THE ADMISSIBILITY OF EVIDENCE OBTAINED ILLEGALLY: A COMPARATIVE ANALYSIS

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1. INTRODUCTION

The principles governing the admissibility of illegally-obtained evidence are based on conflicting policy objectives:

(a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and
(b) the interest of the State to secure that evidence bearing upon the commission of a crime and necessary to enable justice to be done shall not be withheld from Courts of law on a merely formal or technical ground.1

The importance of the first of these objectives was underlined in the classic judgment of Holmes J., a dissent from the majority view of the United States Supreme Court, which held that the use in evidence of private telephone conversations obtained by wiretapping did not infringe the fourth and fifth amendments to the American Constitution:

[W]e must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained... We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.2

The rationale sustaining the second objective has been expounded in equally emphatic terms by Cardozo J., on behalf of the New York Court of Appeals:

The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free.3

The modern law in most jurisdictions is founded on a compromise between these postulates. It is evident that neither objective can be

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3 People v. Defore, 150 N.E. 585, at 588 (N.Y. 1926).
accorded unqualified recognition by the law of evidence. The protection of the citizen is primarily protection against unwarranted, wrongful, and perhaps high-handed interference; the common sanction is an action for damages. The protection is not intended for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the state cannot be magnified to the point of causing all the safeguards for the protection of the citizen to be suppressed and of offering a positive inducement to the authorities to proceed by irregular methods.⁴

II. ALTERNATIVE APPROACHES

Broadly, three approaches are possible to the problem:
1. if evidence is relevant, it cannot be excluded on the ground that it was obtained by illegal action;
2. if evidence is obtained by illegal action, it is never admissible;
3. where evidence is procured by illegal action, it is a matter for the trial judge to decide, in his discretion, whether to admit it or not, subject, in cases where the evidence is admitted, to review by an appellate court.⁵

A. Proposition One: If evidence is relevant, it cannot be excluded on the ground that it was obtained by illegal action.

There is judicial authority in England in support of Proposition One. In a case where a constable who had no right to search the person of the accused did so, and, finding twenty-five young salmon in his pocket, summoned him under the Salmon Fishery Acts for illegally having these in his possession, Mellor J. said on appeal: "I think it would be a dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means it could not be used against a party charged with an offence. The justices rightly convicted the appellant."⁶ The Privy Council, in its opinion given on an appeal from Kenya, asserted: "[T]he test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."⁷

The origins of this principle in English law are discernible in a series of authorities which do not have a direct bearing on illegal searches and

⁴ But cf. supra note 1.
seizures. The cases decided during the eighteenth century and in the early
decades of the nineteenth century adopted the rule that evidence is
admissible notwithstanding that it was illegally procured. These cases
concerned the unauthorized production of the original indictment in
subsequent civil proceedings for malicious prosecution\(^8\) or of a copy of a
bond the original of which had been successfully resisted on the ground
of privilege,\(^9\) the unlawful examination of a witness in insolvency
proceedings,\(^10\) the wrongful abstraction of a letter written by a prisoner in
jail,\(^11\) and the improper obtaining of possession of other documents.\(^12\)

The following graphic comment was made by the Court of Queen’s
Bench in the mid-nineteenth century: ""It matters not how you get [the
evidence]; if you steal it even, it would be admissible. . . . ""\(^13\) In this
case, which concerned an information for penalties under the Corrupt
Practices Act, objection was taken to the production of a letter written by
the defendant because its existence became known only by answers he
had given to the Commissioners who held the inquiry under the Act. The
statute provided specifically that answers before that tribunal should not
be admissible in evidence against him. The Court of Queen’s Bench held
that although the defendant’s answers could not be used against him, if a
clue were thereby given to other evidence — in that case the letter —
which would prove the case, it was admissible.\(^14\)

A clear English authority in support of the Privy Council’s view that
relevant evidence is admissible although secured by unlawful means is
the case of Elias v. Pasmore.\(^15\) The plaintiffs claimed damages for
trespass to premises, damages for seizure of documents, and restitution
of these documents. The police had entered premises of which the
plaintiffs were lessees in order to arrest X, and, while there, seized and
carried away, inter alia, documents found on the premises which were
afterwards used at the trial of Y. Horridge J., purporting to derive support
from Scottish\(^6\) and Irish\(^7\) authorities, stated: ""[T]he interests of the
State must excuse the seizure of documents, which seizure would

\(^8\) Caddy v. Barlow, 1 Man. & Ry. 275, 31 R.R. 325 (K.B. 1827); Legatt v.
Tollervey, 14 East 302, 104 E.R. 617 (K.B. 1811); Jordan v. Lewis, 14 East 306n, 104
E.R. 618 (K.B. 1728).

\(^9\) Calcraf v. Guest, [1898] 1 Q.B. 759. 67 L.J.Q.B. 505; Lloyd v. Mostyn, 10 M.
& W. 478, 152 E.R. 558 (Ex. 1842).


\(^12\) Regina v. Granatelli, 7 St. Tr. N.S. 979 (Ct. Crim. Ct. 1849); Phelps v.

1648 (Q.B. 1861) (Crompton J.). See also Lord Ashburton v. Pape. [1913] 2 Ch. 469, at
473, 82 L.J. Ch. 527, at 529 (C.A.).

\(^14\) But see Regina v. Pamenter, 12 Cox. C.C. 177 (Assizes 1872).

\(^15\) [1934] 2 K.B. 164, 103 L.J.K.B. 223. For the law of New Zealand see

\(^16\) Pringle v. Bremner, 5 Macph. 55 ( Ct. Sess. 1867).

\(^17\) Dillon v. O’Brien, 20 L.R. Ir. 300 (Ex. 1887).
otherwise be unlawful, if it appears in fact that such documents were evidence of a crime committed by any one. . . . "

Although this case did not directly involve the admissibility of evidence, Cowen and Carter, in their book on evidence, regard it as firm authority for the view that "evidence produced through an illegal search or seizure is nevertheless admissible in evidence if relevant." It was by no means beyond controversy that the rule embodied in the judgment in Elias was entrenched in English law at the time that case was decided.

However, the formulation of the rule in unequivocal terms by Horridge J. has decisively influenced the subsequent course of English judicial authority, culminating in the pronouncement by the Privy Council. It may be noted that the principle of law emerging from the judgment in Elias is at variance with authority in the Australian jurisdiction of Victoria, and is, in any event, open to the objection that the liberty of the subject is gravely imperilled by the reception, against A, of evidence discovered in the course of an illegal search of premises belonging to B.

Proposition One is substantiated by explicit authority in Canada. This view has been taken in Ontario, Alberta, and Manitoba, and has been affirmed by the Supreme Court of Canada without reservation. An isolated decision embodying a contrary principle has been subsequently overruled.

In South Asian jurisdictions like India, Burma and Sri Lanka, relevancy has been expressly adverted to as the criterion governing admissibility, irrespective of any taint attaching to the means by which evidence is procured. A distinctive feature of the law in these jurisdictions is that matters affecting the admissibility of evidence are regulated by statutory provisions, and "it is for the legislature alone to

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18 Supra note 15, at 173, 103 L.J.K.B. at 227.
20 See Entick v. Carrington, 19 St. Tr. 1029, 95 E.R. 807 (K.B. 1765).
21 Supra note 7.
decide whether in the interests of the community the admissibility of evidence improperly obtained should be curtailed.'

A Divisional Bench of the Supreme Court of Sri Lanka, which finally resolved a sustained conflict of judicial opinion in the country, emphasized that statutory provisions constituted the exclusive source of the applicable law.

There is no provision in the Evidence Ordinance which renders a relevant fact (such as the detection of an offence) inadmissible merely because the fact has been discovered in the course of an illegal search. In the present state of the law, relevant evidence can be ruled out ab initio on the ground that it was obtained by improper means.

In India it has been held that 'any irregularity or illegality in the search can neither vitiate the trial nor affect a conviction.' A comparable approach is reflected in Burmese authorities.

In Sri Lanka the principle has been baldly stated that 'evidence which is legally admissible does not cease to be admissible merely because that evidence was discovered by an officer who did not comply with the requirements of the law when searching premises.' It has been observed by the courts of Sri Lanka that 'disregard of the provisions of law by a police constable may amount to an offence but cannot possibly affect the competency of the officer in question as a witness' and that 'it does not follow that, because [an officer conducting a search] could be resisted, the evidence given by that person regarding a sale detected by him is not admissible.' This reasoning is supported by a cursus

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32 Supra note 30, at 90 (Gratiaen J.).
34 Chwa Hum Htive v. King-Emperor, 11 Indian L.R. Rangoon 107 (H.C. 1932).
36 Ekanayaka v. Deen, 18 C.L.W. 60 (Ceylon S.C. 1940).
Also, in Sri Lanka there has been some judicial authority in support of the contrary view. The rationale underlying this approach has been succinctly formulated:

[I]t is apparent that the only way in which the object of the Legislature can be achieved and . . . officers confined to . . . their powers within the limits permitted to them by law is by the Courts refusing to take cognizance of and disregarding evidence that may have been improperly or illegally obtained as a result of an unlawful or unauthorized entry upon premises. But this view is no longer valid. A Divisional Bench of the Supreme Court, having drawn attention to provisions of the Sri Lanka laws of evidence which require the exclusion of certain types of evidence (for example, some categories of confessions, evidence relating to the bad character of the accused, and evidence ruled out by privilege), observed: ‘‘Subject to such special restrictions, under our law of evidence, relevant evidence cannot be shut out when tendered by a party to the proceedings through the mouth of a competent and compellable witness.’’

