



NUS Working Paper 2017/014

Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis

Ho Hock Lai

lawhohl@nus.edu.sg

[September 2017]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: <http://law.nus.edu.sg/wps/>

© Copyright is held by the author or authors of each working paper. No part of this paper may be republished, reprinted, or reproduced in any format without the permission of the paper's author or authors.

Note: The views expressed in each paper are those of the author or authors of the paper. They do not necessarily represent or reflect the views of the National University of Singapore.

Citations of this electronic publication should be made in the following manner: Author, "Title," NUS Law Working Paper Series, "Paper Number", Month & Year of publication, <http://law.nus.edu.sg/wps>. For instance, Chan, Bala, "A Legal History of Asia," NUS Law Working Paper 2014/001, January 2014, www.law.nus.edu.sg/wps/

Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis

Ho Hock Lai*

I. Introduction

Two events must occur for the issue of excluding wrongfully obtained evidence to arise before a trial court. The first is the wrongful procurement of evidence.¹ Typically, the procurer is the police.² When the police look for evidence, a major purpose is to supply the prosecutor (or, in some jurisdictions, the investigating judge) with evidence of potential use in securing a criminal conviction. The second preceding event is the step taken by the relevant official (prosecutor or investigating judge) to adduce the evidence at the trial or, in civil law systems, to include the evidence in the dossier for the trial court.

To exclude wrongfully obtained evidence is, in one sense, to prevent the prosecution from adducing it to discharge its burden of proof. In another sense, it is about the trial court being barred from relying on the evidence in determining the guilt of the accused person and, where reasons are required, in justifying its finding of guilt. Rules that compel or permit the exclusion of wrongfully obtained evidence are sometimes called “exclusionary rules”. In some civil law systems, exclusion is achieved by way of the procedural concept of nullity.³ For example, if a search was conducted unlawfully, the judicial chamber has the power to declare it null and void, and the evidence gathered from the nullified search is then excluded from the investigation dossier.⁴

Part II discusses three lines of objections relating to wrongfully obtained evidence. As we will see, they have prompted different rationales and theories for exclusion. Part III explores the different approaches that have been taken to wrongfully obtained evidence. An analysis of legal forms and techniques will be followed by a discussion of the major factors that have been treated as relevant in deliberation on exclusion.

II. Objections, Rationales and Theories

It aids analysis of the topic to separate three lines of objection. Each of them is directed at a different institutional actor. The first objection is to the manner in which the police had obtained the evidence; the second is to the use of the evidence by the prosecution to prove its case against the accused or to the inclusion of the evidence in the trial

* I thank Jenia I. Turner for her valuable comments and Ho Yijie for his research assistance.

¹ The procurement may be wrongful in the sense of being unlawful or in breach of extra-legal standards of conduct. *See infra* Part III.4.

² In the non-typical context where the evidence was obtained by persons acting in a private capacity, see David R. A. Caruso, *Public Policy and Private Illegality in the Pursuit of Evidence*, 21 *Int'l. J. of Evid. & Proof* 87 (2017).

³ *See* Stephen C. Thaman, *Balancing Truth against Human Rights: A Theory of Modern Exclusionary Rules*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 403, 410-412 (Stephen C. Thaman ed., 2013).

⁴ Dimitrios Giannouloupoulos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 *Int'l. J. of Evid. & Proof* 181, 190 (2007).

dossier; and the third is to the trial court's reliance on the evidence in finding the accused guilty as charged or, where provision of reasons is required, in supporting that finding. Different theories or rationales for the exclusion of wrongfully obtained evidence have clustered around these three lines of objection. It is usual to find more than one theory or rationale at work in shaping the law.

1. Exclusion grounded in objections to police misconduct in procuring the evidence

In the standard case, the evidence in question was obtained wrongfully by the police. The problem of admitting or relying on such evidence at a criminal trial is connected to the prior problem of the police misconduct in obtaining it. At one level, the connection is plain to see: the court would not be facing the issue of exclusion had the police not acquired the evidence wrongfully. The relationship between the two problems has, in addition, a purposive dimension. A major aim of criminal investigation is to secure evidence that is capable of standing up in court as proof of guilt. What makes the police conduct wrongful is, in part, that it was directed at getting evidence for use at a criminal trial; the conduct may otherwise be lawful. The law may allow the compulsory acquisition of information from a person in the course of a purely administrative investigation but not allow it if it was for the purpose of supporting a criminal prosecution.⁵

While the two problems are related, they are separable. First, one can arise without the other. The problem of police misconduct in evidence-gathering can easily exist independently of any question of relying on wrongfully obtained evidence in the determination of guilt. An unlawful search may not yield any evidence, and even if it does yield evidence, it may not end up before the court, or the accused may decide to plead guilty, thus foregoing a trial. In all these situations, there is no occasion for a trial judge to exclude wrongfully obtained evidence.

Secondly, the permissibility of the method used by the police in obtaining evidence and the permissibility of reliance on the evidence by the court are different issues. Wrongfully obtained evidence is not always excluded. Further, even where the police have an excuse for obtaining evidence in a wrongful way, and even where it is proper to employ wrongfully obtained evidence for investigative or other non-judicial purposes, it may be objectionable to allow use of the evidence in the legal determination of guilt. In *A v. Secretary of State for the Home Department (No 2)*,⁶ which concerns the admissibility of evidence allegedly obtained from third parties by torture at the hands of foreign agents, the House of Lords of the United Kingdom stressed that the executive and the judiciary have different functions and responsibilities. While the executive may be entitled or even bound in some circumstances to rely on wrongfully obtained evidence in making operational decisions, it is quite another thing to use the evidence in legal proceedings.

Thirdly, there are many ways of addressing the problem of police misconduct in gathering evidence that do not involve exclusion of the evidence and the effectiveness of exclusionary rules in dealing with the problem is questionable. The direct way of handling a particular instance of police misconduct is to institute disciplinary or

⁵ See HUMAN RIGHTS AND CRIMINAL JUSTICE, 617 (Ben Emerson, Andrew Ashworth & Alison Macdonald eds., 3rd ed., 2012).

