessions are a staple of criminal prosecutions in every one of these countries.<sup>122</sup> As with search and seizure rules, country-by-country variations in interrogation rules provide a rich sampling of different approaches to regulation of interrogation that would aid policy makers in figuring out the most effective way to achieve these competing goals.

Particularly useful would be collection of confession and clearance rate information for each country, holding constant as many non-regulatory factors as possible.<sup>123</sup> Such data would allow efficacy comparisons of the relatively stringent warnings and exclusion regime found in the United States with other regimes, like that found in the United Kingdom, that require earlier-stage warnings, a caution about the adverse use of silence and a relatively stringent exclusionary remedy, and with regimes that, like Germany, adopt the first two facets of the U.K. system but a

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<sup>120</sup> See *supra* Part II-B.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> In the United States, scholars have attempted to obtain confession and clearance rate information prior to and after *Miranda*, but numerous problems, including record and definitional difficulties that a modern comparative project could avoid, made empirical assessment extremely difficult. See Stephen Schulhofer, *Miranda's Practical Effects: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506-07 (1996); see also Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1, 11-18 (2000).

much more relaxed approach to exclusion.<sup>124</sup> These regimes could be compared to pre-2011 France, which provided neither a warning about the right to silence nor easy access to an attorney, and which rarely excluded confessions.<sup>125</sup> If the confession rates are similar across regimes, the assertion by some that warnings are misunderstood, undercut, or worked around would tend to be supported.<sup>126</sup> If confession rates are relatively lower in all warnings regimes, the U.K. and U.S. regimes, or the U.S. regime alone, but clearance rates are similar across all regimes, then assertions that warnings and exclusion harm law enforcement might need to be rethought.

Of course, a significant difference in confession rates between two types of regimes would not directly test the ultimate question of whether a particular regulatory approach is better or worse at avoiding coerced confessions. It would also say little about the effect of the “trickery” which plays a greater role in American jurisdictions. Given the difficulty of defining and testing for coercion, a more indirect empirical approach to these topics might be advisable. Specifically, researchers could compare the confession and clearance rates of interrogators using American-style questioning with those relying on “investigative interviewing,” both taped and untaped. If confession rates are the same under both styles of questioning, then the argument for abandoning maximization and minimization techniques would be stronger. If the confession rate for taped and untaped interrogations using the same interrogation technique is similar, then the argument for taping is stronger, given the usefulness of taping—at least dual-party taping—for analyzing voluntariness issues.

While these studies looking at the impact of questioning style and taping could, in theory, be carried out domestically, the already-existing differences between the United Kingdom, Australia, and the United States in these areas makes comparative

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<sup>124</sup> See Kassin et al., *supra* note 90, at 76-77.

<sup>125</sup> See *supra* text accompanying notes 24-44.

<sup>126</sup> George Thomas & Richard A. Leo, *The Effects of Miranda: “Embedded” in Our National Culture?*, 29 CRIME & JUST. 203, 256 (2002) (“In short, the empirical evidence to date, though highly imperfect, suggests that as a safeguard, *Miranda* offers few tangible benefits to suspects.”).

empiricism an attractive option. Australia would need to be added into the mix because, like the United Kingdom, it is moving toward investigative interviewing but, in contrast to the United Kingdom and like the United States, it does not allow questioning of suspects after they have indicated a desire to remain silent, nor does it permit an adverse consequences caution.<sup>127</sup> Confession and clearance rates from these three regimes would significantly improve our understanding of these varying approaches.

Note that, in contrast to the search context, here Type II error (the extent to which heightened legal restrictions prevent confessions or convictions) is easier to measure. Although we often will not know for sure who is guilty among those who resist confessing (and thus can't calculate the overall crime control cost of a given regulatory approach), we can get a next-best comparison of crime-solving success rates if we assume, as I think we can, that virtually all of those who confess are guilty. However, the latter fact means that measuring Type I error—the extent to which a regime produces false confessions—will be almost impossible; the small number of false confessions, combined with the difficulty of figuring out when a confession is in fact false, virtually assures failure.<sup>128</sup> If the goal is to obtain information about potential false positive rates, laboratory studies may be the only feasible approach.<sup>129</sup>

## V. Conclusion

Comparative empirical studies can provide useful insights into the effectiveness of different approaches to regulating police investigating techniques. In contrast to those working in domestic settings, researchers engaging in comparative work do not have to manufacture laboratory scenarios, manipulate rules, or worry about violating domestic law. Of course, there are other, significant methodological challenges in carrying out comparative

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<sup>127</sup> See *McKinney v. The Queen*, 171 C.L.R. 468 (1991); see also Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 532-42 (1998).

<sup>128</sup> Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 958 (2008) ("Our main message is gloomy. We do not know much about false convictions, and it will be difficult to learn more.").

<sup>129</sup> See, generally Russano et al., *supra* note 100.

empiricism, given the ubiquity of third variables, including the interaction of investigatory regulations with other criminal procedure rules and the influence of cultural norms. But as globalization homogenizes the world's legal systems, these types of studies can provide an increasingly meaningful method of informing debates about the best way to allow police to enforce the law without trenching unduly on citizens' liberty interests.

## APPENDIX

**Comparative Empiricism re Search & Seizure and Interrogation  
(Using search hit-rates and interrogation confession-rates)**

Law*	Country	United States	United Kingdom	Germany	France	Australia	Italy
Home search (non-consensual)	Warrants ↑	50-70					
	Exclusion ↑						
	Warrants ↓						
	Exclusion ↓						
	Warrants ↔						
Stops	Record to target + dep't		Post-2003 11-12				
	Record to dep't only			I.D. checks			
	No record	10-20	Pre-2003 11-14		I.D. checks		
Home search (consensual)	Warning + signature						
	Warning only						
	No warning						?
Interrogation (warning re silence)	No Adv. Use ↑		1986-94 (Taping) 40-50			(Taping) 22/16*	
	Exclusion ↑					(Taping) 24/50*	
	No Adv. Use ↓	Post-1966 45-65					
	No Trickery ↓						
Interrogation (no warning)	No Adv. Use ↓		Post-1994 (Taping) 55-58				
	Exclusion ↑						
	No Adv. Use ↓						
	Exclusion ↓	Pre-1966 55-65	Pre-1986 65-75		Pre-2011		

† Indicates higher or lower degree of protection

? Law unknown

\* Full confession/partial admission rates

# For description of Australian search and seizure law see Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Law Systems Uncommonly at Odds*, 12 *J. Int'l & Comp. L.* 27, 37-55 (2004). For all other law, see *supra* text accompanying notes 4-44.