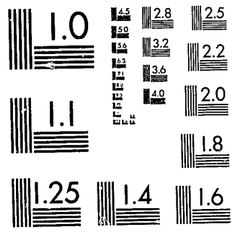

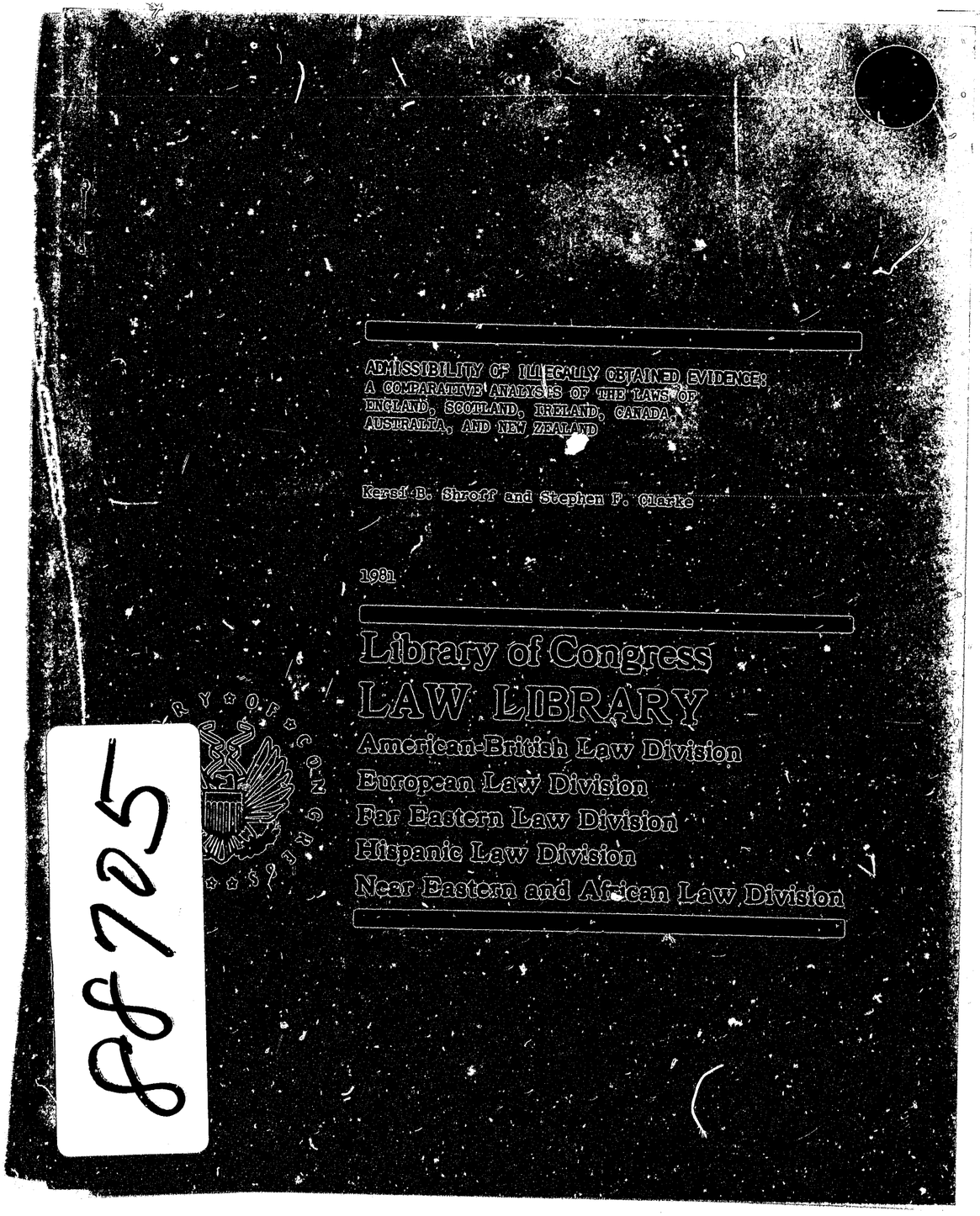

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ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE: A COMPARATIVE ANALYSIS OF THE LAWS OF ENGLAND, SCOTLAND, IRELAND, CANADA, AUSTRALIA AND NEW ZEALAND