⁶ [2006] 2 A.C. 221.

criminal action against the errant officer. Prophylactic measures targeted at the police as a profession include providing better training and clearer investigative rules. Personal remedies may also be obtained by instituting collateral proceedings. In some legal systems, these include financial compensation by the state as a public law remedy to the person whose right had been violated by the police in the course of seeking evidence.⁷ Another possibility is the award of damages under tort law in an action brought by the person against the police.⁸

These ways of addressing the police misconduct occur outside of the criminal proceeding for which the evidence was procured. Responses to the wrongdoing can also occur in the criminal proceeding itself. Some jurisdictions are open to treating the police misconduct as a mitigating factor in sentencing⁹ or, in especially egregious cases, even as a ground for putting a stop to (by granting a stay of) the prosecution.¹⁰ One theory defends exclusion as another form of remedy – and as the most appropriate remedy¹¹ – for the violation of rights committed by the police in securing the evidence.¹² Where the evidence sought to be used against the accused person has been obtained in serious transgression of his or her rights, the most effective remedy for the transgression is to prevent the evidence from being so used. This puts the accused in the position he or she would have been in had his or her right not been infringed. Since it is the violation of the accused’s rights and not the police wrongdoing of itself that justifies exclusion, the theory cannot explain, for example, why evidence obtained by torturing a third party should be excluded. In this situation, it was the victim’s – and not the accused person’s – fundamental right not to be tortured that was breached. One implication of this theory is that the accused would lack standing to call for exclusion if it was someone else’s legal right that had been infringed. This standing requirement exists in several jurisdictions including the United States and Germany.¹³

The remedial theory is rights-based, backward-looking, and defends exclusion as a direct response to the specific wrong committed by the police in getting the evidence. An alternative theory is policy-based, forward-looking, and justifies exclusion in terms

⁷ Such a remedy is available, for example, in the United States (*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)) and in New Zealand (*Simpson v. Attorney-General [Baigent’s Case]* [1994] 3 N.Z.L.R. 667).

⁸ For defence of this remedy in the United States, see Akhil Reed Amar, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 31-45 (1997); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363 (1999).

⁹ See Criminal Procedure Code of the Netherlands, §359a; Matthias J. Borgers & Lonneke Stevens, *The Netherlands: Statutory Balancing a Choice of Remedies*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 183, 190 (Stephen C. Thaman ed., 2013). For a proposal to move in a similar direction in the U.S., see Guido Calabresi, *The Exclusionary Rule*, 26 Harv. J. L. & Pub. Pol’y 111 (2003).

¹⁰ See Criminal Procedure Code of the Netherlands §359a.

¹¹ In New Zealand, the availability of monetary compensation and sentence reduction is generally irrelevant in deciding whether to exclude evidence obtained in breach of the Bill of Rights Act: *R v. Shaheed* [2002] 2 N.Z.L.R. 377, 386, 421.

¹² See Andrew Ashworth, *Excluding Evidence as Protecting Rights*, [1977] Crim. L. Rev. 723; William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 Geo. Wash. L. Rev. 633 (1983); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 Wake Forest L. Rev. 261 (1998).

¹³ On the German position, see Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 113, 122 (Stephen C. Thaman ed., 2013). The position is different in Greece. There “the exclusionary rule applies even in cases where evidence has been obtained through a violation of the right to privacy of a person other than the defendant.” Giannouloupoulos, *supra* note 4, at 197.

of its impact on future police behavior. On this theory, exclusion of wrongfully obtained evidence is analyzed, as it is most prominently in the United States, as a matter of public policy that works indirectly to address malpractices in criminal investigation. The hope is that the exclusion would help to shape police behavior by deterring similar misconduct in the future or by educating the police on the importance of complying with the law. On this rationale, the effect and purpose of exclusion coincide. But, conceptually, the two are distinct. In many other jurisdictions, deterrence is not the (primary) purpose of exclusion. (Other possible rationales are explored below.) Where the adopted rationale is other than deterrence, the exclusionary rule may still have a deterrent effect on the police. But that is beside the point. Even where the purpose of the rule is to deter police misconduct, the problem addressed by the exclusion of evidence is, strictly speaking, still conceptually different from problem of police misconduct. In allowing the evidence to be used, the court risks sending a wrong signal to the police (that is, of legitimizing or giving judicial approval to their method of obtaining evidence) whereas exclusion would impress upon them the futility of such endeavors (by eliminating the incentive for engaging in similar evidence-gathering operations in the future). Hence, even if exclusion is for the sake of deterrence, the problem of allowing wrongfully obtained evidence to be used at the trial is the problem of signaling and incentivization, and not simply the problem of police misconduct.

The deterrence rationale raises a host of questions and rests on a number of assumptions. To deter the police from breaking rules on evidence-gathering, they must know what the rules are. It is questionable whether they do possess adequate knowledge.¹⁴ Exclusion will have little signaling and disincentivization impact if there is no communication channel that keeps the police in the loop every time the court rejects the evidence that they have collected. The deterrence rationale also supposes that the police care or have reason to care sufficiently about exclusion. This will not be so if the culture is such that they perceive their job as done once an arrest is made and investigation closes and their job performance is evaluated by the clearance rate. Even supposing that the police care about exclusion, if they believe that their misconduct will probably not be discovered, they will not be deterred by the threat of exclusion. The motivation for collecting evidence is not always to support a criminal prosecution. Much of police work is about maintaining order without resorting to formal law enforcement. When the police in collecting evidence are not seeking it for use at a trial, the fear of exclusion by the court will not be playing on their mind.¹⁵ Empirical studies on the deterrent effect of exclusionary rules in deterring police misconduct are inconclusive.¹⁶

¹⁴ Inadequate knowledge was reported in a study conducted in the United States: William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. Mich. J. L. Reform 311, 356 (1991).

¹⁵ Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 720 (1970).

¹⁶ The best known empirical study is probably Oaks, *supra* note 15. Although this study is often cited as casting doubt on the deterrent value of the exclusionary rule in the United States, Oaks himself was careful to acknowledge its limitations. *Id.* at 716: "In view of the complexity of the inquiry, it presently appears to be impossible to design any test or group of tests that would give a reliable measure of the overall deterrent effect of the exclusionary rule on law enforcement behavior." On the impact of this article, and for references to other empirical studies, see Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. Chi. L. Rev. 1365 (2008).

2. Exclusion grounded in objections to the prosecution using wrongfully obtained evidence to discharge its burden of proof

In an adversarial trial, to exclude evidence wrongfully obtained by the police is to prevent the prosecution, as a party to the dispute, from presenting it as a means of discharging its burden of proof. Where the trial is by jury, exclusion will keep the fact-finder wholly ignorant of the evidence. Exclusion works differently in an inquisitorial setting; there, it is essentially about the trial court not discussing the evidence at the trial and not taking it into account in the reasons that it has to give for the verdict.

In some jurisdictions that are based on or influenced by civil law, there appears to be a notion of exclusion by the prosecutor. This seems to refer to the prosecutor removing the evidence from the dossier prepared for the trial judge or leaving the evidence aside in deciding how or whether to proceed with the case.¹⁷ In practical terms, the position is not much different in common law systems. There, the prosecutor can similarly choose to leave the wrongfully obtained evidence aside in making prosecutorial decisions and, if the case proceeds to trial, choose not to present the evidence at the trial.¹⁸ The common law, however, does not speak of exclusion by the prosecutor, at least not when “exclusion” is used as a technical term. The power of exclusion lies with the court and whether wrongfully obtained evidence may be adduced is a question of law for the trial judge to decide.