Support for this view can be derived from the structure and content of the codes of evidence based on the Indian Evidence Act of 1872, itself modelled by Sir Fitzjames Stephen. These codes are applicable in India, Malaysia, Singapore and Sri Lanka. Two considerations are relevant. First, these statutes, being not merely fragmentary enactments but consolidating legislation repealing all rules of evidence other than those expressly preserved in the codes, contain the whole law of evidence, except where the legislature in other enactments has provided otherwise. Consequently, it is not legitimate, save in the event of a casus omissus, to import into the statutes regulating the reception of evidence principles derived from public policy. Secondly, reference has been made to the principle that ‘‘[a] rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has power to decide on the policy or expediency of repealing laws, or suffering them to remain in force.’’

A similar approach to the problem seems to have been adopted by the courts of Scotland until the middle of the present century. In one case the Scottish court declined to consider whether the search was lawful or not, on the ground that its finding on this issue could have no

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41 Andiris, id. at 87 (Nagalingam J.). See also Zilva v. Sinno, 17 C.L.R. 473 (P.C. 1914) (Ceylon).
42 Supra note 31, at 364 (Dias S.P.J.).
45 Crook v. Duncan, 2 Adam. 658 (Cr. Just. 1899).
bearing on the admissibility of evidence obtained in consequence of the search. In another case the Court of Justiciary was satisfied that the search was entirely lawful, but added, obiter, that the position regarding admissibility of evidence would not have been different had it reached the opposite conclusion on this point. Consistent with this approach, fingerprints obtained from the accused in violation of an imperative legal requirement relating to the obtaining of a search warrant have been admitted in evidence in Scotland.

A rule of inclusion of evidence despite the unlawful manner in which it was obtained has been applied in some South African decisions. The Cape Provincial Division has explicitly adopted this approach. Indeed, the suggestion has been made by the Cape courts that the exclusionary doctrine is peculiar to American law and is attributable to "the sanctity which the Americans attach to their Constitution."

B. Proposition Two: If evidence is obtained by illegal action, it is never admissible.

1. United States

Proposition Two is exemplified by authority in the United States where the development of the law has taken place within the framework of fundamental rights enshrined in the Constitution.

The fourth amendment to the American Constitution declares:

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, 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.

Protection of this right has been thought to necessitate exclusion, in trials before federal courts, of evidence obtained in a manner repugnant to the Constitution. The reason stated was that

[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the Fourth Amendment is of no value and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

The theory founded on the concept of "fruit of the poisonous tree" has been conducive, in the United States, to a wide interpretation of the

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49 Mabuya, id. at 182 (Gardiner J.P.).
50 Weeks v. United States, 232 U.S. 383, at 393 (1914) (Day J.). The initial formulation of the exclusionary rule in American law appears to have been made in a forfeiture proceeding: Boyd v. United States, 116 U.S. 616 (1886).
exclusionary doctrine which envelops all evidence indirectly derived from infraction of the fourth amendment. This has led to the rejection not only of real evidence, but also of oral evidence such as statements made to the police during an unlawful search of premises.

In recent times, however, the exclusionary rule has been trenchantly criticized by Chief Justice Warren Burger both in the decided cases and ex cathedra. In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), Burger C.J. (dissenting) denounced the principle of exclusion as "the suppression doctrine", id. at 413, which he described as "conceptually sterile", id. at 415. The Chief Justice has commented:

Some of the most recent cases in the Supreme Court reveal, almost plaintively, an unspoken hope that if judges say often and firmly that deterrence is the purpose, police will finally notice and be deterred.

I suggest that the notion ... was never more than wishful thinking on the part of the courts.

We can well ponder whether any community is entitled to call itself an "organised society" if it can find no way to solve the problem except by suppression of truth in the search for truth.


For a defence of the exclusionary rule, see Wilkes, A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth, 32 WASH. & LEE L. REV. 881 (1975).


The Royal Commission on Criminal Procedure in England and Wales headed by Sir Cyril Philips observed:

On the basis of American experience and also on that of the breathalyser law, we believe that an automatic exclusionary rule would give rise to an increase in disputes about the admissibility of evidence (with adverse consequences for trial delays). There would thus be an increase in court time spent on matters which are not concerned with the innocence or guilt of the accused; which would risk a diminution of public respect for the institutions of criminal justice.

REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE IN ENGLAND AND WALES 114 (Cmd. 8092, 1981).

The American Law Institute has proposed a qualification to the automatic exclusionary rule which would permit its invocation without discretion only if the violation was "gross, wilful, and prejudicial" to the accused: see A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, s. 160.7(2)(a) (1975). See also the "reverse onus exclusionary rule" suggested by the AUSTRALIAN LAW REFORM COMMISSION, CRIMINAL INVESTIGATION: REPORT NO. 2, AN INTERIM REPORT 141 (1975).

The central paradox inherent in these divergent approaches is that it is just in the most serious cases that the police will want to bend the rules. Yet, there it is most improbable that the courts will in fact exclude evidence unless a categorical exclusionary rule operates.


American law, the structure of which furnishes a basic contrast with English law on account of the relevance of constitutional provisions, is complicated by four major factors.

First, the limitations on the scope of the exclusionary doctrine are complex and involve, to some extent, conflict with the objectives of the fourth amendment. Thus, the exclusionary rule does not apply if evidence has been unlawfully obtained from a third person. Moreover, illegally-obtained evidence may be used to impeach the testimony of a witness for the defense, even though it would not be received for the purpose of securing a conviction. An accused is disentitled to the protection of the exclusionary rule if the evidence was obtained through an invasion of the rights of another. The rule is inapplicable in circumstances where the evidence was obtained by a private individual instead of a state official.

A procedural limitation is embedded in the rule, laid down by the Supreme Court of the United States, that a pretrial motion to suppress or return evidence procured through illegal searches and seizures is a condition precedent to an objection to admissibility. An analogous restriction seems to have been incorporated in the Australian case law.

It may be noted that the American courts have resorted to the fifth amendment precluding compulsory self-incrimination for the enforcement of the substantive rights guaranteed by the fourth amendment. The Supreme Court has regarded the principle as well settled that "when properly invoked the Fifth Amendment protects every person from incrimination by the use of evidence obtained through a search and seizure made in violation of his rights under the Fourth Amendment." Secondly, the interpretation of constitutional provisions in this context by the American courts has entailed linking the exclusionary rules of evidence with the concept of trespass in the law of tort.
long time it was thought that wiretapping from outside the accused's premises could not be construed as an infringement of the fourth amendment because it was incapable of being categorized as a search or seizure. The underlying assumption was that the fourth amendment applied exclusively to evidence procured by physical intrusion or by electronic devices penetrating into premises. Where federal agents in a room adjoining that in which the defendants were present attached a detectaphone to the partition wall and overheard conversations, it was held by a majority that the evidence was admissible.

The requirement of trespass, which has crucially circumscribed the ambit of the protection available to the accused, has been discarded in subsequent decisions. In keeping with these authorities the criterion is whether the acts of the government or its agents "violated the privacy upon which [the accused] justifiably relied." No importance is attached to the consideration of whether or not the violation had taken place in a manner which involved trespass.

Thirdly, the American cases reflect a distinction between modes of unlawful search which represent, per se, a denial of due process, and those which do not. Distinct principles have been applied to these situations. In a leading case, state police broke into the accused's home and attempted forcibly to remove drug capsules from his mouth. Having failed, they took him to hospital and removed the capsules by forcing an emetic into his stomach by means of a tube. The Supreme Court observed that "[i]t has long ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." Cowen and Carter note that this case was not treated by the Court as an illegal search and seizure case, and that "[t]he decision was rested simply upon the ground that certain methods of obtaining evidence were of themselves a simple denial of due process." In these circumstances the exclusion of evidence was considered compulsory.

Finally, the opinions of federal and state courts have often revealed considerable divergence. Difficulties have arisen, in part, from the fourteenth amendment. The issue has been whether the "liberties" guaranteed by the first eight amendments are liberties within the fourteenth amendment's guarantee that a state shall not "deprive any person of life, liberty, or property, without due process of law." In conformity with a ruling by the Supreme Court that only rights "implicit

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62 Supra note 2.
64 Goldman, supra note 58. But see Nardone, supra note 53; Weiss v. United States, 308 U.S. 321 (1939).
68 Id. at 172 (Frankfurter J.).
69 Supra note 19, at 76.
70 Id.
in the concept of ordered liberty fell within the fourteenth amendment, the whole of the fourth amendment has been held to guarantee such rights, and, consequently, to be binding on the states as well as the federal government.