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INTRODUCTION

Under the accusatorial system of justice practiced in the common law systems, only that evidence which is relevant to the determination of a person's guilt is generally allowed to be presented at trial. The law of evidence in those systems is accordingly replete with rules designed to keep out evidence which has no bearing on the offense being tried. There is one type of evidence, however, which in spite of its relevancy is subject to a great deal of controversy on the question of its admissibility before a court or jury. The admissibility of evidence which has been obtained by illegal means, i.e. in breach of legal restraints placed on the exercise of the state's investigative powers, is treated differently in many of the common law systems. At one extreme, the United States courts automatically exclude at the trial state evidence which is tainted with any kind of illegality. In contrast, England adheres to the view that generally all relevant evidence is admissible regardless of any illegality in the manner in which it was obtained.

In the United States, the exclusionary rule has been developed by the U.S. Supreme Court as a corollary to the protection against illegal searches and seizures granted in the fourth amendment to the Constitution, although the amendment does not state the consequences for its breach. A brief sketch of the development of the rule is helpful in introducing the issues involved in the controversy.

The genesis of the exclusionary evidence rule is found in Weeks v. United States,[1] wherein the Supreme Court upheld the inadmissibility of illegally obtained evidence in federal prosecutions. Justice Day based the decision on the fourth amendment in the following terms:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. . . . The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. 2/

The Weeks rule, however, was not followed in a number of states, and in Wolf v. Colorado[3] the U.S. Supreme Court refused to extend it to prosecutions under state law. Justice Frankfurter, speaking for the Court stated that the remedy of exclusion was not an essential ingredient of the right of protection against arbitrary intrusions by the police, as was evidenced by the number of states that had rejected the Weeks rule. He noted that those states had not left the right without any protection, as the remedies of private actions, disciplinary measures, and the exercise of public opinion against oppressive police conduct were

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1/ 232 U.S. 383 (1914).

2/ Id. at 391-392.

3/ 338 U.S. 25 (1949).

available. Nor was the exclusionary rule thought to be a remedy as such against illegal searches as it served only to protect those against whom something incriminating had been found. Further support on restricting the rule was drawn from jurisdictions in the United Kingdom and the Commonwealth, none of which had held evidence obtained by illegal search and seizure to be inadmissible.

The stand taken in Wolf, however, was not maintained for very long. In Elkins v. United States,[4] the Court abandoned the "silver platter" doctrine which had allowed the federal courts to use evidence even though it had been unconstitutionally obtained by state officers and passed on to federal authorities. This foreshadowed the decision in Mapp v. Ohio,[5] holding that the exclusionary rule should also be applied to state prosecutions. In reversing Wolf, Justice Clark, writing for the Court, stated that the decision was bottomed on factual considerations which had since changed, as more than half of the states were now to be found in favor of the Weeks rule. The reasoning in Wolf that the right of privacy was protected by remedies other than the exclusion obtained by its breach was thought to be equally inapplicable, as the experience of the states showed that such remedies were "worthless and futile."[6] The Court believed that without the exclusionary rule "the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the

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4/ 364 U.S. 206 (1960).

5/ 367 U.S. 643 (1961).

6/ Id. at 652.

freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'"[7] While being mindful of Justice (then Judge) Cardozo's observation in an earlier New York case that "the criminal may go free because the constable had blundered" and conceding that under the rule some criminals may indeed go free, the Court nonetheless quoted the decision in Elkins that the "imperative of judicial integrity"[8] was another consideration. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[9]

Since the decision in Mapp v. Ohio, although the exclusionary rule has been refined and some restrictions placed on its application,[10] the debate on the need for the rule has continued. Opponents of the rule question its very validity under the fourth amendment and also stress that the rule is unique to American jurisprudence and has not been adopted by other highly regarded systems in the British Commonwealth.[11]

7/ Id. at 655.

8/ 364 U.S. 206, 222 (1960).

9/ 367 U.S. 643, 659 (1961).