Two other differences between common law and civil law legal systems bear on the present topic. First, in common law legal systems, the functions of the police department and the prosecution office tend to be clearly demarcated and these institutions operate with a degree of independence from each another. The same cannot be said of civil law jurisdictions where criminal investigations are normally led by a prosecutor or an examining magistrate. Secondly, in an adversarial setting, the prosecution is a party to a proceeding that is often characterized as a contest, and, in this contest, it carries the general burden of proving the charge that it has brought against the accused. Exclusion of evidence is an action taken by the trial judge, whose role is popularly depicted as that of an “umpire”, to prevent the prosecution from presenting the evidence as proof. An inquisitorial trial is structured differently. In Germany, for instance, witnesses are, with rare exceptions, called by the court on its own initiative and evidence given at the trial is considered as “the court’s evidence”; as such, the view is taken that “excluding a piece of evidence would not be depriving the

¹⁷ See, e.g., Giulio Illuminati, *Italy: Statutory Nullities and Non-usability*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 235, 239 (Stephen C. Thaman ed., 2013); Chinese Criminal Procedure Law 2012, Art. 54 (English translation available from the website of the Office of the High Commissioner, United Nations Human Rights: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fADR%2fCHN%2f20050&Lang=en); Swiss Criminal Procedure Code, Art. 141(5) (English translation available from the website of the Swiss government: <https://www.admin.ch/opc/en/classified-compilation/20052319/index.html>).

¹⁸ See Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor’s Role*, 47 U.C. Davis L. Rev. 1591 (2014), arguing that prosecutors in the United States have a constitutional and ethical responsibility to refrain from using evidence obtained in breach of the Fourth Amendment regardless of judicial admissibility.

offending party of ‘its’ evidence but would interfere with the court’s effort to obtain a complete picture of the relevant facts.’¹⁹

Resistance to exclusion from an adversarial perspective stresses two related factors. First, it is the duty of the prosecution office to prosecute those who are believed to have committed crimes. Secondly, in systems which maintain clear lines of functional demarcation, the police acts independently and as a separate entity from the prosecution. The exclusion of evidence proffered by the prosecution hampers the prosecution in discharging its burden of proof and in carrying out its public duty to prosecute crimes. Why should the execution of this public duty be thwarted by the misconduct of the police? On the “fragmentary” conception of government attacked by Schrock and Welsh,²⁰ and on the “separation thesis” criticized by Ashworth,²¹ the misconduct of the police, acting as a separate and distinct entity in procuring the evidence, ought not to prejudice the prosecution whose hands are, so to speak, clean.

Various theories have been offered to justify barring the prosecution from proffering wrongfully obtained evidence. One theory invokes the principle that the state should not profit from its own wrongdoing.²² In the situation where evidence has been obtained through a wrongful act of an agent of the state (namely, the police), to allow the state (through the prosecution) to use the evidence against the accused is to allow the state to derive an unfair advantage over the accused in their adversarial contest. A different theory rests on the claim that the prosecutor’s (or the state’s) moral standing to call for criminal condemnation of the accused is undermined by the unlawful conduct employed in securing the means by which it seeks to condemn the accused.²³

Both theories face the already mentioned difficulty raised in the fragmentation or separation thesis. Insofar as the police had acted independently in wrongfully procuring the evidence, the prosecution would arguably not be benefitting from *its* own wrong in using the evidence at the trial. For the same reason that the prosecution was not involved in the wrongdoing, the police misconduct would not undermine the prosecution’s moral standing to seek a criminal conviction. One way of meeting this criticism is to find complicity by the prosecution in choosing to use the evidence as legal proof. Another is to reject the fragmentation or separation thesis by denying the separate agency of the police and prosecution; we should view them, instead, as members of the single collective agent that is the state.²⁴ If the police and the prosecutor are members of the same collective agent, the wrong of one qua member of the collective agent is

¹⁹ Thomas Weigend, *Throw It All Out? Judicial Discretion in Dealing with Procedural Faults*, in DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 185, 189 (Michele Caianiello & Jacqueline S. Hodgson eds., 2015).

²⁰ Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251 (1974). See also Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 Harv. J.L. & Pub. Pol’y 173 (1991).

²¹ Andrew Ashworth, *Exploring the Integrity Principle in Evidence and Procedure*, in ESSAYS FOR COLIN TAPPER 107 (Peter Mirfield & Roger Smith eds., 2003).

²² See, e.g., Peter Chau, *Excluding Integrity? Revising Non-Consequentialist Justifications for Excluding Improperly Obtained Evidence in Criminal Trials*, in THE INTEGRITY OF CRIMINAL PROCESS: FROM THEORY INTO PRACTICE 267 (Jill Hunter et al., eds., 2016); Antony Duff et al., THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 107-8 (2007)..

²³ See, e.g., Duff et al., *supra* note 22, at 109.

²⁴ See Ho Hock Lai, *The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence*, 10 Crim. L. & Phil. 109 (2016).

attributable to the other qua member of the same collective agent. In short, while different hands are at work, there is but one actor.

3. Exclusion grounded in objections to the court relying on wrongfully obtained evidence in reaching or justifying a conviction

A third group of theories focuses on objections to the trial court relying on wrongfully obtained evidence in determining or justifying a finding of guilt. If, on the arguments explored in the section immediately above, it is objectionable for the prosecution to use the wrongfully obtained evidence at the trial, it would be objectionable for the court to allow the prosecution to do so by admitting the evidence. This merely brings us back to the arguments just considered. But there is more to be said. The court's reliance on the evidence in finding the accused guilty, or in justifying that finding, may be problematic in its own right.

a. Reliability

Notwithstanding the oft-made, and occasionally exaggerated, claim that there is greater respect for material truth in the civilian tradition than at common law, a widely accepted aim of a trial, be it an inquisitorial or adversarial one, is to ascertain the truth in the charge brought against the accused person. Given the relevance of wrongfully obtained evidence, its exclusion would, *prima facie*, run counter to this aim. This is a major source of pressure *against* exclusion.

