

Lessons From Down Under: A Dialogue on Police Search and Seizure in New Zealand and the United States

Scott Optican*

The Cast

Professor “Yankee”: a distinguished professor of criminal law and procedure visiting New Zealand from a prestigious American law school.

Professor “Kiwi”: a (more or less) distinguished professor of criminal procedure and evidence teaching at the Faculty of Law, The University of Auckland, New Zealand.

The Back Story

Professor Kiwi has invited Professor Yankee to visit at the University of Auckland Faculty of Law in New Zealand. Harboring a secret ambition to tour the filming locations for “The Lord of the Rings” movie trilogy, Professor Yankee readily accepts. The two academics agree to teach a Masters (LL.M.) short course in comparative criminal procedure, focusing on the control of police investigations under the Bills of Rights of New Zealand and the United States.

* Senior Lecturer, Faculty of Law, The University of Auckland, New Zealand. Any resemblance of the characters in this dialogue to persons living or dead is only somewhat coincidental. In fact, the author wishes to thank the Faculty co-Managing Editor of the *Ohio State Journal of Criminal Law*, Professor Joshua Dressler (Frank R. Strong Chair in Law, Michael E. Moritz College of Law, The Ohio State University), for coming to New Zealand in June 2004 and co-teaching an intensive, one-week Masters (LL.M.) course with him on comparative United States/New Zealand criminal procedure. It was a wonderful experience and this dialogue grows out of our personal and class discussions. In reality, I am an American graduate of Harvard Law School (Class of 1998) and teach evidence, criminal procedure, and comparative Bill of Rights law at the Faculty of Law, The University of Auckland, New Zealand. This article is an edited version of talks given in January and February 2005 at The University of Western Ontario Faculty of Law, Canada; The Institute of Bill of Rights Law at The College of William and Mary Marshall-Wythe School of Law; and The University of Kansas School of Law. I am grateful to the students and faculty of these institutions for their helpful feedback and comments. I am doubly grateful to Joshua for publishing (and offering suggestions on) this somewhat unusual law review piece. However, if the reader finds any errors, or disagrees with anything said in this dialogue, you should blame him. After all, it's his journal.

After a particularly succulent dinner of roast lamb—easy to come by in a country populated by 60,000,000 sheep—and an excellent local Cabernet Merlot, Professors Yankee and Kiwi drive the Auckland waterfront in search of a Starbucks. Professor Kiwi has paid for dinner and drinks, and Professor Yankee has graciously offered to spring for two coffees.

The Scene

Late evening. Professor Kiwi's affordable Japanese import headed down Tamaki Drive, a beautiful beachside thoroughfare in Auckland, New Zealand.

The Dialogue

Professor Kiwi: Yankee, it's great to have you here. But don't you think we should start figuring out what to say in our comparative "crim. pro." class? After all, it starts tomorrow morning.

Professor Yankee: Nah, let's just wing it. That's what we do in America . . .

(Suddenly, flashing blue and red lights appear directly behind Professor Kiwi's vehicle and interrupt the discussion between the two legal academics.)

Professor Kiwi: Uh, oh . . . better pull over.

Professor Yankee (quizzically): What's going on? You weren't speeding.

Professor Kiwi: No. It's nothing like that. The police are getting pretty tough on drunk drivers cruising the waterfront. It's probably just for a random breath-alcohol screening test [breathalyzer].

Professor Yankee (surprised): A what . . . ?

(Professor Kiwi pulls over to the side of the road as a marked police car from the Auckland Central District rolls to a stop behind them. Constable Fishchips, in uniform, exits the police car and approaches Professor Kiwi's vehicle on the driver's side.)

Constable Fishchips: Good evening, Sir. May I see your license? And can I ask if you've had anything to drink tonight?

Professor Kiwi (*taking his license out of his wallet and smiling innocently*): Here you go, Officer. Yes, I had some wine with dinner tonight. We were just going for coffee at Starbucks.

Constable Fishchips (*holding out a passive breath-alcohol testing device and placing it through the open car window near Professor Kiwi's mouth*): Wouldn't mind a Frappuccino[®] myself.¹ Could you please state your name and address for me?

(Professor Kiwi complies and Constable Fishchips checks an indicator window on the front of the passive breath-alcohol testing device. He reports to Professor Kiwi that the machine has registered a "pass" result. Constable Fishchips wishes Professor Kiwi a pleasant evening and admonishes him to drive carefully. The entire stop and testing procedure has taken about three minutes. Professor Kiwi drives a bit farther up the thoroughfare and parks the car. The two law teachers exit the vehicle and head for Starbucks.)

Professor Yankee (*agitated*): Kiwi, what the hell was that all about? I can't believe you let that cop do that to you!

Professor Kiwi (*confused*): What are you talking about?

Professor Yankee: Well, you weren't speeding or weaving, you don't have a broken taillight, and there's no breath-alcohol testing checkpoint set up on the road. That cop had no probable cause whatsoever and didn't have any right to stop us. I would have told him to f**k off!