In a case where police went to the defendant's office without a warrant and seized his appointment book and a list of his patients, it was held by the Supreme Court that state courts were exempt from the exclusionary doctrine. The accepted view at one time was that evidence was admissible when it was illegally obtained by a state, and not by a federal, officer. Further curtailment of the rights of the accused on account of the dichotomy between federal and state jurisdictions was inherent in the "silver platter" doctrine. The effect of this was that the reception of evidence in federal courts was countenanced where the evidence had been obtained unconstitutionally by a state officer and later transmitted to the federal prosecutor. This doctrine has since been abrogated by the Supreme Court. The logical culmination of this approach was reached in the ruling that no discrimination was permissible in regard to invocation of the exclusionary doctrine between federal and state courts. It is beyond controversy today that state courts are equally bound by the exclusionary rule.

2. South Africa

Some South African authorities exemplify the approach in Proposition Two. It has been held in the Transvaal that evidence obtained by compelling the accused to compare his foot with footprints at the scene of the crime was inadmissible, and that fingerprint evidence taken from accused persons under compulsion could not be received.

A similar conclusion has been reached in Natal. Where conviction for a statutory offence was based on the perusal of books belonging to the accused, which he could not be compelled to produce, an acquittal was entered on appeal on the ground that the conviction rested on inadmissible evidence.

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26 The decisions in Olmstead, supra note 2, & Schwartz, supra note 73, are inconsistent with Katz, supra note 66, & White, supra note 65.
29 Goorpurshad v. The King, 35 Nat. L.R. 87 (S.C. 1914).
These cases, however, do not support the general proposition that evidence obtained by illegal searches and seizures is inadmissible. The authorities are explicable on the narrow ground that transgression of the privilege against self-incrimination, which is part of the common law of South Africa,\textsuperscript{81} was the effective basis of exclusion of evidence. Evidence of a palmprint taken from the accused by compulsion has been held admissible by the Appellate Division on the ground that the privilege against self-incrimination was not contravened.\textsuperscript{82} Watermeyer J. A. observed: “Now, where a palm print is being taken from the accused person, he is . . . entirely passive. He is not being compelled to give evidence . . . when his photograph is being taken or when he is put upon an identification parade or when he is made to show a scar in court.”\textsuperscript{83} In circumstances where no breach of the privilege against compulsory self-incrimination is demonstrable, the courts of the Cape have shown themselves inclined to admit relevant evidence although it had been obtained by illegal means.\textsuperscript{84} On the other hand, it has been held in the Witwatersrand that privileged documents taken from the office of the accused’s attorney are not admissible at the trial.\textsuperscript{85}

The condition of South African law is exposed to criticism in terms of policy. The courts of the Transvaal have been prepared to receive, as substantive evidence, property which was discovered on the premises of the accused persons during an illegal search.\textsuperscript{86} But confinement of the exclusionary rule to circumstances falling within the purview of the doctrine against self-incrimination is anomalous in principle.

It appears difficult, once Wigmore’s limitation of the protection of self-incrimination privilege to a witness is abandoned, to see any meaningful difference between the cases in which a man is compelled to give his finger-prints, to submit to medical examination, to submit his books for examination, or to stand by while police illegally ransack his house for evidence.\textsuperscript{87}

It is relevant to note that the use of compulsion in connection with an illegal search has been expressly alluded to in the South African authorities as a factor requiring the exclusion of evidence discovered during the search.\textsuperscript{88} It is submitted that a legal system which rules out evidence on the basis of illegal compulsion brought to bear on the

\textsuperscript{81} A. Dowd, \textit{The Law of Evidence in South Africa} 94 (1963).
\textsuperscript{83} \textit{Id.} at 82-83.
\textsuperscript{84} \textit{Supra} note 48.
\textsuperscript{87} \textit{Supra} note 19, at 99.
\textsuperscript{88} \textit{Supra} note 86.
acquitted cannot, in harmony with sound policy, apply a different principle in respect of evidence procured by means of an unlawful search not entailing duress or compulsion. No discrimination is legitimate between the objectives of policy appropriate to these contexts.

It was seen that Propositions One and Two are each reinforced by cogent considerations of policy. The former principle is defensible from the standpoint of protection of the collective interest of the community: "When evidence tending to prove guilt is before a court, the public interest requires that it be admitted. It ought not to be excluded upon the theory that individual rights under these constitutional guaranties are above the right of the community to protection from crime." In Burma it has been pointed out that "the acquittal of a guilty accused is just as much a miscarriage of justice as the conviction of an innocent person." The justification for the latter approach has been spelt out convincingly by a Scottish judge:

In a country where a system of criminal jurisprudence prevails which protects the individual against unfair extraction of evidence from him, one would naturally expect that the obtaining and use of such evidence by the police would be regulated by provisions which would protect the individual against any unfair use thereof.

A South African court has supported this conclusion on the basis that the contrary view "would be tantamount to adopting the obnoxious principle that the means justify the end, and that the Crown could avail itself of and connive at the commission of one crime to prove another." A.

C. Proposition Three: The trial judge should have discretion whether or not to admit evidence obtained illegally

This proposition is the product of a compromise between the divergent postulates reflected in Propositions One and Two, and is generally reflected in the contemporary law of England and Scotland. There is, however, a difference in regard to the reasoning adopted by the two systems.

In England, relevant evidence is admissible in law whether illegally obtained or not, but it has been suggested that the exercise of discretion is required in order to decide whether, even though admissible, it should be excluded in fairness to the accused. In Scotland, it is for the court to exercise its discretion in each case, untrammelled by a general principle favouring admissibility.

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90 Supra note 34, at 109 (Baguley J.).
91 Supra note 47, at 86 (Lord Hunter, dissenting).
92 Supra note 77, at 536 (Krause J.).
94 Supra note 1.
The availability of discretion to the English courts to exclude technically admissible evidence in the interest of achieving a fair and impartial trial of the accused, is conceded by a strand of judicial opinion. Cases involving evidence obtained by unlawful methods can, in principle, be accommodated within the ambit of this discretion. The English Court of Criminal Appeal has observed: "There is, of course, ample authority for the proposition that a judge has an overriding discretion to exclude evidence, even if such evidence is in law admissible."\(^{95}\) However, a similar view, echoed by a Divisional Court of the Queen's Bench Division,\(^{96}\) is incompatible with the recent rejection of the discretionary principle, in its application to unlawfully obtained evidence other than confessions and admissions, by the House of Lords.

In Scotland, the principle has been laid down that "[a]n irregularity in the obtaining of evidence does not necessarily make that evidence inadmissible."\(^{97}\) The clear implication, then, is that there are circumstances in which the exclusion of relevant evidence unlawfully obtained is warranted. A distinguished Scottish judge has asserted that, in the absence of any absolute rule, the question is one of degree and that "[w]hether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed."\(^{98}\)

The salient feature of the approach reflected in Proposition Three is its flexibility. The crux of this solution is that a uniform principle capable of mechanical application is inappropriate, and that the diversity of the elements of policy relevant to divergent factual contexts makes necessary the use of a substantial measure of discretion by the courts.

The principle established in Australia, however, is significantly less rigid than that applied by the courts of England. The House of Lords has asserted uncompromisingly that "[h]owever much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason."\(^{99}\) The High Court of Australia has regarded as considerably more complex "the controversial question whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly."\(^{100}\) The essence of the Australian approach is that

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\(^{98}\) Supra note 1, at 40 (Lord Cooper).
\(^{100}\) Wendo v. The Queen, 109 C.L.R. 559, at 562 (Aust. H.C. 1963) (Dixon C.J.). For examples of the use of discretion in Australian jurisdictions, see Regina v.
the court "would be bound to consider whether or not in point of
discretion in all the circumstances the evidence should be received."\textsuperscript{101}
This involves the

weighing against each other of two competing requirements of public policy,
thereby seeking to resolve the apparent conflict between the desirable goal of
bringing to conviction the wrongdoer and the undesirable effect of curial
approval, or even encouragement, being given to the unlawful conduct of
those whose task it is to enforce the law.\textsuperscript{102}

III. FACTORS GOVERNING THE EXERCISE OF DISCRETION BY THE COURTS

Since the courts of most modern jurisdictions unfettered by
constitutional provisions eschew "'principles within the framework of an
unqualified maxim','\textsuperscript{103} and opt for greater malleability in their approach
to the problem, it is of practical importance to identify and evaluate the
factors which condition the exercise of judicial discretion in this area.