However, reliability concerns may also be a source of pressure *for* exclusion. Evidence may be unreliable because of how it was obtained. Use of unreliable evidence increases the risk of error in fact-finding. Exclusion would serve the truth-seeking purpose of a trial. Unreliability of evidence is the criterion employed in exclusionary rules such as Article 69(7) of the Statute of the International Criminal Court. But the exclusion of wrongfully obtained evidence on this ground faces theoretical and practical difficulties. It has been noted in relation to confessions that unreliability is a matter that, theoretically, should “go to the weight and not to the admissibility of the evidence”,²⁵ and, at the practical front, there are difficulties in devising “a clear, administratively feasible means of evaluating the trustworthiness of specific confessions.”²⁶

Other exclusionary rules focus instead on the reliability of the method used in obtaining the evidence. Certain methods of obtaining evidence carry a significantly high risk of producing unreliable evidence. Where evidence is excluded under these rules, it is because the evidence was obtained by an unreliable method and not because the evidence is unreliable. For instance, a provision in the Indian Evidence Act requires the exclusion of a confession if its making was “caused by any inducement, threat or promise”.²⁷ In applying this exclusionary rule, the court has to consider if any of these three forms of pressure was exerted on the accused person in getting him or her to confess; the court does not undertake an assessment of the reliability of the confession itself. A method of obtaining a confession is unreliable insofar as it generates a significant risk of falsity in confessions procured by that method. The method is

²⁵ Ibrahim v. R [1914] A.C. 599, 610; A v. Secretary of State for the Home Department (No. 2), *supra* note 6, at 287.

²⁶ Welsh S. White, *What is an Involuntary Confession Now?*, 50 Rutgers L. Rev. 2001, 2028 (1998).

²⁷ Indian Evidence Act § 24.

unreliable even if its use on a particular occasion produces a true confession. To draw an analogy, speeding is a dangerous way to drive as it increases the risk of an accident occurring. This proposition holds up even if a driver managed to avoid causing any accident while speeding on a particular occasion. Similarly, that a confession obtained by an unreliable method happens to be true does not establish that the method is therefore reliable. Sometimes, the test for exclusion is the unreliability of the method and not unreliability of the evidence.²⁸

Tensions between the interest in admitting reliable relevant evidence and the value of exclusion come to the fore where the wrongfully obtained evidence leads to the discovery of other evidence. The latter is often called “derivative evidence” or described metaphorically as “fruits of the poisonous tree”²⁹ and its reliability is usually not in doubt. At common law, the derivative evidence is generally admissible.³⁰ This reflects the priority given to the interests in uncovering guilt and crime control. In other jurisdictions, such as the United States, the exclusionary rule extends, with exceptions, to derivative evidence.³¹ This serves the interest of deterrence. There is even less reason for the police to engage in wrongful procurement of evidence if they do not stand to benefit even indirectly from such acts.

Another situation where tension exists is where facts are subsequently discovered which establish the reliability of a wrongfully obtained statement. If reliability of evidence is the crucial consideration, the initial ground for excluding the wrongfully obtained statement dissipates with the new discovery. In Singapore, the statement now becomes admissible.³² The position is different under English common law. Admissibility of the statement would generally remain inadmissible.³³ This is because while “the inherent unreliability of involuntary statements is one of the reasons for holding them to be inadmissible there are other compelling reasons also.”³⁴ As noted earlier, the law is normally underpinned by multiple rationales. We now turn to these other compelling reasons.

b. Integrity

Many theories of exclusion invoke the values of “integrity” and “legitimacy”. These two terms are used interchangeably in the literature. The two concepts will be delineated in order to isolate, and facilitate the systematic exposition of, the different arguments that come under their labels. Legitimacy will be treated, as it is in social and political theory, as a concept that is associated with claims of authority. Legitimacy-based arguments for exclusion will be addressed in the next section. This section

²⁸ On this distinction in England, see Ian Dennis, *THE LAW OF EVIDENCE* 238-239 (6th edn., 2017), and in the United States, see Yale Kamisar, *What is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 Rutgers L. Rev. 728, 753; Welsh S. White, *supra* note 26; Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 Mich. L. Rev. 1 (2015).

²⁹ For a comparative study, see Kerri Mellifont, *FRUIT OF THE POISONOUS TREE: EVIDENCE DERIVED FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE* (2010)

³⁰ *R v. Warickshall* (1783) 1 Leach 263.

³¹ *Silverthorne Lumber Co. v United States* 251 U.S. 385 (1920).

³² Criminal Procedure Code, Cap. 68, 2012 rev. edn., §258(6)(c).

³³ *Lam Chi-ming v. The Queen* [1991] 2 A.C. 212.

³⁴ *A v. Secretary of State for the Home Department* (No. 2), *supra* note 6, at 249; *Lam Chi-ming v. The Queen*, Privy Council, appeal from Hong Kong) *supra* note 33, at 220.

considers integrity as a value underpinning exclusionary rules.³⁵ There are two prominent conceptions of integrity in this area of the law.

On one conception, integrity is about abiding by principles and being steadfast in recognizing rights as trumps. It is the duty of the court to vindicate the legal rights of individuals in their dealings with the state.³⁶ This duty is especially grave where the rights are constitutional or fundamental in nature. Judicial integrity reinforces the remedial theory of exclusion discussed earlier.³⁷ There is an abdication of judicial duty in the failure to exclude wrongfully obtained evidence where exclusion is the only or most meaningful way of vindicating the right that has been breached.

A different argument conceives of integrity as moral coherence.³⁸ It emphasizes the nature of the criminal law as a censoring institution. A criminal conviction blames and condemns a wrongdoer for the wrong that the person has done. To expand on the collective agency analysis mentioned above, the court, in convicting a person, is acting as one component of the collective agent that is the criminal justice machinery of the State. This is sometimes described as integrity as integration. Exclusion upholds the value of integrity understood as normative coherence in the operations of the criminal justice system considered as an integrated whole. There is a lack of normative coherence when the state itself violates the law in its attempt to enforce the law; in the first, the state violates the law through the agency of the police in obtaining evidence and in the second, the state attempts to enforce the law through the agency of the court in seeking a criminal conviction.

c. Legitimacy

Another group of arguments focuses on the concept of legitimacy. The court in seeking to achieve the internal aim of finding the truth is subject to side-constraints based on values external to the trial. Such side-constraints are necessary if the court or, more broadly, the administration of justice or, even more broadly, the government is to have legitimacy in the sense of drawing (and being deserving of) public confidence and respect. This was a driving force in the development of exclusionary rules by the United States' Supreme Court before the ascendancy of the deterrence rationale. To preserve judicial legitimacy, and to avoid being tainted by the executive's dirty hands, the court has to renounce and dis-associate itself from the police illegality by refusing to accept and act on the product of the illegality.³⁹ A similar approach is taken, albeit from a

³⁵ See generally Ashworth, *supra* note 21. For an example of an exclusionary rule that turns on the concept of integrity, see Art. 69(7) of the Statute of the International Criminal Court.