Professor Kiwi: Then it's a good thing I was driving. Police officers in New Zealand don't like being told to "f**k off." Do they enjoy it more in the States?

Professor Yankee (*irritated*): Don't be sarcastic. You know what I mean. Without probable cause, reasonable suspicion, or a properly set-up checkpoint, that stop was blatantly unconstitutional under the reasonable search and seizure requirement of the Fourth Amendment to the Constitution.²

¹ It was inevitable that product placement advertisements would eventually find their way from movies and television into American law review articles. I am hoping to show this reference to the manager of my local Auckland Starbucks and get free coffee for the rest of the year. I would encourage other law review authors to do the same with their favorite goods and services.

² For those foreign (non-American) readers, the United States Bill of Rights is comprised of the first ten amendments to the United States Constitution. The Fourth Amendment to the United States Constitution states: "The 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,

Professor Kiwi (*patiently*): Well, it might be in the U.S.A. But, as the lady said in the movie: “You’re not in Kansas anymore, mate.”³ Virtually all police powers of stop, search, or seizure are granted by statute in this country. And what that cop did was perfectly legal under the New Zealand Land Transport Act 1998. Under that Act, New Zealand police have an “anytime, anyplace, anywhere” power to pull a car over and check the details of the driver’s license and the ownership of the car.⁴ They have the same right to stop motorists if they want to give them a breath-alcohol screening test.⁵ They don’t need to set up a checkpoint, and they don’t need probable cause or even reasonable suspicion. They can simply stop whichever cars they like.⁶

Professor Yankee (*confused*): But doesn’t a statutory power like that have to comply with the New Zealand constitution? I thought you told me that they had a Bill of Rights in this country? Surely you have a requirement that all police searches and seizures be reasonable?

Professor Kiwi (*annoyed*): Stop calling me “Shirley.” And this is what I mean about preparing for class! Didn’t you read *any* of the material I sent you? Look, the New Zealand “constitution” isn’t a single document. It’s a collection of laws, procedures and understandings that make up our constitutional system of governance. The New Zealand Bill of Rights Act 1990 [the “Bill”] is part of that system, but it’s just an ordinary piece of legislation, not supreme law.⁷

Professor Yankee: But you do have the equivalent of a Fourth Amendment?

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. Readers wishing more information on criminal procedure under the United States Bill of Rights should consult JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE (3d ed. 2001).

³ See THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

⁴ Land Transport Act 1998, § 114, No. 110, 1998 N.Z. Stat. 1595, 1681–82, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1998/se/110se114.html>.

⁵ Land Transport Act 1998, § 68, No. 110, 1998 N.Z. Stat. 1595, 1642–43, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1998/se/110se68.html>. If a motorist fails the roadside breath-alcohol screening test, New Zealand police can require the motorist to accompany them to a police station for evidential breath-alcohol testing. Land Transport Act 1998, § 69, No. 110, 1998 N.Z. Stat. 1595, 1643–45, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1998/se/110se69.html>.

⁶ See *Jones v. Attorney-General*, [2004] 1 N.Z.L.R. 433, 437 (P.C.).

⁷ The full text of the New Zealand Bill of Rights Act 1990 is available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1990/an/109.html>. Readers wishing more information on the interpretation and application of the Bill, and its place in New Zealand’s constitutional system should consult PAUL RISHWORTH ET AL., THE NEW ZEALAND BILL OF RIGHTS (2003).

Professor Kiwi: Of course. Section 21 of the New Zealand Bill of Rights states that “[e]veryone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.”⁸ However, section 4 makes clear that no court can invalidate any *existing* statute—including a statutory police power of investigation—because of a conflict with the Bill.⁹ That reflects New Zealand’s traditional deference to parliamentary rather than judicial supremacy when it comes to fashioning legal rules.

Professor Yankee (frowning his brow): Now I’m really confused. Whether it’s authorized by statute or not, what’s the point of having a Bill of Rights if a judge can’t use it to declare police conduct unconstitutional? How does your Bill control the investigative practices of New Zealand police?

Professor Kiwi (chuckling): That’s what I love about you Americans—always keen to have unelected judges strike down laws as unconstitutional! Look, even without being able to invalidate any statutory police powers, section 21 of our Bill of Rights has still had a significant impact on New Zealand search and seizure law. Let me give you an example . . .

(The conversation is interrupted when the two professors reach Starbucks and order coffee. Professor Yankee also goes to the restroom. While flushing, he is pleased to note that water in Southern Hemisphere toilet bowls does, in fact, go down the other way.)

Professor Kiwi (explaining): OK, it works like this. Section 4 of the New Zealand Bill of Rights excludes the possibility of a New Zealand judge nullifying any law because of an inconsistency with the Bill. But section 6 goes on to state that, to the extent possible, all existing laws should be interpreted consistently with the Bill’s various provisions, including the reasonable search or seizure requirement of section 21.¹⁰ So, what does that mean? Well, let’s take for

⁸ New Zealand Bill of Rights Act 1990, § 21, No. 109, 1990 N.Z. Stat. 1687, 1690, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1990/se/109se21.html>.