The existence of circumstances of urgency is a relevant considera-
tion. In a Scottish case,\textsuperscript{104} police officers investigating an offence called
at the accused's house and were given permission by him to search it.
They removed an attaché case unconnected with the matter being
investigated but relevant to a later charge of theft. The High Court of Justiciary held the evidence admissible. Lord Guthrie observed: "'I
do not think that the police officers acted in any way improperly in taking
away that article in order to make further inquiries about it. If they had
not done so, it might have disappeared."\textsuperscript{105} In another case,\textsuperscript{106} objection
was taken to the admission at a trial in Scotland of documents seized
during a search of the accused's house under a warrant. The documents
seized were not in the accused's name. The High Court of Justiciary
admitted the evidence. Lord Wheatley declared that the matter was
urgent since the documents might be lost or deliberately destroyed, as the

\textsuperscript{101} Hass, [1972] 1 N.S.W.L.R. 589 (C.A.); Regina v. Demicoli, [1971] Qd. R. 358 (S.C.);

\textsuperscript{102} Merchant v. The Queen, 126 C.L.R. 414, at 418 (Aust. H.C. 1971) (Barwick
C.J.).

\textsuperscript{103} Bunning v. Cross, 141 C.L.R. 54, at 74 (Aust. H.C. 1978) (Stephen & Aickin
J.J.).

This approach has been adopted in subsequent Australian decisions: see Phillips v.
Cassar, [1979] 2 N.S.W.L.R. 430 (C.A.); Regina v. Padman, 25 A.L.R. 36 (Tas. S.C.
1979).

\textsuperscript{104} Supra note 1. at 39. For Australian law, see Regina v. Banner, [1970] V.R.
240 (S.C. 1969); Regina v. Weir, [1973] Qd. R. 496 (Crim. Ct.); for New Zealand, see


\textsuperscript{106} Id. at 40.

accused had escaped from Scottish prison custody pending the charge and had been living under a false name.

Where a warrant was granted to two police doctors to examine the accused's teeth to see if they corresponded with marks on the body of a murdered girl, the High Court of Justiciary held that, even if the warrant was not legal, the medical evidence had been properly admitted because "there was in this case an element of urgency, since a visit to a dentist or an injury to the accused's teeth could have destroyed the evidence."107 In an Irish case,108 Kingsmill Moore J., in his enumeration of the indicia pertinent to the exercise of the court's discretion, included whether there were circumstances of urgency or emergency which provided some excuse for the action. In Scotland,109 a warrant was granted to search for documents in the possession of the accused, an accountant. The warrant was limited to documents relating to a particular client of the accused, but other documents were seized. It was held that the latter were not admissible in evidence because they had been obtained by an illegal search or seizure. One of the reasons given by Lord Guthrie for this decision was the lack of circumstances of urgency.

The nature and degree of the illegality committed may have some bearing on the question of admissibility of evidence. The Irish courts have accepted that, in determining whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained by illegal actions, one of the relevant considerations is whether the illegality is trivial or technical in nature, or whether it was a serious invasion of important rights the recurrence of which endanger necessary freedoms.110

The character of the charge should be considered. The "gravity or otherwise of the suspected offence"111 has been adverted to as a relevant factor. The difference in popular attitudes prevailing in England and in the United States is accounted for, to some extent, by the fact that search and seizure problems have generally arisen in England in the context of serious crimes like the receiving of stolen goods, while the majority of American cases involve gambling and the illicit possession of liquor and drugs112 — offences which are not obnoxious to the public conscience in the same degree. In principle, however, this criterion is not supportable. As the English Court of Criminal Appeal recently pointed out: "The test cannot logically be different according to the gravity of the crime under

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108 Supra note 5.
109 H.M. Advocate v. Turnbull, [1951] S.L.T. 409 (Ct. Just.). See also Bunning, supra note 102, at 79, where the High Court of Australia pointed out that "the ease with which the law might have been complied with in procuring the evidence in question" would "tend against the admissibility of evidence illegally obtained."
110 Supra note 108.
112 J. Heydon, Cases and Materials on Evidence 251 (1975). For Australian law, see Bunning, supra note 102, at 80.
investigation, with one test for murder or terrorism and another for the perhaps less serious offence of drunken driving.'\textsuperscript{113}

The nature of the investigation must also be taken into account. Cartwright C. J. C., in a dissenting judgment delivered in Canada, said: "[T]he nature of the investigation as a result of which the respondent disclosed the whereabouts of the murder weapon was such as to reflect no credit on the authorities concerned."\textsuperscript{114} This was stated as a ground for regarding the evidence which was sought to be admitted as having the potential to bring the administration of justice into disrepute.

The position of the accused\textsuperscript{113} has been mentioned as a factor which may properly be considered. Such elements as the antecedents, cultural and educational background, temperament and demeanour of the accused are probably subsumed in this criterion. So broad an approach, admitting an infinite range of subjective factors, is open to objection from the standpoint of policy.

The purpose for which the impugned evidence is sought to be used is relevant. On behalf of the Court of Justiciary in Scotland, Lord Guthrie has stated:

\begin{quote}
[When I consider the matter in the light of the principle of fairness to the accused, it appears to me that the evidence so irregularly and deliberately obtained is intended to be the basis of a comparison between the figures actually submitted to the Inspector of Taxes and the information in the possession of the accused. If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible.\textsuperscript{116}]
\end{quote}

The question whether the unlawful search has been conducted by the police or by some other persons is of marginal importance. In a leading Scottish case,\textsuperscript{117} the accused was convicted of using milk bottles without the consent of the true owners. The Scottish Milk Bottle Exchange Ltd. carried on the business of collecting and restoring bottles to their true owners. It was approved by the Scottish Milk Marketing Board. All contracts between the Board and producers and distributors of milk provided that the company's inspectors might examine the premises of any producer or distributor in contractual relations with the Board to inspect bottles in their possession. Two inspectors displayed their warrant cards to the accused, who was entitled to refuse them permission to inspect because she had not entered into a contractual relationship with the Board. However, she refrained from doing so, and the inspectors found the bottles. Lord Cooper, holding that the evidence had been wrongly admitted, said:

\textsuperscript{115} Supra note 111, at 139.
\textsuperscript{116} Turnbull, supra note 109, at 411-12.
\textsuperscript{117} Supra note 1.
It is specially to be noted that the two inspectors who in this instance exceeded their authority were not police officers enjoying a large residuum of common law discretionary powers, but the employees of a limited company acting in association with the Milk Marketing Board, whose only powers are derived from contracts between the Board and certain milk producers and distributors, of whom the appellant is not one. Though the matter is narrow I am inclined to regard this last point as sufficient to tilt the balance against the prosecution, upon the view that persons in the special position of these inspectors ought to know the precise limits of their authority and should be held to exceed these limits at their peril.\(^{118}\)

Acquiescence by the accused to a search made without lawful authority arguably reduces the cogency of an objection to the reception of evidence procured by the search. In South Africa, indications that the accused had vehemently resisted the search have been held, in conjunction with other factors, to justify exclusion of evidence,\(^{119}\) while the lack of any objection to the search has been thought to support the contrary conclusion.\(^{120}\) The High Court of Justiciary in Scotland has stated as a tentative ground of admission of evidence, "[t]he accused persons accepted the warrant as authority to search the house for money or for some trace of it."\(^{121}\)

The question may be considered whether distinctions should be drawn between evidence obtained by illegal means, depending on whether the illegality emanates from a rule of the common law, a statutory rule or a rule entrenched in constitutional provisions.

The Scottish courts have in one instance\(^ {122}\) given an unqualified answer in the negative:

[We] are unable to accept the suggestion that a distinction should be drawn between the statutory offence, the *malum prohibitum*, and the common law crime, the *malum in se*, for the interests of the State are as much involved in offences against penal statutes as in offences against the common law, and the former category has greatly expanded in recent times.\(^ {123}\)

A similar view has been expressed by the Privy Council,\(^ {124}\) interpreting a provision of the Jamaican Constitution\(^ {125}\) scheduled to a Jamaican order-in-council.\(^ {126}\) Lord Hodson commented:

This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law . . . . In either event the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form.\(^ {127}\)

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\(^{118}\) *Id.* at 40.

\(^{119}\) *Mabuya*, *supra* note 48.

\(^{120}\) *Uys*, *supra* note 86.

\(^{121}\) *Supra* note 106.

\(^{122}\) *Supra* note 1.

\(^{123}\) *Id.* at 40.

\(^{124}\) *Supra* note 93.

\(^{125}\) The Constitution of Jamaica, s. 19.

\(^{126}\) No. 1550 (1962).

\(^{127}\) *Supra* note 93, at 319, [1968] 3 W.L.R. at 401.
In contrast, the American courts, in their development of the exclusionary doctrine, have been profoundly influenced by the constitutional entrenchment of fundamental rights. The Irish Constitution provides that "[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law." With reference to this constitutional provision the Irish courts have observed:

The courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person.