³⁶ Under Art. 40 of the Constitution of Ireland, the "State guarantees.... [b]y its laws to defend and vindicate the personal rights of the citizen". The Irish courts have founded the exclusionary rule on this constitutional guarantee: see, e.g., D.P.P. v. JC [2015] I.E.S.C. 31 at [4.18], judgment of Clarke J. See Tony Ward & Clare Leon, *Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Irish and English Law*, 35 Legal Stud. 571 (2015).

³⁷ *Supra* Part II.1.

³⁸ See, e.g., Duff et al., *supra* note 22, ch. 8; Paul Roberts & Adrian Zuckerman, CRIMINAL EVIDENCE 157-160 (2004); Ho Hock Lai, *State Entrapment*, 31 Legal Stud. 71, 88-91 (2011) (applying the same type of argument to entrapment).

³⁹ See Robert M. Bloom, *Judicial Integrity: A Call for its Re-emergence in the Adjudication of Criminal Cases*, 84 J. Crim. L. & Criminology 462 (1993); Robert M. Bloom and David H. Fentin, *A More Majestic Conception: The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. Pa. J. Const. L. 47 (2010); Fred Gilbert Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. Rev. 1129 (1973).

broader perspective, under section 24(2) of the Canadian Charter of Rights and Freedoms. Exclusion under this provision turns on whether admission of evidence obtained in breach of the Charter “would bring the administration of justice into disrepute.” This is determined objectively from the viewpoint of a reasonable and informed person. The focus is on social policy considerations pertaining to the damage that might prospectively be done, in the long term, to the legitimacy of the justice system if the court were seen as condoning the illegal practices of the police.⁴⁰ Even more broadly, legitimacy is also an attribute of the government. As will be discussed later, the introduction of exclusionary rules in China was, on one account, prompted by the interest of the communist party in preventing erosion of its authority.⁴¹

But legitimacy is a double-edge sword. Just as legitimacy of the criminal process would be eroded if “the court as a dispenser of justice... is seen to condone illegality”, it would also be undermined if “the public perceives that factually guilty people are getting away with serious crimes because of a trivial breach of legislation”.⁴² Hence, the Canadian approach treats society’s interest in the adjudication of cases on their merits as a relevant countervailing consideration. Exclusion of prosecution’s evidence is seen as being detrimental to the social interest in having an effective law enforcement system. This is controvertible. Exclusion may produce a net positive gain for law enforcement over the long term. Schulhofer, Tyler and Huq argue, in the context of Fourth Amendment violations in the United States, that “judicial tolerance for [such] violations will generate disrespect for authority, chill voluntary compliance, and discourage law-abiding citizens from offering the cooperation that makes it possible to apprehend and convict other offenders in future cases.”⁴³

Thus far, the discussion has been on the legitimacy of institutions. We may also speak of the legitimacy of a verdict. Some have argued that the purpose of a trial is not simply to get to the truth but to legitimize the verdict. On this account, legitimacy is an internal aim, not merely an external value, of the trial process. The legitimacy of verdict has a positive and a normative meaning. Briefly, a verdict is legitimate in the positive sense if it is to gain general acceptance by the public and it is legitimate in the normative sense if it is worthy of such acceptance.⁴⁴ On a wholly positive reading, legitimacy is a matter of public opinion, rightly or wrongly held. Courts have tended to emphasize the normative dimension of the concept.⁴⁵

A verdict that is the product of an unfair trial lacks legitimacy. The concepts of “fairness” and “reliability” are inter-twined. Just as we can say that it is unfair (or unjust) to convict a person who is innocent, we can also say that it is unfair (or unjust)

⁴⁰ See, e.g., *R. v. Grant*, 2009 S.C.C. 32; *R. v. Harrison*, 2009 S.C.C. 34.

⁴¹ See *infra* Part II.3.d.

⁴² *S.M. Summit Holdings Ltd. v. P.P.* [1997] 3 S.L.R. 922 at [48] (High Court of Singapore). This point is stressed by Adrian A. S. Zuckerman in advocating a balancing approach: *Illegally-Obtained Evidence – Discretion as a Guardian of Legitimacy*, 40 *Current Legal Probs.* 55 (1987).

⁴³ Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 *J. Crim. L. & Criminology* 335, 364 (2011).

⁴⁴ See generally Ho Hock Lai, *A PHILOSOPHY OF EVIDENCE LAW – JUSTICE IN THE SEARCH FOR TRUTH* 57-61 (2008); Ian Dennis, *THE LAW OF EVIDENCE* 52-63 (6th edn., 2017).

⁴⁵ See, e.g., *R. v. Grant*, *supra* note 40, at [68], [84] (Canada); P. J. Schwikkard and S.E. van der Merwe, *South Africa, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 471, 488 (Craig Bradley ed., 2007) (South Africa).

to reach a guilty verdict on evidence that is unreliable. Where the evidence is unreliable, it is incapable of giving us sufficient assurance that the accused person is in fact guilty. Reliance on evidence that is unreliable by virtue of its wrongful provenance would undermine the fairness of a trial and, thence, the legitimacy of the verdict. This is to interpret the concept of a fair trial in terms of reliability. English courts predominantly take this interpretation of fairness when applying the exclusionary discretion in section 78(1) of the Police and Criminal Evidence Act 1984.⁴⁶ However, if the fair trial rationale is to be independent of the reliability rationale, it cannot be driven only by the concern about reliability.

The right to a fair trial is contained in Article 6(1) of the European Convention of Human Rights (“the ECHR”). It is well-established that the reception of evidence obtained in breach of certain rights protected under the ECHR will or may render the trial unfair. In making this determination, the European Court of Human Rights (“ECtHR”) will assess the fairness of the proceedings considered as a whole and engage in a balancing of relevant and competing considerations. One relevant factor is “whether the circumstances in which [the evidence] was obtained ... cast doubts on its reliability or accuracy.”⁴⁷ But other factors must also be weighed in the overall assessment. They include, for example, whether the rights of the defence have been respected and the opportunities afforded the accused to challenge the authenticity of the evidence and oppose its use or admissibility.⁴⁸ What is clear from the Strasbourg jurisprudence is that fairness means more than reliability. What is lacking is a clear explanation of how the admission of unlawfully obtained evidence can render the trial unfair.⁴⁹

d. Rule of law

In addition to finding the truth and ensuring the legitimacy of a criminal conviction, another purpose of the trial is arguably to uphold the rule of law by ensuring the legality of the executive enforcement of criminal law. Across the world, countries on the path to democracy, with the experience of authoritarian oppression still in vivid memory, have adopted exclusionary rules as a symbol of political progress. The exclusionary rules are adopted, at least in part, because they embody “the idea of restraining government power and promoting the rule of law.”⁵⁰ How does the exclusion of evidence uphold the rule of law? Some of the theories canvassed above provide quick answers: the exclusion of evidence uphold the rule of law by deterring the police from breaking the law or by vindicating the rights of citizens guaranteed by the law.