⁹ New Zealand Bill of Rights Act 1990, § 4, No. 109, 1990 N.Z. Stat. 1687, 1688, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1990/se/109se4.html> (“Other enactments not affected—No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.”).

¹⁰ New Zealand Bill of Rights Act 1990, § 6, No. 109, 1990 N.Z. Stat. 1687, 1688, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1990/se/109se6.html> (“Interpretation consistent with Bill of Rights to be preferred—Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be

example section 18(2) of the New Zealand Misuse of Drugs Act 1975. It states that police can conduct a warrantless stop and search of a motor vehicle if they have “reasonable ground for believing” that the car contains illegal drugs . . .¹¹

Professor Yankee (*interrupting*): Hey, you stole that one from us! It’s called the “automobile exception” to the Fourth Amendment requirement of a search warrant. The exception is triggered whenever police have “probable cause” that a car, or any container therein, contains evidence of criminal conduct.¹² The U.S. Supreme Court came up with that years ago based on the ready mobility of automobiles and the lowered expectation of privacy people have in their motor vehicles.¹³ So, what else is new . . . ?

Professor Kiwi (*annoyed*): Excuse me, but I’m not sure that one country can actually “steal” a law of criminal procedure from another. Now, may I finish?

Professor Yankee (*distractedly wondering whether he gets CNN in his hotel room*): Sorry, go ahead . . .

Professor Kiwi (*still annoyed*): Right, well, as I was saying, under section 18(2) of the New Zealand Misuse of Drugs Act 1975, police can conduct a warrantless stop and search of a motor vehicle if they have reasonable ground for believing that the car contains illegal drugs. However, section 21 of the New Zealand Bill of Rights states that all searches and seizures must be reasonable—the same protection that exists under the Fourth Amendment to the U.S. Constitution. Now, what’s the connection between section 21 of the Bill of Rights and section 18(2) of the Misuse of Drugs Act? The answer is that New Zealand courts have used section 21 to *read down* section 18(2) based on reasonableness criteria stemming from judicial interpretations of the Bill. What has this meant in practice? Well, to give an example, one result has been that *warrantless* searches of cars are only deemed reasonable when there is, in fact, no time or opportunity for police to obtain a search warrant from a judicial officer. So, case law makes it clear that police could not reasonably undertake the warrantless search of an *impounded* automobile for drugs, even though section 18(2) of the Misuse of Drugs Act itself makes no distinction between police searches of impounded

preferred to any other meaning.”).

¹¹ Misuse of Drugs Act 1975, § 18(2), No. 116, 1975 N.Z. Stat. 863, 877, *available at* <http://rangi.knowledge-basket.co.nz/gpacts/public/text/1975/se/116se18.html> (“Search and seizure—(2) Where any member of the Police has reasonable ground for believing that there is in or on any . . . vehicle . . . any controlled drug, . . . he . . . may enter and search the . . . vehicle . . . as if authorised to do so by a search warrant . . .”).

¹² *See* DRESSLER, *supra* note 2, at 233–52.

¹³ *See, e.g.,* California v. Carney, 471 U.S. 386 (1985).

vehicles and searches of those pulled over on the road.¹⁴ You see, in New Zealand, there is a difference between the *legality* of a police search and seizure under an applicable authorizing statute and its *reasonableness* under section 21 of the Bill of Rights. Reasonableness is a different and wider test than lawfulness. In each case, reasonableness involves assessing the particular “time, place and circumstances” of the challenged police investigation and—as in the United States¹⁵—necessitates a weighing of individual privacy concerns against societal interests in the detection and prevention of crime.¹⁶ But the point is that, as an overarching test of the propriety of *all* police searches or seizures, section 21 of the New Zealand Bill of Rights can exert significant control over police investigative conduct *even though* it is authorized by statute, and *even without* New Zealand courts being able to declare such statutes unconstitutional. Get it now?

Professor Yankee: Got it. What you’re saying is that, on a case-by-case basis, New Zealand courts interpret section 21 of the Bill of Rights to ensure that police invoke and exercise their statutory search powers in a reasonable way. I can see the logic of your approach. In fact, I sometimes wish there were more of that kind of dialect between courts and legislators in the United States. The most widely employed powers of police search and seizure in America have not generally been created by federal or state legislation. Instead, they have arisen out of Fourth Amendment rulings made by the U.S. Supreme Court.¹⁷

Professor Kiwi: Well, in New Zealand, section 21 of the Bill of Rights has been conceptualized by case law as placing *limits* on the exercise of statutorily