Judicial pronouncements in several jurisdictions recognize that the distinctions under consideration are material. In a Scottish action for divorce where the husband sought to introduce in evidence a letter from the defendant wife, it was proved that the letter had been posted by the wife and had been procured illegally by the husband who had stolen it from the post office. Lord Traynor, delivering the majority judgment admitting the evidence, emphasized the distinction between common law crimes and statutory offences. At an Australian trial, a photograph of the accused which a police officer had wrongly told him he had to have taken was admitted, as was evidence of a medical examination for which there was no statutory warrant. Zolling J. said:

[Not sufficient attention has been paid to the distinction between rules of the common law and rules laid down by statute. Where the rule said to be infringed is a rule of the common law or one arising out of case law (or in States and countries which have the Judges Rules out of the Judges Rules) then it seems to me it is reasonable for the judges to mould their own law and their own rules in the light of public policy. Where a power to interfere with a man's civil rights and to obtain evidence thereby is specifically given by statute exercisable only on the performance of certain conditions precedent then to rule that that evidence may be obtained by methods other than those sanctioned by the statute and then successfully used in court is not simply to declare the law but to amend the statute and this no judge has any right to do.]

This principle, it is submitted, is better expressed in a more flexible form. There is no absolute distinction among common law, statute law and constitutional provisions as the source of the sanction of illegality. Nevertheless, acts in breach of a statute could more readily warrant the rejection of evidence as a matter of discretion: or the statute or constitutional provision may, on its proper construction, itself impliedly forbid the use of evidence procured in breach of its terms.

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128 Weeks, supra note 50.
129 Constitution of Ireland, Art. 40, para. 5.
130 Supra note 108, at 170 (Walsh J.).
133 Id. at 447-48.
The subjective animus of the person responsible for the unlawful search may affect the result. Several factors may be dealt with briefly under this heading.

Naturally, a deliberate illegality is less easily excused than an accidental illegality. The Scottish Court of Justiciary, exercising its discretion in favour of exclusion of evidence, has stated: “The police officers did not accidentally stumble upon evidence of a plainly incriminating character in the course of a search for a different purpose. If the documents are incriminating, their incriminating character is only exposed by careful consideration of their contents.” In another Scottish case, an inspector employed by the respondents reported his opinion that the accused was in unlawful possession of salmon in breach of the Salmon Fisheries (Scotland) Act of 1868, to the Ministry of Food which had a duty to investigate allegations relating to breaches of the salmon laws. An official of the Ministry of Food with an official warrant helped the respondent’s inspector to search local cold stores, from one of which salmon owned by the accused was removed by the respondent’s inspector. Although the latter had no search warrant under the statute, the evidence was held by the High Court of Justiciary to have been properly admitted. Lord Cooper observed: “It would have been quite in order for [the Ministry enforcement officer] to have reported to the proper authorities any evidence incidentally obtained by him and bearing upon an infringement.”

The question whether the unlawful act was intentional or unintentional has been expressly referred to as a relevant consideration in Ireland. The Irish courts have been disposed to receive evidence on the ground, inter alia, that “the mistake was a pure oversight.” This element has been adverted to with emphasis in Australia. The High Court, referring to an error which made the administration of a “breathalizer” test unlawful, declared: “Although such errors are not to be encouraged by the courts they are relatively remote from the real evil, a deliberate or reckless disregard of the law by those whose duty it is to enforce it.” Recently the Criminal Division of the English Court of Appeal, in a prosecution for an obscene publication, pointed out that the manner in which evidence had been obtained, although unlawful, was not oppressive, in that the police had made an error regarding the validity of a warrant for the purpose of entry, search and seizure.

If the unlawful act is intentional, the further question arises whether it is the result of an ad hoc decision or whether it represents a settled or

134 Turnbull, supra note 109, at 411.
136 Id. at 58.
137 Supra note 108.
138 Id. at 161 (Kingsmill Moore J.).
139 Bunning, supra note 102, at 78.
predetermined policy. The courts of Ireland have found it easier to admit evidence where there has been "no policy to disregard the provisions of the Constitution or to conduct searches without a warrant." 141

It is probably relevant to consider whether the motive of the officer conducting the search was proper or improper. This element has received emphasis in the Scottish decisions. 142 Reprehensible neglect on the part of the person making the search, in regard to compliance with the procedure required by the law, could conceivably tilt the balance in favour of exclusion of evidence. In another Scottish case, 143 the accused was suspected of blowing open a safe with explosives. Before arresting and charging him, the police scraped his fingernails for traces of explosives, which chemical analysis subsequently revealed to be present. This conduct amounted to assault, since there was no right to search without warrant before arrest. The High Court of Justiciary held that the evidence had been wrongly admitted. Lord Cooper made the comment:

"This is not a case where I feel disposed to "excuse" the conduct of the police. The proper procedure for search of the appellant's house . . . was duly followed out, and it would have been very simple for the police to have adopted the appropriate procedure in relation to a search of his person." 144

The presence of good faith in the person responsible for the search is inconclusive. Thus, where the inspectors had acted bona fide but it was incontrovertible that they had obtained the assent of the accused to the search of her shop by means of a positive misrepresentation made to her, the evidence discovered during the search was held to have been wrongly admitted. 145

The adequacy or paucity of the grounds on which the search was made is a pertinent factor. This factor has been emphasized by Lord Guthrie:

If information was in the hands of the criminal authorities implicating the accused in other crimes, these could have been mentioned in the petition containing the warrant under which the search was authorised. If they had no such information, the examination of private papers in the hope of finding incriminating material was interference with the rights of a citizen. 146

It would ordinarily make a difference whether or not a defendant in criminal proceedings has been deliberately misled by the person embarking on the search. The Privy Council, admitting the evidence objected to in a Jamaican case, said: "Although the search was not authorised by the Dangerous Drugs Law or the Constabulary Force Law there was no evidence that the appellant was wilfully misled by the police.

141 Supra note 108. at 161.
142 See supra note 135.
144 Id. at 135.
145 Supra note 1.
146 Turnbull, supra note 109. at 411.
officers or any of them into thinking that there was such authorisa-

47 The Australian courts have taken the view that

if the police not only make on an accused person a demand with which he is
not bound to comply, but in addition give him to understand that compliance
is legally necessary, and he complies believing that he has to comply, then
this court should discourage such conduct in the most effective way, namely,
by rejecting the evidence. 44

It is perhaps appropriate to consider whether some trick or deception
has been perpetrated on the accused. This circumstance has sometimes
been taken into account directly. The Scottish courts have asserted that
the principle of fairness to the accused requires consideration in any case
in which the departure from the strict procedure has been adopted by
design with a view to securing the admission of evidence obtained by an
unfair trick. 449 Lord Cooper, in a case where the impugned evidence was
admitted, said: “I can find nothing to suggest that any departure from the
strict procedure was deliberately adopted . . . in the present instance the
irregularity ought to be ‘excused’.” 450 The Privy Council, in its opinion
delivered on an appeal from Kenya, mentioned, as a ground for
excluding relevant evidence, that it had been obtained by a “trick.” 451
Kingsmill Moore J., admitting evidence of this kind in an Irish case,
said: “I can find no evidence of deliberate treachery, imposition [or]
deciet.” 452 As a ground for rejecting evidence, the Supreme Court of
Canada has pointed out: “Admittedly, the statement by the accused was
procured by trickery, duress and improper inducements.” 453

On the other hand, the exclusion of evidence procured by means of a
trick is not necessarily required. Lord MacDermott L.C.J. has expressed
the view that there is

no ground for saying that any evidence obtained by any false representation
or trick is to be regarded as oppressive and left out of consideration.
Detection by deception is a form of police procedure to be directed and used
sparingly and with circumspection; but as a method it is as old as the
constable in plain clothes and, regrettable though the fact may be, the day has
not yet come when it would be safe to say that law and order could always be
enforced and the public safety protected without occasional resort to it. 454

147 Supra note 93, at 314, [1968] 3 W.L.R. at 396.
148 Supra note 132, at 423 (Bmy C.J.).
149 Supra note 1.
150 Supra note 135, at 58.
151 Kuruma, supra note 7.
152 Supra note 108, at 161. See also Regina v. Atkinson, [1976] CRIM. L. REV.
153 Supra note 114, at 305, 11 D.L.R. (3d) at 699.
154 Supra note 111, at 147-48. For S. African law, see State v. Zulu, [1965] 3 S.
Afr. L.R. 802 (Natal Prov. Div.).
The English Court of Appeal has recently stated that evidence should not be excluded "merely because a trick or misrepresentation has been used to secure that evidence."\(^{155}\)

A distinction is sometimes drawn between evidence obtained unfairly and that obtained illegally. As a rationale underlying this distinction, it has been suggested that illegally-procured evidence should be excluded more readily than unfairly-obtained evidence because illegal acts usually affect both guilty and innocent adversely, while tricks do...

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It is clear that, according to Canadian law, "[a] statement obtained by a trick or fraud is not inadmissible for that reason, alone, unless the trick, artifice or fraud involved a promise or threat by a person in authority which conveyed a hope of advantage or inspired a fear of prejudice." Regina v. Allen (No. 3), 46 C.C.C. (2d) 553, at 563 (Ont. H.C. 1979) (Goodman J.). This principle is consistently substantiated by Canadian decisions: Regina v. Rothman, 42 C.C.C. (2d) 377 (Ont. C.A. 1978); Regina v. Robertson, 21 C.C.C. (2d) 385. 29 C.R.N.S. 141 (Ont. C.A. 1975). "Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick or artifice practised upon him by the officer or other person to whom it was made." Rex v. White, 18 O.L.R. 640, at 643, 15 C.C.C. 30, at 33 (C.A. 1908) (Osler J.A.). In Regina v. McLeod, 5 C.R.N.S. 101, at 104 (Ont. C.A. 1968) Laskin J.A. stated: "I do not rule out as a matter of law all stratagems that the police or persons in authority may employ in questioning a person under arrest."