On another theory, the rule of law rationale runs more deeply. A central idea of the rule of law is that the government should be subject to and accountable under law. One way of achieving this is to have separation of powers under a system of checks and balances.

⁴⁶ See, e.g., Andrew L-T Choo, *England and Wales: Fair Trial Analysis and the Presumed Admissibility of Physical Evidence*, in EXCLUSIONARY RULES IN COMPARATIVE LAW 331 (Stephen C. Thaman ed., 2013); D. Ormerod & D. Birch, *The Evolution of the Discretionary Exclusion of Evidence*, [2004] Crim. L.Rev. 767.

⁴⁷ Gäfgen v. Germany (22978/05), 52 E.H.R.R. 1, 41 (2011) (Grand Chamber of the ECtHR).

⁴⁸ *Id.*

⁴⁹ See John D. Jackson & Sarah J. Summers, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE – BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 184 (2012).

⁵⁰ Jenia Iontcheva Turner, *The Exclusionary Rule as a Symbol of the Rule of Law*, 67 S.M.U. L. Rev. 821 (2014).

The criminal trial is an important feature of this system; it is where the executive branch is held to account on its bid to enforce the criminal law by way of a conviction and sentence. The Court's role is to scrutinize the legality of this bid. On a narrow view, the scrutiny must remain focused on whether the prosecution has discharged the burden of establishing that the accused is guilty as charged. On a more "majestic" view,⁵¹ the Court's duty to ensure that the executive's bid for a conviction is in accordance with law also includes the responsibility to prevent it from getting a conviction through its own unlawful conduct. An upshot of this is that it must prevent the executive from using evidence that it had acquired unlawfully to support a criminal prosecution.⁵²

This rule of law rationale differs from the legitimacy-based arguments considered earlier. Even an authoritarian regime, by virtue of its self-interest in possessing legitimacy, has a place for exclusionary rules. Such rules can serve not just to constrain government power but also to concentrate and strengthen governmental control. In China, concerns about political stability have grown out of widespread adverse reactions to miscarriages of justice caused by evidence (mostly false confessions) that had been obtained wrongfully by the police. Public anger aroused by such cases poses the risk of social unrest and erosion of state authority. The central government has found it necessary to introduce exclusionary rules through a series of reforms and to vocally promote a tougher stance in the enforcement of those rules. These measures are aimed at appeasing public disquiet, stemming the abuses of police power and correcting failures in governance at the local level. They are an attempt by the central government to preserve and exert political power through "rule by law".⁵³

III. Legal Approaches to the Exclusion of Wrongfully Obtained Evidence

We now turn to the legal mechanisms by which wrongfully obtained evidence is excluded (Parts III 1-2) and the competing considerations which have been acknowledged as having a bearing on the decision to exclude (Parts III 3-4).

1. Determinacy of application

An exclusionary rule is at its most determinate where the necessary and sufficient conditions that must be met to trigger it are stated in a manner that is clear and specific and the applicability of the rule on the facts in individual cases permits of only one possible answer. Such an approach to exclusion may be described as "categorical" or "automatic". (These two descriptions are not terms of art. "Categorical" or "automatic" can also refer to another feature, discussed later, about the operation of an exclusionary rule.) The determinacy of an exclusionary rule is a matter of degree. It may be weakened in one or more of the three ways described below. Where it is weakened in one or more of these ways, the judge is often said, accurately or not, to have discretion. The concept of discretion is a slippery one. Generally speaking, discretion involves choice between

⁵¹ *Herring v. United States*, 129 S.Ct. 695, 707 (2009) (Ginsburg, J., dissenting).

⁵² *See, e.g.,* Ho Hock Lai, *The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence*, 10 *Crim. L. & Phil.* 109 (2016); Schrock and Welsh, *supra* note 20; Grant, *supra* note 20.

⁵³ Margaret K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 *N.Y.U. J. of Int'l L. & Pol.* 629 (2011). On exclusion under Chinese law, *see generally* Zhiyuan Guo, *Exclusion of Illegally Obtained Confessions in China: An Empirical Perspective*, 21 *Int'l. J. of Evidence and Proof* 30 (2017); Kuo-hsing Hsieh, *THE EXCLUSIONARY RULE OF EVIDENCE – COMPARATIVE ANALYSIS AND PROPOSALS FOR REFORM Part II* (2014).

different interpretations or applications of the law. The choice is to be made not on personal whim but in the exercise of a judgment that is expected to be capable of reasoned and principled defense.

First, many conditions for applying an exclusionary rule are stated broadly. Exclusion may turn on whether admission of the wrongfully obtained evidence would undermine the “fairness of the proceedings”, bring “the administration of justice into disrepute”, or damage “the integrity of the proceedings”. The abstract concepts contained in these conditions (“fairness”, “justice”, “disrepute”, “integrity” and so forth) permit of different possible interpretations, the choice between which is left open by the rule. It is true that many other narrower (and seemingly factual) terms also permit of different interpretations. What counts as a “search” for the purposes of the Fourth Amendment exclusionary rule or a “custodial interrogation” that triggers the *Miranda* requirement a warning of rights? Answers to these questions can also be highly contentious. But “fairness” and “justice” are thinner concepts – telling us less of what we should be looking for in applying them – than “search” and “custodial interrogation”. The thinner the concept used in an exclusionary rule, the greater the tendency to describe the rule as discretionary.

Secondly, the concepts, interpreted in the abstract, have to be applied to the facts of individual cases. Guidance is sometimes provided, “without limiting the matters that the court may take into account”, by setting out a non-exhaustive list of relevant factors.⁵⁴ Other rules simply instruct the court to consider “all the circumstances”.⁵⁵ The judge is left to his or her own devices in identifying the relevant circumstances.

Thirdly, the application of many exclusionary rules require a balancing of factors. Under Scottish law, the court has to weigh the interest of the citizen to be protected from wrongful invasion of his liberties against the interest “to secure that evidence bearing upon the commission of the crime and necessary to enable justice to be done shall not be withheld.”⁵⁶ In Australia, section 138(1) of the uniform evidence legislation directs the judge to weigh the desirability of admitting wrongfully obtained evidence against the undesirability of doing so. The balancing approach is taken not only in applying an exclusionary rule as in these examples; it can also come into play in developing exceptions to the rule. In the United States, exceptions to the rule excluding evidence obtained in breach of the Fourth Amendment protection against unreasonable search and seizure have been created by balancing the costs of exclusion against the benefits of deterring similar violations.⁵⁷ In all of these instances, the judge has to work out ways of determining, in the case at hand, the relative importance of the competing considerations and how a compromise or resolution is to be reached.