¹⁴ R v. Laugalis, [2003] 10 C.R.N.Z. 350, 355–56 (C.A.). New Zealand judges have also read various provisions of the Bill of Rights *into* existing statutory schemes and required police to extend enumerated rights while exercising authorized powers of criminal investigation. See, e.g., Ministry of Transp. v. Noort; Police v. Curran, [1992] 3 N.Z.L.R. 260 (C.A.) (requiring police to extend the right to counsel under the New Zealand Bill of Rights Act 1990, § 23(1)(b) to drivers detained by the police for breath-alcohol testing under the Transport Act 1962, (now the Land Transport Act 1998 (N.Z.)). This is not the U.S. position. United States v. Wade, 388 U.S. 218, 227–28 (1967); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (pretrial blood sampling of a criminal suspect does not implicate the right to counsel contained in the Sixth Amendment to the U.S. Constitution). For a comparative discussion of the rights to counsel of drunk driving suspects in New Zealand and the United States, see Paul Rishworth & Scott Optican, *Two Comments on Ministry of Transp. v. Noort: A) How Does the Bill of Rights Work? B) The Right to Counsel in Breath/Blood Alcohol Investigations: Noort from the United States Perspective*, 1992 N.Z. Recent L.R. 189, 200–09. For a discussion of “reading down” and “reading into” pursuant to the New Zealand Bill of Rights, see RISHWORTH ET AL., *supra* note 7, at 163–66.

¹⁵ See generally DRESSLER *supra* note 2, chs. 18–19.

¹⁶ R v. Grayson and Taylor, [1997] 1 N.Z.L.R. 399 (C.A.). See also R v. Jefferies, [1994] 1 N.Z.L.R. 290, 319 (C.A.) (Thomas, J.). For a discussion of the determination of reasonableness under the New Zealand Bill of Rights Act 1990, § 21, see RISHWORTH ET AL., *supra* note 7, at 433–92.

¹⁷ See generally DRESSLER, *supra* note 2, chs. 5–20 (discussing U.S. Fourth Amendment case law).

authorized police behavior in any given case. Judges can't use it to "make" reasonable search and seizure rules the way your U.S. Supreme Court does under the Fourth Amendment.¹⁸

Professor Yankee: That's fine, if you don't want courts to be primarily responsible for shaping search and seizure law. But we could probably have a very contentious discussion about whether judges or legislators are the best locus of rulemaking for criminal procedure.¹⁹ Not to mention the unique problem we have in the United States of *which* judges or legislators should carry the ball—those connected with the federal government or those allied with the individual states?²⁰ You will also need to convince me of the correctness of New Zealand's basic approach to section 21. Even with a statutory anchor, I'm not at all persuaded that courts should be assessing the reasonableness of police searches or seizures on a case-by-case basis. We've been having this argument in the United States for some time. Should judges develop criminal procedure as a set of *standards* to be applied or as bright-line *rules* to be followed?²¹ Fourth Amendment law is no different. When you look at Supreme Court cases over the years, you will see that constitutional notions of reasonableness have vacillated continually between rules and standards. The result is a patchwork of search and seizure decisions that reflect one pole or the other, and sometimes even *combine* rules and standards in various discrete pronouncements of Fourth Amendment law.²²

Professor Kiwi (*gently mocking*): Sounds like you fellows just can't make up your mind . . .

Professor Yankee (*ignoring the subtle but somewhat justified dig at U.S. Fourth Amendment jurisprudence*): Perhaps, but the tension between rules and standards may be inherent with a constitutional mandate based on reasonableness. After all, that test can be read to incorporate both case-by-case and bright-line approaches to the control of police investigative behavior. Each has its benefits and burdens when it comes to the judicial or legislative creation of search and seizure laws.²³ Regardless, I'm not at all ready to say that the New Zealand "time, place and circumstances" approach is preferable to a set of determinate

¹⁸ *Jefferies*, 1 N.Z.L.R. at 301 (Richardson, J.); *Grayson and Taylor*, 1 N.Z.L.R. at 407. See Scott Optican, *Search and Seizure in the Court of Appeal—An Essay on the Uses and Misuses of Section 21 of the Bill of Rights*, 18 N.Z. U. L. REV. 411, 414 (1999).

¹⁹ See generally DRESSLER, *supra* note 2, § 2.06 (discussing whether American legislatures or judges should formulate rules of criminal procedure and whether such rules should be devised at the state or federal level).

²⁰ *Id.* at 37–38.

²¹ *Id.* § 2.07[A].

²² *Id.*

²³ See *id.*

reasonableness rules. Take, for example, the U.S. position on police car stops when the driver is suspected of being drunk or committing any other traffic violation. Fourth Amendment law is clear: with the exception of duly authorized road safety checkpoints, cops can stop individual vehicles for traffic related offenses only if they have probable cause to believe, or reasonable suspicion, that a driver has committed one. American police can't pull someone over to check their license, or administer some kind of roadside breath-alcohol test, *just because they feel like it*. In fact, I can't believe New Zealand police have that kind of unbridled discretion! I know that New Zealand judges can't strike down legislation, but shouldn't your Parliament consider changing the Land Transport Act 1998 in light of the reasonable search and seizure requirements of section 21 of the Bill of Rights?