Where an exculpatory statement was obtained from the accused by a trick, the police pretending to release the accused to an officer who had assumed the role of a bondsman, the Court of Appeal of British Columbia quashed the conviction (Regina v. Pettipiece, [1972] 5 W.W.R. 129, 18 C.R.N.S. 236 (B.C.C.A.)), not on the basis of unfair police conduct — the same court had unhesitatingly accepted in evidence statements made to police "plants" (Regina v. Towler, 65 W.W.R. 549, 5 C.R.N.S. 55 (B.C.C.A. 1968)) — but because of the failure of the trial judge to apply the ordinary
Problems connected with the use of unfair means in obtaining evidence have frequently arisen in the setting of activities instigated by an agent provocateur.

The general approach of the English courts to the use of discretion in excluding evidence in the interest of fairness to the accused has been set out authoritatively in the following terms:

"The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence. . . ."

This principle is applicable with particular force in "similar fact" cases, since evidence of an analogous situation by its very nature might lead juries to convict when that evidence, properly analyzed, can be demonstrated to contain negligible probative value but substantial prejudicial effect. In all such cases "the judge ought to consider rules regulating the admissibility of confessions. It has been reasserted in Ontario that the courts do not have the power to express their disapproval of unfair police conduct by excluding otherwise admissible evidence: Regina v. Deleo, 8 C.C.C. (2d) 264, 18 C.R.N.S. 261 (Ont. Cty. Ct. 1972).

The Supreme Court of Canada has affirmed that the exclusion of evidence obtained by unlawful means is not required by the provisions of the Canadian Bill of Rights (R.S.C. 1970, App. III, s. 2(c)(ii)). Although the effect of the Canadian Bill of Rights may be to render federal legislation inoperative (Regina v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473 (1969)) or inapplicable in a specific context (Brownridge v. The Queen, [1972] S.C.R. 926, 28 D.L.R. (3d) 1) the Canadian Supreme Court has declared: [E]ven if the Canadian Bill of Rights . . . is given the same effect as a constitutional instrument, this does not mean that a rule of absolute exclusion, which is in derogation of the common-law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that Bill.

Hogan v. The Queen, [1975] 2 S.C.R. 574, at 585, 9 N.S.R. (2d) 145, at 156, 26 C.R.N.S. 207, at 216 (Pigeon J.). The inclusionary rule, which has been acted upon by Canadian courts since 1886 (Regina v. Doyle, 12 O.R. 347, at 353 (Q.B. 1886)), is entrenched in Canadian law: "The choice of policy here is to favour the social interest in the repression of crime despite the unlawful invasion of individual interests and despite the fact that the invasion is by public officers charged with law enforcement." Hogan, id. at 595, [1975] 2 S.C.R. 574, at 595, 9 N.S.R. (2d) 145, at 162, 26 C.R.N.S. 207, at 223 (Laskin J.).

Canadian law on this point is completely at variance with American law. Where a federal agent succeeded by surreptitious means in listening to incriminating statements made by a person indicted for violating federal narcotics law while the latter was released on bail, the statements were held inadmissible in the United States: Massiah v. United States, 377 U.S. 201 (1964).

J. Heydon, supra note 112, at 254.


whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted.\textsuperscript{159} The English courts, formulating a principle generally applicable to criminal jurisprudence, have emphasized the paramount duty of a judge, when trying a charge of crime, "to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused."\textsuperscript{160}

Nevertheless, it is settled law in England that these principles cannot be accorded an interpretation so wide as to confer on the trial judge the power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, the prosecution ought not to have been brought.\textsuperscript{161} In some cases,\textsuperscript{162} counsel for the Crown appears to have conceded that a discretion exists which is sufficiently amorphous in scope to prevent the Crown from presenting its case. However, the established view today is that unfairness as to the method of securing evidence for the prosecution cannot produce this result. In a recent case\textsuperscript{163} where a prostitute who had been convicted of soliciting appealed on the ground that her offence had been committed as a result of incitement by police officers and that that evidence should not have been admitted, the Divisional Court dismissed the appeal. In a case\textsuperscript{164} where a street bookmaker had undoubtedly been incited to commit the alleged offences by police officers who placed bets with him in a public house, Lord Goddard C.J. and Humphreys J. expressed strong disapproval of the incitement. However, it was not suggested that the police evidence was inadmissible as a matter of law, or that the magistrates had discretionary power to exclude it.

In a recent trilogy of English cases,\textsuperscript{165} the participation of an agent provocateur in the procuring of evidence was considered solely in the context of an appeal against sentence. There is no doubt today that the

doctrine of entrapment has no place in English law. Lord Widgery has regarded as plainly admissible relevant evidence obtained from or through police informers. This attitude is necessitated by practical realities: "One must recognize that up to a point infiltrators must show sympathy with an encouragement of the group into which they have infiltrated themselves." In a recent case, the police had acted illegally in searching the accused's room without his consent and found drugs. The accused was charged with drug offences on the basis of evidence thus illegally obtained. The justices had excluded the evidence. The Divisional Bench allowed an appeal by the prosecutor on the ground that the evidence, however obtained, was relevant and therefore admissible, and ordered the case to be remitted for trial before another bench of justices.

There seem to be only two English cases in which judicial discretion has been used in a manner not readily reconcilable with the principles emanating from these authorities. In these cases, the facts of which are indistinguishable, the accused persons were charged with driving a car while under the influence of liquor. They were convicted. They had consented to be examined by a doctor in order to ascertain whether they were ill or disabled. The doctor was called by the Crown to testify that the accused were under the influence of drink. The trial judge had admitted the evidence. However, in each case the conviction was quashed by the Court of Criminal Appeal on the ground that the evidence, although admissible as a matter of law, ought to have been excluded by the exercise of discretion; the accused would probably not have consented to the medical examination had they realized that the doctor would give evidence. The authority of these decisions, however, is considerably weakened by the tenor of an exhaustive judgment by the English Court of Appeal in a subsequent case.

In the present state of the English authorities the following propositions may be considered established:

(a) The courts have the power to exclude evidence of little probative value but of gravely prejudicial effect, since it is the duty of the courts to safeguard an accused person against the risk of wrongful conviction in consequence of the admission of such evidence.

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167 Mealey, id. at 64.
168 Id.
171 Sang, supra note 96, Ameer, supra note 162, Regina v. Burnett, [1973] CRIM. L. REV. 748 (Cent. Crim. Ct.), & Regina v. Foulder, [1973] CRIM. L. REV. 45 (Q. Sess. 1971), cases which held that the judge has a discretion to exclude evidence which has been obtained as the result of the activities of an agent provocateur, have been expressly overruled by the House of Lords: Sang, supra note 96, at 1235, [1979] 3 W.L.R. at 276.
(b) This principle operates to qualify the otherwise absolute rule that evidence which is relevant is admissible whether obtained illegally, unfairly, by trick or by other misrepresentation.

(c) This qualification does not, however, justify a judge in refusing to admit evidence of obvious probative value because it has been obtained through the illegal activities of a police officer or informer, or because the offence charged would not or might not have been committed but for those activities. A judge has no discretion to refuse to admit such evidence.

It is of interest to note that the Canadian courts, departing from the general rule of reception, have purported in some decisions to recognize a doctrine founded on abuse of the court’s process. However, this doctrine, which lacks a convincing rationale, has been repudiated emphatically in several judicial pronouncements, and has no firm basis in Canadian law.

It is clear, however, that the English courts recognize, in the context of unlawful administration of ‘‘breathalizer’’ tests in respect of driving

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The comment has been made that entrapment does not constitute a defence to a criminal charge: Regina v. Chervecki, [1971] 5 W.W.R. 469, at 471, 4 C.C.C. (2d) 556, at 559 (B.C.C.A.) (Bull J.A.). The Canadian courts have declared: ‘‘Our laws have long recognised the necessity to employ agents provocateurs for the protection of society.’’ Regina v. Timar, [1969] 2 O.R. 90, at 93, [1969] 3 C.C.C. 185, at 188 (Cty. Ct. 1968) (Dupont D.C.J.).

The exclusionary rule dependent on judicial discretion has been considered applicable only if the agent provocateur was responsible for calculated inveigling and persistent importuning; in the sense that he had gone beyond mere solicitation or decoy work and actively organized a scheme of ensnarement: Regina v. Kirzner, [1978] 2 S.C.R. 487, 38 C.C.C. (2d) 131, 81 D.L.R. (3d) 229 (1977); Regina v. Bonnar, 4 N.S.R. (2d) 365, at 376, 30 C.C.C. (2d) 55, at 64 (C.A. 1975) (MacDonald J.A.). See also Regina v. Burke, 16 Nfld. & P.E.I.R. 132, 44 C.C.C. (2d) 55 (P.E.I.C.A. 1978) for a general review of the case law.