10/ See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978), wherein the exclusionary rule was made inapplicable to defendants who did not have an ownership or possessory interest in searched property; United States v. Calandra, 414 U.S. 338 (1974), wherein it was held that the rule does not apply to grand jury proceedings; Harris v. New York, 401 U.S. 222 (1971), wherein it was found that evidence excludable under the rule can be admitted to impeach a defendant's credibility.

11/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C.J., dissenting).

In a recent airing of the issue, Judge Wilkey of the District of Columbia Circuit Court of Appeals stressed the point in the following manner:

> To my mind, one proof of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it. If there were merit in any of the grounds advanced in support of the rule, at least one other country somewhere would have emulated our 65-year-old example. All have shunned it. 12/

This statement is certainly true; however, it is not the case that all other countries have an unqualified inclusionary rule under which the manner in which real evidence is obtained is irrelvant to the question of its admissibility in a criminal trial. In fact, the authors of this study have found that even within the selected countries surveyed, there are different qualifications placed on their general inclusionary rules. In some of those countries, the rule is increasingly subject to a judicial discretion to exclude evidence. The purpose of this study then is to outline the rules of admissibility of illegally obtained evidence in the selected countries and to point out the proposals for legislative reforms that have been made in those countries.

12/ Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 JUDICATURE 214, 216 (1978).

ENGLAND

In England the question of admissibility of illegally obtained evidence has not reached the level of debate found in the United States, and writers have not given the subject a great deal of attention. The cases in which the question has directly been presented to the courts have virtually always ruled in favor of admissibility. While much of the older authority is based on analogy to cases involving evidence not obtained by illegal search and seizure, some recent cases have made clear pronouncements on the issue.

The landmark decision on the subject is the case of Kuruma, Son of Kaniu v. R.[13/] in which the Judicial Committee of the Privy Council[14/] generalized the rule of admissibility. This was an appeal from Kenya, whose law at the time may be taken to be the same as in England in a case arising out of emergency regulations which were in force during the violent campaign by the Mau Mau. The regulations empowered only police officers of the rank of assistant inspector or above to stop and search persons suspected of committing offenses under the regulations. In the case in question, the defendant had been found to be in possession of two rounds of ammunition after an

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13/ [1955] A.C. 197 (P.C.) (Ken.).

14/ The Judicial Committee of the Privy Council is in essence a Commonwealth court with jurisdiction to hear appeals from those Commonwealth countries which after attaining independence have not abolished such appeals. Generally, appeals are heard by five members, who in most cases are Law Lords from the House of Lords--the highest court of appeal in the United Kingdom. The Privy Council's decisions are technically given in the form of advice to the Queen and are promulgated as Orders in Council.

illegal search by two officers below the prescribed rank. Along with the ammunition, a pocket knife was also allegedly found, but was claimed to have been returned to the accused in custody. The defendant denied the possession of either the ammunition or the knife, but was convicted by a magistrate against the unanimous advice of three assessors.[15] There were three on-lookers at the scene of the search, but none of them was called as a witness. After an unsuccessful appeal to the Court of Appeal for Eastern Africa, the advice of the Privy Council was sought on the question of admissibility of the evidence. Lord Goddard, C.J., who delivered the advice, held that the evidence was admissible under the following test:

> In their Lordships' opinion, the 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. [16]

Lord Goddard derived the test from a number of early English decisions which, without spelling out the proposition in the precise wording of the test, were generally in support of it.[17] For instance, in R. v. Leatham, involving a prosecution under an act outlawing corrupt practices, the defendant objected to the production of a letter whose existence had become known through answers he had given in an administrative hearing held under the statute. The statute provided that answers given in the

15/ As an African, the accused was not entitled under Kenyan law to a trial by jury.

16/ [1955] A.C. 197, 203 (P.C.) (Ken.).

17/ 121 Eng. Rep. 589 (Q.B. 1861).

hearing could not be used against a defendant. It was held that although the answers were inadmissible, the other evidence revealed in the answer--i.e., the letter--was admissible. During argument by counsel, Justice Crompton was moved to state: "It matters not how you get it; if you steal it even, it would be admissible . . . ."[18] In another case, police had entered certain premises in order to arrest a person, but in the process they seized some documents which were thereafter used at the trial of one Elias. Although the right to search upon arrest was stated not to extend to the property of any other person, it was held that the interests of the state excused the unlawful seizure if the documents were evidence of a crime committed by a person.[19]

The Privy Council in Kuruma also relied on civil cases in which claims for privilege were denied when a copy of the privileged document came into the hands of the opponents. Lord Chief Justice Goddard also made brief reference to Scottish and American cases. The Scottish cases cited were thought to be in support of the view that all relevant evidence is admissible. However, the rule of exclusion adopted by the U.S. Supreme Court was tersely disposed of by pointing out the differences of decisions in the state and federal courts.