Professor Kiwi: Perhaps, but I suppose that legislators, like judges, can differ as to what amounts to a reasonable power of police investigation—particularly when it comes to some combination of automobile searches, impaired driving, criminal investigation, and road safety.²⁴ In any event, your argument is with the New Zealand Parliament, not me. Still, if I were you, I wouldn't exactly tout your Fourth Amendment requirement of "probable cause." As I understand it, the U.S. Supreme Court interprets the Fourth Amendment as permitting police to stop cars for traffic-related offenses based on probable cause even when the *actual* motivation for the stop is some other type of criminal investigation, or even to harass the driver on racial grounds!²⁵ That kind of pretextual inquiry would be a clear abuse of automobile stopping powers here in New Zealand.

Professor Yankee (confused): Sorry, what do you mean by "abuse"? I thought you said that New Zealand police have an "anytime, anyplace, anywhere" power to stop drivers for license checks and breath-alcohol tests? How can a cop "abuse" such an absolute discretion?

Professor Kiwi: Well, New Zealand judges have held that statutorily authorized traffic stops must be made for a true Land Transport Act purpose, that is, one actually related to road safety. If police have a *pretextual* motive for the stop, such as wanting to engage in some type of additional criminal investigation,

²⁴ See generally DRESSLER, *supra* note 2, § 19.04 (discussing the different types of vehicle-use searches and seizures permitted or not permitted under the Fourth Amendment to the U.S. Constitution).

²⁵ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that a police officer's subjective state of mind is irrelevant to the objective existence of probable cause justifying a vehicle stop for a traffic-related offense); see also *Devenpeck v. Alford*, 543 U.S. 146 (2004); DRESSLER, *supra* note 2, § 9.02[F].

the invocation of the Land Transport Act 1998 will be *illegal* under the statute and also *unreasonable* under section 21 of our Bill of Rights.²⁶

Professor Yankee (cynically): Assuming that New Zealand police don't just lie on the witness stand as to their real reasons for the traffic stop! It's easy enough for a cop to testify that a motorist *actually* ran a red light, or that he *actually* wanted to check someone's license or administer a breath-alcohol test. Who could prove him wrong?

Professor Kiwi (annoyed yet again): Well, that's the purpose of defense cross-examination, right? Look, I'm not saying that *some* New Zealand constables won't lie as to their actual motivation for stopping a car. But assessing their veracity has been no more of a challenge for our judges than assessing the credibility of any other witness in court.²⁷ Compare that to the American system. Cops can actually tell the *truth* about pretextual traffic stopping in the United States with no Fourth Amendment consequences.²⁸ Moreover, U.S. police can similarly fabricate the probable cause alleged to justify a car stop at first instance. The New Zealand approach to pretextual stopping may not be perfect, but your American way makes even less sense.

Professor Yankee (defensive): Look, for lots of different reasons, I'm no fan of the U.S. Supreme Court's decision to sanction pretextual car stopping under the Fourth Amendment.²⁹ But at least cops in the United States need *some* objective evidence of wrongdoing allowing them to pull over an individual motorist for drunk driving, a license check, or a traffic offense. So, which is more reasonable? The U.S. way: requiring police to *have* probable cause for a traffic stop, even when a traffic offense is not their true motivation for the investigation? Or, the New Zealand way: without any suspicion whatsoever that a traffic offense has been committed, letting police stop *any* motorist on the road so long as traffic safety is their *actual* reason for the stop?

Professor Kiwi: Well, pay your money and take your choice. But I would rather live with a requirement of reasonable search and seizure that has *something* to say about pretextual police traffic stops. Besides, the real problem in New

²⁶ See Jones v. Attorney-General, [2004] 1 N.Z.L.R. 433, 437 (P.C.); R v. Bainbridge, [1999] 5 H.R.N.Z. 317, 324–25 (C.A.); RISHWORTH ET AL., *supra* note 7, at 447.

²⁷ See, e.g., Bainbridge, 5 H.R.N.Z. at 324. See generally RISHWORTH ET AL., *supra* note 7, at 447 (discussing cases involving pretextual police car stops under the New Zealand Bill of Rights Act 1990, § 21).

²⁸ See, e.g., Arkansas v. Sullivan, 532 U.S. 769 (2001).

²⁹ See generally DRESSLER, *supra* note 2, § 9.02[F] (discussing the negative consequences of case law permitting pretextual police car stops under the Fourth Amendment to the U.S. Constitution).

Zealand law doesn't come when judges hold that the *unlawful* police use of a car stopping power is also *unreasonable* under the Bill of Rights. That's not a difficult conclusion to reach. The problem comes when New Zealand courts find that *illegal* car stops are actually *reasonable* pursuant to section 21.³⁰

Professor Yankee (*perplexed*): Excuse me? I'm not sure I heard that correctly . . ."