The Supreme Court of Canada has recognized ‘‘the utility of a general principle of abuse of process which Judges should be able to invoke in appropriate circumstances to mark their control of the process of their Courts and to require fair behaviour of the Crown towards accused persons.’’ Rourke v. The Queen, [1978] 1 S.C.R. 1021, at 1034, 35 C.C.C. (2d) 129, at 139, 76 D.L.R. (3d) 193, at 203 (1977) (Laskin J.C.C.).


offences, an exception to the general rule that all relevant evidence is admissible subject to judicial discretion to exclude it.\textsuperscript{175} The basis of the exception is that evidence of the accused’s failure to provide a specimen of breath is not evidence of an offence which the accused had already committed but direct evidence of the ingredients of the offence itself.\textsuperscript{176} The statutory provisions\textsuperscript{177} not only define the offence but “lay down the only way in which the offence can be proved.”\textsuperscript{178}

Evidence obtained through an \textit{agent provocateur}, although not susceptible to exclusion either by virtue of a rule of law or as a matter of discretion, should be evaluated with circumspection. South Asian codes of evidence based on the Indian Evidence Act of 1872 incorporate a presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars.\textsuperscript{179} The view has been expressed that a decoy is on a different footing from an accomplice so far as the precautionary rule regarding corroboration is concerned, but that the evidence of the former should be probed with due care as well.\textsuperscript{180} In practice, a court may well show reluctance to convict on the evidence of a decoy without confirmation from an independent source.\textsuperscript{181} A conviction based on the uncorroborated testimony of a decoy may properly be quashed on appeal.\textsuperscript{182} The rule of prudence applies with special force whenever the only evidence for the prosecution is that of an \textit{agent provocateur} whose enticement contributed directly to the commission of the crime.\textsuperscript{183}

The distinction between admissibility and probative value is important in this context. Thus, the unlawful or unfair character of a search in the course of which evidence is discovered is a factor which may legitimately be taken into account in assessing the evidence offered by the prosecution.\textsuperscript{184} The Sri Lankan courts have been prepared to distinguish between the concepts of admissibility and credibility for this purpose.\textsuperscript{185}


\textsuperscript{176} Morris, \textit{id.}

\textsuperscript{177} Road Traffic Act, 1972, U.K. 1972, c. 20, s. 6(1), re-enacting Road Safety Act, 1967, U.K. 1967, c. 30, s. 1(1).


\textsuperscript{179} See, e.g., Evidence Ordinance of Sri Lanka, 1895, (no. 14), \textit{Legislative Enactments} 1956, c. 14, s. 114, illus. (b).


\textsuperscript{183} Mayawathie v. De Silva, 59 N.L.R. 430, at 431 (S.C. 1957).

\textsuperscript{184} \textit{Supra} note 30, at 90.

\textsuperscript{185} \textit{Supra} note 31, at 364.
A final point relates to the test of "unfairness" as a basis for the use of discretion. The abundance of judicial authority in Scotland and Ireland has resulted in the elaborate formulation of the criteria governing the exercise of discretion. Overall, these criteria have been usefully and perceptively conceived. A vivid contrast with the attitude of the Scottish and Irish courts is provided by the approach of the majority of the Supreme Court of Canada in a case where the accused told the police in an induced confession that he had thrown the murder weapon into a swamp, where it was later found. The trial judge refused to allow the introduction of evidence as to the accused's part in the discovery of the weapon and the accused was acquitted. The Crown unsuccessfully appealed to the Ontario Court of Appeal, but the majority of the Supreme Court of Canada allowed a further appeal by the Crown and ordered a new trial. Martland J. emphasized that "unfairness" should be linked not with the method of obtaining evidence, but with the actual trial of the accused by reason of its admission. The effect of this view is that the exclusionary discretion of the court is restricted to evidence whose probative value is significantly disproportionate to its potential prejudice. In keeping with this approach, evidence whose probative value is unimpeachable can in no circumstances be excluded at the discretion of the trial judge on the ground that it has been obtained by illegal or unfair means. It is submitted that this criterion is too rigid and narrow to be of value in achieving the ends of justice.

IV. THE RELATION BETWEEN THE CONFESSION RULE AND THE EXCLUSION OF EVIDENCE OBTAINED BY ILLEGAL MEANS

The Transvaal Provincial Division in South Africa has left open the question whether exclusion on the ground of compulsion should be limited to cases where the accused has been forced physically or by threats to create against himself evidence which could otherwise not have been brought into existence or whether it extends also to cases where the accused has only been forced to produce or submit to a search for evidence against him which already exists in the form of documents or the like.

It is submitted, however, that a clear distinction is warranted by considerations of policy between the two situations contemplated in this passage. The Supreme Court of Sri Lanka, while accepting as settled law that "relevant evidence (for example, evidence existing independently of the illegal activity of the person discovering it) is admissible despite the

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187 Uys, supra note 86, at 407 (Schreiner J.).
illegality of the activity in the course of which such evidence was discovered”, has properly placed emphasis on the different considerations applicable to the proof of confessions:

[W]here . . . the fact which is sought to be admitted in evidence is one which was non-existent prior to or independently of the . . . unauthorised act, and came into existence only because of it, and would not have come into existence at the time and in the circumstances it did, but for the [unlawful] act . . . the principle that relevant evidence discovered in the course of an illegal or irregular activity is admissible can have . . . no application.188

The crux of the distinction is that, in the latter context, unlike in the former, the unlawful act brings into existence and directly moulds the evidence.

The validity of the distinction has been acknowledged in English law. The House of Lords recently asserted that “there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.”190

The true analogy, it is suggested, is not between improperly induced confessions and real evidence procured by illegal means, but between real evidence discovered in consequence of an improperly induced confession and real evidence obtained by unlawful methods. The assimilation of these situations on the basis of a uniform principle is defensible because property discovered as a result of inadmissible confessions and evidence discovered by illegal means are alike received as evidence on the ground that they constitute independently verifiable material.191

The theory of confirmation of the substance of confessions by subsequently discovered facts is inextricably interlinked with the acceptance of potential untrustworthiness as the rationale underlying the exclusion of confessions within limits demarcated by the law. However, it is a recognized principle of evidentiary law that

if, in the course of [an inadmissible] confession, the party [confessing] state where . . . goods or a body may be found, and they are found accordingly, this is evidence, because the fact of finding proves the truth of the allegation, and his evidence in this respect is not vitiated by the hopes or threats which may have been held out to him.192

The applicable rationale is that “the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby

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189 Id.
191 See, e.g., Doyle, supra note 150.
induced to say what is false: but the fact discovered shews that so much of the confession as immediately relates to it is true.\footnote{Rex v. Butcher. 168 E.R. 235 n (Assizes 1798).} Similarly, testimonial trustworthiness of evidence procured during an illegal search is unaffected by the mode of its discovery.

Although different considerations apply to the judicial reception of improperly induced confessions and of evidence discovered by illegal means, it is clearly desirable, in the interest of achieving consistency and symmetry within a legal system, to avoid a direct conflict between the structural framework of the law in the two areas.

The approach of English law to the admissibility of confessions in criminal proceedings is founded on three cardinal principles:

(a) a confession which does not satisfy the test of "voluntariness" is strictly inadmissible as a matter of law;

(b) a confession which has been obtained in contravention of the Judges' Rules\footnote{The Judges' Rules are a code of procedure drafted by the judges to aid the police when they question suspects. Over the years these rules have been revised and the current rules were issued in 1964 by Lord Parker C.J. in a practice note: [1964] 1 All E.R. 237, [1964] 1 W.L.R. 152 (C.C.A.).} may be excluded as a matter of discretion; and

(c) a confession, the reception of which involves unfairness to the accused, may be excluded at the court's discretion.\footnote{J. HEYDON, supra note 112, at 168.}

It is interesting to note the fundamental contrast offered by the structural framework of South Asian codified systems modelled on the Indian Evidence Act. The law of Sri Lanka, which is representative of these systems, precludes proof of the following categories of confessions:

1. confessions caused by an inducement, threat or promise;\footnote{Evidence Ordinance of Sri Lanka, 1895, (no. 14). LEGISLATIVE ENACTMENTS 1956, c. 14, s. 24.}
2. confessions made to a police officer, a forest officer or an excise officer;\footnote{S. 25(1). (2).}
3. confessions made by any person while in the custody of a police officer, a forest officer or an excise officer.\footnote{S. 26(1). (2).}

As to the first category, the voluntary character of a confession is a precondition of its admissibility in evidence. Although the form of words used by English and Sri Lankan authorities is not identical, there does not seem to be any difference in substance.