A number of shortcomings can be discerned in the Kuruma decision. While the basis of the Privy Council's advice was that the court must not be denied evidence of a reliable nature, the evidence in Kuruma was hardly the the type on which to pin an admissibility rule based on reliability. As

18/ 8 Cox's Criminal Law Cases 498, 501 (Q.B. 1861).

19/ Elias v. Pasmore, [1934] 2 K.B. 164.

As Lord Chief Justice Goddard himself observed, the evidence of possession in the case was tinged with "this remarkable action" on the part of the police in returning the alleged pocket knife to the accused, and that the decision not to call the three onlookers as witnesses was "most unfortunate."[20] He also noted that the accused was familiar with the roadblock at which he was searched and could have easily taken another route where he would not have been searched. The presence of these factors in a case involving a capital offense gave strong grounds for doubting the evidence of possession.

In adopting a simplistic approach based on slender reasoning, the Privy Council missed the opportunity of developing a modern rule with a flexibility which would allow an accommodation of the serious issues arising from illegal police conduct. The Scottish cases, which had begun to take into account the nature and extent of the illegality involved, were misapplied in a self-serving way, and the American cases, which critically analyzed the important and relevant questions on the issue, were accorded superficial treatment, reflecting a certain degree of judicial narrowness.

A further shortcoming arose in the Privy Council's treatment by dictum of the court's inherent discretion to generally exclude evidence whose prejudicial nature outweighs its probative value. A cursory treatment of the subject injected considerable confusion in the law for nearly 25 years. The application of the court's discretion in cases involving illegally obtained evidence deserves closer examination.

20/ [1955] A.C. 197, 202 (P.C.) (Ken.).

In reference to the court's general discretion to exclude evidence, the Privy Council offered the following opinion in Kuruma:

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. . . . If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. 21/

The comment was based on earlier decisions in Noor Mohamed v. The King,[22] and Harris v. Director of Public Prosecutions,[23] which indicated that the judge had a discretion to exclude illegally obtained evidence. However, as in Kuruma, both cases upheld the admission of evidence in spite of the manifest irregularity, unfairness, or illegality of the means used in obtaining it. Similarly, in Callis v. Gunn,[24] based on the dictum in Kuruma, the court accepted the existence of a discretion to exclude, but it was held that there was no justification for excluding evidence of fingerprints obtained without cautioning the defendant that he had a right of refusal. Lord Parker, C.J., understood the discretion to be exercisable "if there was any suggestion of it [the evidence] having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort."[25]

21/ [1955] A.C. 197, 204 (P.C.) (Ken.).

22/ [1949] A.C. 182 (P.C.) (Brit. Guiana).

23/ [1952] A.C. 694.

24/ [1964] 1 Q.B. 495 (1963).

25/ Id. at 502.

In most cases in which the admissibility of illegal evidence has been considered, the existence of the overall discretion of the court to exclude such evidence has been routinely acknowledged. However, there are only two English cases which, on similar facts, excluded evidence in exercise of that discretion. In R. v. Payne,[26] the defendant who was involved in a car collision was asked, and agreed, to submit to a medical examination not for the purpose of determining his fitness to drive, but to see if he was suffering from any illness or disability. At the trial on a charge of drunken driving, the doctor who had conducted the examination gave evidence of the defendant's unfitness to drive. In quashing the conviction, the court held that although the evidence was clearly admissible, it should nonetheless have been refused on the ground that the defendant would not have allowed the examination had he been told that the doctor would give evidence as to his fitness to drive.