Professor Kiwi: Well, remember when I told you that in New Zealand legal police investigative conduct could still be unreasonable under section 21? It also works the other way around. Take the statute that we've already talked about, section 18(2) of the Misuse of Drugs Act 1975. A New Zealand police officer might stop and search a car without having, as the statute requires, reasonable ground for believing that illegal drugs will be found. But if the cop *actually recovers* drugs in the car, the prosecutor can argue to a trial judge that while the search may have been *illegal* under the Misuse of Drugs Act, it was nonetheless *reasonable* under section 21 of the Bill of Rights. Reasonableness is a different and wider test than *lawfulness*, but it's also a different and wider test than *unlawfulness*. As always, the section 21 determination will depend on the "time, place and circumstances" of the particular police investigation, and on the appropriate balance between privacy rights and law enforcement concerns.³¹ In New Zealand, neither reasonableness nor unreasonableness rests wholly on whether police complied with or violated some applicable search and seizure law.³²

Professor Yankee (*incredulous*): Now, *that* is the *craziest* thing I've ever heard! How can it be reasonable in New Zealand for police to break the very laws designed to control their investigative behavior in the first place? I can understand how a legal search can be unreasonable. But now you're saying that section 21 can act as a jurisprudential washing machine—one that launders illegal police conduct and makes it come out squeaky clean under your Bill of Rights!

Professor Kiwi (*wincing*): Oh, that's a *really* bad metaphor! But, to be honest, I agree with you. The idea that a search can be wholly illegal under an authorizing statute but reasonable under section 21 of the Bill of Rights doesn't

³⁰ See, e.g., *R v. Loh*, [1997] 14 C.R.N.Z. 649 (C.A.). See generally RISHWORTH ET AL, *supra* note 7, at 444–47 (discussing the lawfulness and reasonableness of vehicle searches under the New Zealand Bill of Rights Act 1990, § 21); Optican, *supra* note 18 (discussing and critiquing the idea that a police search in New Zealand can be wholly illegal under an authorizing statute but reasonable under the New Zealand Bill of Rights Act 1990, § 21).

³¹ See *supra* notes 15–16, and accompanying text.

³² *R v. Grayson and Taylor*, [1997] 1 N.Z.L.R. 399, 407 (C.A.); *R v. Jefferies*, [1994] 1 N.Z.L.R. 290, 304 (C.A.) (Richardson, J.).

make a lot of sense.³³ It's particularly problematic in New Zealand where, given our notion of parliamentary supremacy, such statutory authority has been the traditional mechanism for both sanctioning *and controlling* searches and seizures by the police.³⁴

Professor Yankee (*somewhat smugly*): It also goes against the idea that section 21 is a limiting statute that can't be used by New Zealand judges to "make" reasonable search and seizure laws. In effect, your courts *will* be creating new and different search powers every time they rule that a police investigation falling short of statutory authorization was nonetheless reasonable under the New Zealand Bill of Rights.

Professor Kiwi (*with a sigh*): Yes, I've complained about that inconsistency myself; but judges just never seem to read my law review articles.³⁵ All I can say is that the "time, place and circumstances" approach to reasonableness doesn't usually ratify statutorily unlawful police behavior. In fact, New Zealand courts appear far less likely these days to hold that a wholly illegal car search was reasonable under section 21.³⁶ A lot of those types of decisions seemed designed to avoid application of our old exclusionary rule for evidence obtained by police in violation of the New Zealand Bill of Rights. But since we got rid of that rule, courts seem far less inclined towards such tortured interpretations of section 21.

³³ However, the same logic might not apply to a mere technical or procedural default in the police execution of a lawfully authorized power of search and seizure. See *Jefferies*, 1 N.Z.L.R. at 323 (Thomas, J.). See generally RISHWORTH ET AL., *supra* note 7, at 444–45 (noting that technical or procedural police breaches of statutes authorizing vehicle searches will not render such searches unreasonable under the New Zealand Bill of Rights Act 1990, § 21).

³⁴ See Scott Optican, *Search and Seizure*, in RIGHTS AND FREEDOMS: THE NEW ZEALAND BILL OF RIGHTS ACT 1990, AND THE HUMAN RIGHTS ACT 1993, 297, 300–01 (Grant Huscroft & Paul Rishworth eds., 1995). By contrast, Fourth Amendment jurisprudence in the United States is concerned almost exclusively with the reasonableness (constitutionality) of any challenged police behavior and not whether such conduct complied with any applicable state or federal statute. See generally WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1(e), at 115–16 (4th ed. 2004) (discussing the impact of various police breaches of non-constitutional law on the exclusion of evidence under the Fourth Amendment to the U.S. Constitution); Scott Optican, *Warrantless Police Searches and the Fourth Amendment to the United States Constitution: Jefferies from the United States Perspective*, 1994 N.Z. L. REV. 168, 171–72.

³⁵ See Optican, *supra* note 18, at 421; see also Scott Optican, *Search and Seizure: An Update on s 21 of the Bill of Rights*, 1996 N.Z. L. REV. 215, 234–37; Scott Optican, *Search and Seizure*, in RIGHTS AND FREEDOMS, *supra* note 34, at 326–29. Of course, New Zealand judges may actually read my law review articles and just think that they are not very good. Such ill-considered views could explain why courts have ignored much of my critique of their work—a problem no doubt shared by many of the legal academics reading this article.