⁵⁴ See, e.g., New Zealand Evidence Act 2006, §30(3); Australian uniform evidence legislation, §138(3). The latter legislation refers to the model Statute on evidence proposed by the Australian Law Reform Commission in 1987 that has been adopted with minor modifications and variations in a number of Australian states and in the Capital Territory.

⁵⁵ See, e.g., Canadian Charter of Rights and Freedoms, §24; Police and Criminal Evidence Act 1984, §78 (England and Wales).

⁵⁶ *Lawrie v. Muir*, 1950 J.C. 19; for a critique, see Findlay Stark & Fiona Leverick, *Scotland: A Plea for Consistency*, in *EXCLUSIONARY RULES IN COMPARATIVE LAW* 69 (Stephen C. Thaman ed., 2013).

⁵⁷ See Wesley MacNeil Oliver, *Toward a Better Categorical Balance of Costs and Benefits of the Exclusionary Rule*, 9 *Buffalo Crim. L. Rev.* 201 (2005).

In general, predictability in the application of an exclusionary rule increases with its determinacy. The less determinate the rule, the less likely that there is a uniquely correct answer to its application. And given the existence of a range of acceptable positions that can be taken, the less likely it is that an appeal from the first instance application of the rule will succeed. But this does not mean, as use of the term “discretion” might wrongly imply, that the accused person has no legal *right* to exclusion. Indeed, his or her right to exclusion under non-determinate rules such as Article 35(5) of the South African Constitution and Article 6 of the ECHR are of a constitutional or fundamental nature.

2. *Wrongful provenance of evidence as the direct and indirect ground for exclusion*

Evidence is sometimes excluded simply by virtue of its wrongful provenance. In some jurisdictions, that the evidence was gathered in an unlawful search, without more, compels its exclusion (unless an exception to the rule applies). Evidence obtained by torture is widely treated as inadmissible simply because it has been obtained in that unlawful manner. Where a rule requires evidence to be excluded by the very fact of its wrongful provenance, as it does in these examples, there is nothing else to consider. Wrongfulness straightforwardly entails exclusion, without room for further consideration save for the possibility of an exception to the rule applying. This approach to exclusion has also attracted the label “categorical” or “automatic”. An exclusionary rule that is “categorical” or “automatic” in this sense is quite different from one that is “categorical” or “automatic” in the sense of being highly determinate. For instance, the rule that excludes evidence extracted by torture is “categorical” or “automatic” in the present sense but it is not “categorical” or “automatic” in the sense of being highly determinate; the concept of “torture” is amenable to different interpretations and whether a form of ill-treatment amounts to “torture” (a legal term that is distinct from “inhuman or degrading”) calls for a contestable evaluation of a highly charged standard.

The wrongfulness of the means by which the evidence was gathered does not always lead directly to exclusion. In the examples we have encountered, exclusion depends on the adverse impact that admitting the evidence would have on the fairness of the trial, repute of the administration of justice or integrity of the proceedings.

3. *Interest in convicting the guilty*

Many factors have been treated as relevant to the decision to exclude wrongfully obtained evidence.⁵⁸ There are two main sets of considerations. The first set bears on what the Canadian Supreme Court has called the “interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law.”⁵⁹ How greatly this interest calls for admission of relevant but unlawfully procured evidence has been treated as depending on factors such as (i) the degree to which the evidence is probative of guilt, (ii) the availability of other evidence to support the prosecution’s case and (iii) the severity of the alleged crime. These three factors are not free from

⁵⁸ See Petra Viebig, ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT 163-186 (2016); Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, in COMPARATIVE CRIMINAL PROCEDURE 280, 293-299 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016). A list of relevant factors is set out in New Zealand Evidence Act 2006, §30(3) and the Australian uniform evidence legislation, §138(3).

⁵⁹ R v. Grant, *supra* note 40 at [79].

controversies. First, caution is sounded against putting too much store on probative value of the evidence as this might “foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it.”⁶⁰ Similar caution has been sounded against the second factor. Giving decisive weight to the importance of the evidence to the prosecution’s case and the non-availability of other evidence would result in exclusion only when it matters least to the prosecution.⁶¹ The third factor cuts both ways. It is not just the interest in convicting the guilty that increases with the seriousness of the alleged crime; the gravity of the condemnation in and harm following a conviction likewise increases. As Mirfield has pointed out, “the more serious are the consequences of conviction for the accused, the more punctilious should be the authorities in observing the various rights and privileges granted by law to the suspect.”⁶²

4. Gravity of the wrong committed in obtaining the evidence

The second set of considerations relates to the nature of the wrong committed in obtaining the evidence and the circumstances in which the act was done. A stronger approach is generally taken the more serious the wrong. At one end lie methods of procurement that are ethically wrongful but fall short of being unlawful. In Singapore, it seems that this can of itself give no cause for exclusion in criminal cases.⁶³ In Australia and New Zealand, on the other hand, the Court is explicitly empowered to exclude evidence not only when it was obtained unlawfully but also when it was acquired “unfairly”⁶⁴ or “improperly”.⁶⁵ Where evidence was acquired unlawfully, the unlawfulness in question may occasion greater or lesser concern. The illegality committed in collecting evidence differs in gravity. It may be of a technical nature. There is reluctance to exclude evidence, with the potential consequence of letting a criminal go free, on a mere technicality.⁶⁶ Under Article 141(3) of the Swiss Criminal Procedure Code, evidence remains admissible even though it “has been obtained in violation of administrative regulations.”⁶⁷

In some legal systems, evidence obtained in breach of constitutional or fundamental rights is subject to a special exclusionary rule that is explicitly provided for in the constitution or bill of rights.⁶⁸ But there is not always a constitutional right to exclusion of evidence obtained unconstitutionally. The exclusion of evidence obtained in breach of the Fourth Amendment to the United States’ Constitution “is a judicially created

⁶⁰ *Bunning v. Cross* (1978) 141 C.L.R. 54, 79 (Australian High Court).

⁶¹ As Slobogin, *supra* note 58, at 292, puts it, “this factor, if taken seriously, suggests that clean judicial hands are a concern only when they cost the system nothing.”

⁶² Peter Mirfield, SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE 364 (1997). See also Ashworth, *supra* note 21, at 120.