In regard to the second category, statutory provisions in Sri Lanka incorporate a prohibition against the reception in evidence of a confession made to a police officer unless the confession has been recorded by a magistrate. In England and in most Commonwealth jurisdictions, as well as in the United States, a confession made to a police officer is ruled out only if it infringes the criterion of voluntariness.
or if its exclusion is considered desirable by the court on the basis of the "unfairness" rule. In Sri Lanka, however, if a confession has been made to a police officer it is unnecessary to inquire whether it has been made voluntarily, for the confession is excluded absolutely in these circumstances.  

As to the third category, the law of Sri Lanka provides that "[n]o confession made by any person while he is in the custody of a police officer, unless it be in the immediate presence of a magistrate, shall be proved as against such person."  

English law contains no comparable limitation.

It is one thing to accept, as Anglo-American law does, that "statements obtained from prisoners, contrary to the spirit of [the Judges'] [R]ules, may be rejected as evidence. . . ."  

It is another to protect an accused person by forbidding the proof of a confession, even when made of his own free will, to a police officer or when in the custody of a police officer except in the immediate presence of a magistrate. Sri Lankan and Indian law adopt the latter approach.

The crucial issue in this area is the question whether truth alone should be the criterion governing the admissibility of confessions in criminal proceedings. The Eleventh Report of the Criminal Law Revision Committee in England contains the recommendation that the law should be based entirely on the criterion of reliability. Statutory provisions in New Zealand and in the Australian jurisdiction of Victoria are founded on the same premise.

In contrast, the second and third exclusionary rules above, relating to confessions contained in the Indian and Sri Lankan statutes, do not depend on the actual unreliability of a confession, since a confession made to a police officer or made while the accused is in police custody may well be true. But in these circumstances the pressures, direct or insidious, operating on the accused to make an admission of guilt are substantial enough to justify doubts as to the reliability of the confession. Moreover, the reception in evidence of confessions obtained in these circumstances is repugnant to the principle against self-incrimination, and, in particular, is in direct conflict with the object of discouraging unfair police practices.

The salient difference between English law on the one hand, and Indian and Sri Lankan law on the other, is that in the former system the test of voluntariness is capable of universal application to confessions in

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200 Evidence Ordinance of Sri Lanka, 1895, (no. 14), LEGISLATIVE ENACTMENTS 1956, c. 14, s. 26(1).


criminal proceedings while, under the latter system, absolute rules of exclusion govern specific categories of confessions—namely, confessions to police officers and confessions made in police custody—without reference to the criteria of voluntariness and spontaneity. In view of this difference, the principle that relevant evidence of demonstrable testimonial trustworthiness should be admissible, is capable of application with greater ease in England than it is under the codified South Asian systems based on the Indian Evidence Act. The latter systems, unlike the English law of evidence, reflect the assumption that in limited contexts there are good reasons for excluding evidence, even though its truth is incontrovertible. In the setting of the South Asian systems, therefore, strong indications that evidence is true and reliable in substance do not render any less valid the reasons for exclusion of such evidence since these reasons are wholly unrelated to the truth or reliability of the evidence.

The criteria governing admissibility of confessions in England are, in reality, veracity and dependability. Consequently, the internal cohesion of the law is in no way disturbed by adoption of the general rule that relevant and reliable evidence discovered by illegal means is admissible. However, this is not true of the approach of the South Asian systems. The priority accorded by these systems is to the principle that other elements of public policy, especially the privilege against compulsory self-incrimination and the control of police initiative, render necessary the exclusion of evidence, notwithstanding both its probative value and its testimonial trustworthiness. This warrants the exercise of judicial discretion in the South Asian region in favour of exclusion of relevant evidence illegally obtained on a broader and more liberal basis than that appropriate to English law. For this reason, the detailed criteria developed by the courts of Scotland and Ireland are likely to be of particular value in jurisdictions such as India, Malaysia, Singapore and Sri Lanka.

V. CONSIDERATIONS OF POLICY MILITATING AGAINST THE EXCLUSIONARY RULE

Reliability of the evidence secured is in no way affected by the illegality of the search. This reflection has assumed particular importance in the context of the growing conviction among lawyers and criminologists today that excessive protection is conferred on the accused by such doctrines of the law of evidence as the admissibility of similar fact evidence, evidence of character, confessions and the testimony of experts. The Criminal Law Revision Committee in England has made a series of proposals aimed at giving a criminal trial the complexion of an inquiry into truth rather than the appearance of a game. The Ontario Court of Appeal has commented:

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We have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our laws is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety.

This climate of opinion is favourable to the restoration of opportunity to the prosecution to lead relevant evidence with minimal restriction. This attitude would seem consistent with the reception of evidence procured by an illegal search on the ground that its probative value is entirely unimpaired by the method by which it was obtained. The introduction of such evidence often facilitates ascertainment of the truth.

The countervailing argument is that the reliability of evidence, although obviously of great importance, is not the only pertinent consideration. One of the significant objectives of public policy in this area is discouragement of unscrupulous or oppressive methods resorted to by the police. It is arguable that this objective is achieved by the deterrent effect of excluding evidence procured by an illegal search. However, the validity of this “deterrent” principle may be convincingly assailed. It has been pointed out that “well-publicized judicial criticism and the consequential arousing of public opinion will deter the police better than the exclusion of evidence; and if it does not, there is probably something wrong with the police too deep-rooted to be cured by the law of evidence.” In any event, it is probably true of the great majority of cases in which an unlawful search is conducted that the police are “prompted by the hope that it will not be brought to the notice of the court, not by the belief that evidence discovered in consequence of it will be received . . . .” Where the reception of evidence is accompanied by an emphatic judicial reprimand addressed to the police, it is unrealistic to assume that that criticism exercises no restraining influence on the police merely because the evidence is admitted.

The expedient of seeking to punish the police by rejecting unlawfully obtained evidence is inherently illogical. The point was effectively illustrated by Wigmore:

The indirect and unnatural method is as follows: “Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for


The result is that, far from redress being offered for the wrong done, reparation entails the commission of two wrongs. This argument holds good whether the search infringes constitutional provisions or rights secured by the common law.

The rule of exclusion is dispensable since the protection of the citizen can be adequately ensured without depriving the courts of pertinent evidence in reaching a just conclusion as to the imputation of guilt. Notwithstanding the reception of evidence discovered during an illegal search, sufficient sanctions are still available to the party whose constitutional or common law rights are violated. Civil actions for trespass, assault, false arrest, malicious seizure of property, conversion and damage to property provide a wide range of remedies.

The effectiveness of these remedies may, however, be questioned on pragmatic grounds. The lack of solvency of the individual police officer responsible for the unlawful search, insistence on malice as a precondition of award of aggravated or exemplary damages, the likelihood of extenuation of damages on account of the plaintiff’s bad reputation and the legitimate fear which a plaintiff may well entertain in regard to invasion of his privacy are circumstances which, cumulatively, detract from the utility of the remedies furnished by the civil law. These objections are strengthened by the practical consideration that “self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.”

The wide sweep of the traditional rule acted upon by the English courts, that no action would lie in tort if the evidence unlawfully seized were subsequently used in a criminal prosecution, has been drastically curtailed. This protection is available to the officer responsible for the illegal search only where the police have reasonable grounds for believing that a serious offence has been committed, that the evidence is material, and that the person in possession of it is a participant in the crime. However, there remains an area in which arbitrary or capricious use of police authority could place the fundamental rights of the citizen in jeopardy.

The exclusionary doctrine is perhaps open to the objection that it necessitates adjudication of collateral issues which distract attention

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from the primary purpose of the trial. This entails the disadvantages of delay and confusion. On the other hand, the exclusionary rule has the beneficial result of according the accused the right to invoke the protection of the law in the same proceeding instead of being compelled to incur delay and expense in commencing a fresh action. Moreover, the English and Scottish doctrines, far from eliminating a collateral investigation, further encumber and complicate the issues subsumed in the collateral inquiry by superimposing the criterion of fairness to the accused on the tests governing illegality of the search.

Finally, contemporary crime is characterized by a high degree of organization and sophistication. The finding has been made recently in England that "there is . . . a large and increasing class of . . . professional criminals who are not only highly skilful in organizing their crimes and in the steps they take to avoid detection but are well aware of their legal rights and use every possible means to avoid conviction if caught."213 In these circumstances it is probably self-stultifying to fetter the police by excessive stringency in regard to the means which they may properly employ in the detection of crime.

VI. CONCLUSION

Despite the cogency of some of the arguments which may be urged in denigration of the exclusionary rule, a compromise must be found between the competing ideals of effective law enforcement and adequate protection of individual rights. "There must be a discretionary power to exclude illegally-obtained evidence, at any rate in criminal cases, for public opinion would not tolerate its reception if it were procured by torture, however much it was confirmed by such convincing matters as the subsequent voluntary admission of the accused. . . . "214 It is submitted that the criteria discussed in section III provide a foundation for the guidelines which could usefully regulate the exercise of this discretionary power by the courts.

213 Supra note 204, at para. 21.
214 Supra note 207.