³⁶ See, e.g., *R v. Maihi*, [2002] 19 C.R.N.Z. 453 (C.A.). See generally RISHWORTH ET AL., *supra* note 7, at 444–52 (discussing New Zealand case law related to the reasonableness of police vehicle stops under the New Zealand Bill of Rights Act 1990, § 21).

Professor Yankee (*stunned*): Hold on a minute. Do you mean to tell me that evidence obtained by New Zealand police in a search violating your Bill of Rights isn't excluded at a defendant's trial? That's nuts! Without an exclusionary rule, a Bill of Rights is toothless!

Professor Kiwi (*now truly annoyed*): Look, don't get your knickers in a twist! *Of course* New Zealand has an exclusionary rule for evidence obtained in violation of the Bill of Rights. It's just that, a few years ago, our Court of Appeal³⁷ changed things.³⁸ We used to deal with exclusion the way you do in the United States.³⁹ When the Bill of Rights was violated, any evidence obtained by the police was, subject to a few narrowly drawn exceptions, automatically excluded at a defendant's trial. But, in 2002, our Court of Appeal abandoned the "*prima facie*" exclusionary rule that was, in fact, its own creation.⁴⁰ Evidence is now excluded in New Zealand only if exclusion is held to be a proportional remedial response to the breach of the Bill of Rights at issue in the case.⁴¹ In order to make that determination, judges have to settle on what best serves the due administration of justice.⁴² They do this by balancing up a number of factors—the key ones being the nature of the police breach of the Bill of Rights, the seriousness of the offense,

³⁷ In rotating panels of three to seven judges, the New Zealand Court of Appeal hears direct appeals in criminal cases and has been responsible for almost all of the important criminal procedure decisions made pursuant to the New Zealand Bill of Rights Act 1990. In July 2004, New Zealand abolished final appeals to the Privy Council in England and established a New Zealand Supreme Court comprised of five permanent judges. See Supreme Court Act 2003, No. 53, 2003 N.Z. Stat. 1887, available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2003/an/053.html>. At its discretion, the New Zealand Supreme Court can hear appeals in criminal cases from the Court of Appeal. However, as of September 2005, the newly established Court had yet to decide an appeal involving an issue of search and seizure and/or the exclusion of evidence under the New Zealand Bill of Rights Act 1990.

³⁸ See *R v. Shaheed*, [2002] 2 N.Z.L.R. 377 (C.A.). For discussion of the history of the exclusionary rule in New Zealand and a critique of the current judicial approach to excluding evidence obtained in violation of the New Zealand Bill of Rights Act 1990, see Scott Optican & Peter Sankoff, *The New Exclusionary Rule: A Preliminary Assessment of R v. Shaheed*, 2003 N.Z. L. REV. 1; Scott Optican, *The New Exclusionary Rule: Interpretation and Application of R v. Shaheed*, 2004 N.Z. L. REV. 451.

³⁹ See generally DRESSLER, *supra* note 2, ch. 21 (discussing the exclusionary rule for evidence obtained by police in violation of the Fourth Amendment to the U.S. Constitution).

⁴⁰ The now defunct "*prima facie*" rule of exclusion for evidence obtained by police in violation of the New Zealand Bill of Rights Act 1990 was established by the New Zealand Court of Appeal in *R v. Butcher*, [1992] 2 N.Z.L.R. 257, 266 (C.A.) (Cooke, P.). See also *R v. Kirifi*, [1992] 2 N.Z.L.R. 8, 12 (C.A.). Major judicial statements regarding interpretation and application of the "*prima facie*" rule can be found in *R v. Goodwin*, [1993] 2 N.Z.L.R. 153 (C.A.) and *R v. Te Kira*, [1993] 3 N.Z.L.R. 257 (C.A.). See also *Shaheed*, 2 N.Z.L.R. at 410–16. For discussion of the rule, see Richard Mahoney, *Vindicating Rights: Excluding Evidence Obtained in Violation of the Bill of Rights*, in *RIGHTS AND FREEDOMS*, *supra* note 34, ch. 11.

⁴¹ *Shaheed*, 2 N.Z.L.R. at 387 (Richardson, P., Blanchard & Tipping, JJ., delivered by Blanchard, J.).

⁴² *Id.* at 419–22.

and the centrality of the evidence to the prosecution's case.⁴³ So, in New Zealand these days, the remedy of exclusion doesn't *automatically* follow from a violation of the Bill. Instead, it's a discrete determination separate from the reasonableness calculus under section 21 or, for that matter, any other police violation of the Bill of Rights that produces evidence in a criminal case.

Professor Yankee (*derisively*): Boy, would a lot of U.S. judges love that! They could declare police conduct a violation of the Fourth Amendment, while still letting the evidence in anyway. My guess is that's what your courts do all the time, right?