⁶³ See *Wong Keng Leong Rayney v. Law Society of Singapore*, [2007] 4 S.L.R. 377 at [27] (Singapore Court of Appeal). A different position is taken by the Australian High Court: *Ridgeway v. R.*, (1995) 184 C.L.R. 19, 36.

⁶⁴ New Zealand Evidence Act 2006, §30(5)(c).

⁶⁵ Australian uniform evidence legislation, §138(1).

⁶⁶ A reluctance that Cardozo J. famously expressed in *People v. Defore*, 242 N.Y. 13, 21 (1926) Court of Appeal of New York: “The criminal is to go free because the constable has blundered.”

⁶⁷ *Supra* note 17.

⁶⁸ See, e.g., Canadian Charter of Rights and Freedoms, §24(2); Constitution of South Africa Constitution, Art. 35(5); Constitution of Greece, Article 19(3).

remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”⁶⁹

Even where a special exclusionary rule is not explicitly provided, the courts have been known to develop – and it has been argued that they should apply⁷⁰ – a stricter test for evidence obtained in breach of constitutional or fundamental rights than for evidence obtained in other unlawful ways. In Ireland, evidence obtained in “deliberate and conscious” (non-inadvertent) violation of the constitution is strictly inadmissible save in extraordinary excusing circumstances.⁷¹ Exclusion is discretionary for other types of illegally obtained evidence. Although there are recent indications of readiness to take a similar approach to evidence obtained in deliberate and conscious breach of non-constitutional legal rights, it is at the same time acknowledged that “a court might well more readily find fault beyond inadvertence in relation to a breach of constitutional rights [as compared to other] legal rights”.⁷²

Not all breaches of constitutional or fundamental rights are treated alike. For example, while the ECtHR treats evidence procured in breach of the right against torture in Art 3 of the ECHR as automatically or categorically inadmissible, it adopts a weaker, balancing, approach towards evidence obtained in violation of the right to privacy in Article 8.⁷³

The seriousness of the wrong committed in procuring evidence is not only a matter of the status of the norm that has been breached. It is also a matter of the degree to which the protected interest of the accused person was affected.⁷⁴ “Plucking a hair from the suspect's head” is far less intrusive of privacy than “a body cavity or strip search”.⁷⁵ Also going to the seriousness of the wrong are the motive of the police officer in transgressing the law and the blameworthiness of his or her conduct.⁷⁶ A breach committed *mala fide* is a more troubling display of excess or abuse of power, and calls more pressingly for deterrence and judicial renunciation and disavowal, than a breach committed in good faith.⁷⁷ The exclusionary pressure is also greater where the breach is not an isolated incident but part of a systemic problem.⁷⁸ Excuses for committing the wrong may be present. In New Zealand, it matters “whether there was any urgency in

⁶⁹ United States v. Calandra, 414 U.S. 338, 348 (1974).

⁷⁰ See Ashworth, *supra* note 21, at 109-110; Thaman, *supra* note 3.

⁷¹ This exclusionary rule does not apply if the police did not know they were acting in breach of the constitution and their action was not reckless or grossly negligent: D.P.P. v. J.C. [2015] I.E.S.C. 31 departing from the earlier leading cases of *People (A.G.) v. O'Brien* [1965] I.R. 142 and *People (D.P.P.) v. Kenny* [1990] 2 I.R. 110. For a commentary, see Yvonne Marie Daly, *Overruling the Protectionist Exclusionary Rule: D.P.P. v. J.C.*, 19 Int'l. J of Evidence & Proof 270 (2015).

⁷² D.P.P. v. J.C. [2015] I.E.S.C. 31 at [6.3] of the judgment of Clarke J. A similar two-tier approach was taken in New Zealand until it was abandoned by the Court of Appeal in *R v. Shaheed* [2002] 2 N.Z.L.R. 377.

⁷³ See Andrew Ashworth, *The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence*, in CRIMINAL EVIDENCE AND HUMAN RIGHTS – REIMAGINING COMMON LAW PROCEDURAL TRADITIONS 145 (Paul Roberts & Jill Hunter eds., 2012).

⁷⁴ This is one line of inquiry in applying the Charter exclusionary rule in Canada: see *R v. Grant*, *supra* note 40, at [125] and it is also listed as a relevant factor in New Zealand Evidence Act 2006, §30(3)(a).

⁷⁵ *R v. Grant*, *supra* note 40, at [103].

⁷⁶ *Id.* at [124].

⁷⁷ See, e.g., U.S. v. Leon, 468 U.S. 897 (1984) (good faith exception to the Fourth Amendment exclusionary rule).

⁷⁸ *R v. Grant*, *supra* note 40, at [75]; *People v. O'Brien* [1965] I.R. 142, 160 (Supreme Court of Ireland).

obtaining the improperly obtained evidence”⁷⁹ and “whether the impropriety was necessary to avoid apprehended physical danger to the Police or others”.⁸⁰ Conversely, that the police could have obtained the evidence through alternative and lawful means has been treated as a factor supporting exclusion.⁸¹

IV. Conclusion

The exclusion of wrongfully obtained evidence may be aimed at deterring similar police misconduct or educating the police on the importance of abiding by the law, or it may be a remedy that vindicates the right that the police had breached. It may be unfair to allow the prosecution to use the evidence or such use may morally compromise the standing to blame the accused. On another set of theories, wrongfully obtained evidence is rightly excluded where it is at odds with our interests in the reliability of the trial process or with different conceptions of integrity and legitimacy. Lastly, exclusionary rules symbolize and are means of upholding the rule of law. Legal approaches to wrongfully obtained evidence varies. Exclusionary rules differ in determinacy and in the test adopted for exclusion. On some tests, the wrongful manner in which the evidence was acquired is sufficient to trigger its exclusion; on other tests, exclusion turns what the effect would be of allowing the wrongfully evidence to be used at the trial. A common approach is to require a balancing of competing considerations. These considerations include the importance of the evidence in ascertaining the truth of the criminal charge and the gravity of the wrong committed by the police in acquiring the evidence.

Bibliography

Tracey Maclin, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* (2013)

Peter Mirfield, *SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE* (1997)

Steven R. Schlesinger, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* (1977)

Stephen J. Schulhofer, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* (2012)

Stephen C. Thaman ed., *EXCLUSIONARY RULES IN COMPARATIVE LAW* (2013)

James J. Tomkovicz, *CONSTITUTIONAL EXCLUSION – THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER* (2011)

⁷⁹ New Zealand Evidence Act 2006, § 30(3)(h).

⁸⁰ *Id.*, § 30(3)(g).

⁸¹ *Id.*, §30(3)(e); Australian uniform evidence legislation, §138(3)(h).

Petra Viebig, ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL
CRIMINAL COURT (2016)