Professor Kiwi (*somewhat testy*): Not at all. It's early days yet for the "proportionality-balancing" test. But New Zealand judges still regularly exclude evidence obtained in violation of various provisions of our Bill of Rights.⁴⁴ Nonetheless, I have to admit that, when the crime is serious and the evidence crucial to the prosecution case, courts generally favor admission.⁴⁵ That may not be an attractive proposition to those who prefer a strong exclusionary rule, but it's no surprise under a test that looks to a broader notion of the due administration of justice. Basically, it means that, in every criminal case, application of New Zealand's current approach to exclusion will come down to the age-old balance in criminal procedure between the values of "due process" and "crime control."⁴⁶ Even you Americans should get that . . .

Professor Yankee (*now testy himself*): Hey, I *get* it, but I sure don't *like* it. It gives your judges *far* too much discretion in responding—or not—to a breach of the New Zealand Bill of Rights and is *far* too malleable an approach to exclusion. It also seems designed to defend rights only when it's easy and not when it's hard. That's not at all in keeping with the spirit and purpose of a Bill of Rights, at least not as I understand one.

Professor Kiwi (*thoroughly exasperated and ready to go home*): Well, blame Canada! Canadians live in one of the most rights-oriented countries on the planet, but they have a similar exclusionary rule for evidence obtained in an unreasonable

⁴³ See Scott Optican, *The New Exclusionary Rule: Interpretation and Application of R v. Shaheed*, 2004 N.Z. L. REV. 451, 527.

⁴⁴ See *id.* at 476–508 (discussing current New Zealand case law dealing with the exclusion of evidence obtained in violation of the New Zealand Bill of Rights Act 1990).

⁴⁵ *Id.* at 528.

⁴⁶ See generally DRESSLER, *supra* note 2, § 2.02 (discussing the attributes of the "due process" and "crime control" models of criminal procedure). The models were first set out and elaborated in the seminal law review article, Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

police search violating section 8 of their Charter of Rights and Freedoms.⁴⁷ New Zealand basically stole its version of the rule from Canadian law.⁴⁸

Professor Yankee (*under his breath*): Yeah, just like you ripped off the Fourth Amendment “automobile exception” from us . . .

(The two legal giants arrive at Professor Kiwi’s car. Each of their faces reveals the wound-up look common to law professors who cannot convince a badly informed colleague of the error of his or her ways. Professor Kiwi finally breaks the silence as he drives Professor Yankee back to his hotel.)

Professor Kiwi (*warily*): Well, I would say that discussion was a pretty good warm-up for the start of class tomorrow. I suppose we will have these debates again in front of the students, wouldn’t you think?

Professor Yankee (*wearily*): I suppose. But do all of them have the same nutty ideas that you do?

Professor Kiwi (*angrily*): Damn it, Yankee; that is a *totally* obnoxious thing to say! You Americans are so arrogant sometimes that it makes me want to . . .

(A police car flashing red and blue lights behind them suddenly interrupts Professor Kiwi’s antipodean rant. The irate academic pulls over his affordable Japanese import and watches a New Zealand constable approach the vehicle with a passive breath-testing device.)

⁴⁷ See Constitution Act, 1982, pt. I (Canadian Charter of Rights and Freedoms), Schedule B to the Canada Act, 1982, § 24(2) (U.K.), available at <http://laws.justice.gc.ca/en/charter> (“Exclusion of evidence bringing the administration of justice into disrepute—Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”). The section 24(2) test applies to any evidence obtained by Canadian police (or other state agents) in violation of the criminal procedure rights set out in the Charter. For a case demonstrating how the Supreme Court of Canada applies section 24(2), see, for example, *R v. Feeney*, [1997] 2 S.C.R. 13. For discussion of the section 24(2) exclusionary rule and the requirement of reasonable search or seizure under the Canadian Charter of Rights and Freedoms, 1982, section 8, see DON STUART, *CHARTER JUSTICE IN CANADIAN CRIMINAL LAW* chs. 3 & 11 (3d ed. 2001). Like the U.S. Constitution and unlike the New Zealand Bill of Rights Act 1990, the Canadian Charter is superior law that can be used by judges to declare Canadian criminal procedure legislation unconstitutional. See, e.g., *Baron v. Canada*, [1993] 1 S.C.R. 416.

⁴⁸ See Optican & Sankoff, *supra* note 38, at 28.

Professor Kiwi: Oh, bloody hell, not again . . . !

Professor Yankee (*laughing hysterically*): Hey, why don't you let me talk to him? Maybe he's ready for a new approach.

Professor Kiwi: Bugger off, mate

THE END⁴⁹

⁴⁹ Readers interested in comparative criminal procedure, and who liked this dialogue-style law review article, will enjoy Myron Moskowitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121 (1995). Readers inspired to visit New Zealand should consult their local travel agent or visit the official Tourism New Zealand web site, available at <http://www.newzealand.com/travel/>. Thank you to my colleague, Professor Rick Bigwood, Faculty of Law, The University of Auckland, New Zealand, for his editorial assistance with this article. The author welcomes comments or communications at: s.optican@auckland.ac.nz. See you down under.