The exclusion of the evidence in Payne is not in conformity with the general rule of admitting all relevant evidence, and, recently in R. v. Sang,[27] the Court of Appeal doubted its precedential validity, and the House of Lords explained its rationale differently. Before the Sang decision confirmed the narrowness of the discretion, however, the Divisional Court in Jeffrey v. Black,[28] attempted to impose a broader interpretation

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26/ [1963] 1 W.L.R. 637 (Crim. App.). See also R. v. Court, [1962] Crim. L. Rev. 697 (Crim. App.).

27/ [1980] A.C. 402 (1979).

28/ [1978] Q.B. 490 (Div'l Ct. 1977).

of the rule. Lord Chief Justice Widgery set out the nature of the discretion and the circumstances in which it may be exercised, in the following terms:

> [T]he justices . . . have a general discretion to decline to allow any evidence to be called by the prosecution if they think that it would be unfair or oppressive to allow that to be done. . . . It is a discretion which every judge has all the time in respect of all the evidence which is tendered by the prosecution. . . . [I]f the case is exceptional, if the case is such that not only have the police officers entered without authority, but they have been guilty of trickery or they have misled someone, or they have been oppressive or they have been unfair, or in other respects they have behaved in a manner which is morally reprehensible, then it is open to the justices to apply their discretion and decline to allow the particular evidence to be let in as part of the trial. I cannot stress the point too strongly that this is a very exceptional situation, and the simple, unvarnished fact that evidence was obtained by police officers who had gone in without bothering to get a search warrant is not enough to justify the justices in exercising their discretion to keep the evidence out.[29]

In the Court's decision, however, evidence of the possession of prohibited drugs obtained as a result of an illegal search was ruled relevant, and on the strength of Kuruma, it was admitted.

In R. v. Sang, on a charge of uttering forged United States bank-notes, the appellant had alleged that the forgery was committed at the inducement of an informer acting on behalf of the police. Given the recently pronounced decisions holding that "entrapment" was not a defense in English law, the defendant tried to circumvent the rule by a submission that the issue should be considered under the general discretion of the court to exclude evidence. On appeal against a ruling that there was no such

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29/ Id. at 497-498.

discretion, the Criminal Division of the Court of Appeal devoted a substantial part of its judgment to a discussion of the discretion to exclude evidence. In Kuruma, the court noted that the principal evidence against the accused had been obtained in a flagrantly illegal search by methods which were far more than just "unfair." If the discretion did exist, it was difficult for the court to envisage a stronger case for its exercise. Pointing to the test of exceptional circumstances set out in the statement of Lord Chief Justice Widgery in Jeffrey v. Black, the Court of Appeal questioned why it was that in all the cases in which the exercise of the discretion had been sought (apart from Payne), the evidence had invariably been admitted. The Court therefore concluded that it was questionable whether there was a discretion as broad as was stated in cases such as Kuruma and Jeffrey v. Black. It preferred the view that there may be residual discretion only where the action of the prosecution was so oppressive that it was an abuse of the legal process. In dismissing the appeal, the Court of Appeal, however, agreed that the question of the existence of discretion to exclude evidence was an issue of general public importance and was therefore appropriate for further appeal.

On consideration of the appeal by the House of Lords, apart from the specific question of the use of agent provocateurs, the [illegible] Lords also discussed at length the application and extent of the court's discretion to exclude evidence. Lord Diplock, with whom all other Law Lords agreed,

accepted that there was a rule of practice under which a court has the discretion to exclude evidence which could have a prejudicial effect out of proportion to its evidentiary weight. However, he was unable to say that the discretion was as broad as had been suggested in various dicta, particularly in Kuruma the "fountain head of all subsequent dicta on this topic."[30/] In analysing the particular passage describing the discretion in Kuruma, Lord Diplock thought that when Lord Chief Justice Goddard spoke of evidence "unfairly," he intended to refer only to the probable prejudicial effect of evidence in disproportion to its true evidential value. Thus, the instance given of obtaining a document by a trick was analogous to confessions unfairly induced from an accused, which have long been excluded in English law. In a similar way, the exclusion of the improperly obtained medical evidence in the Payne case was explainable as being analogous to an unfair inducement to confess by an accused. He acknowledged that dicta subsequent to Kuruma went further than allowing the discretion to be used only in cases of prejudicial influence on the jury, but he noted that such dicta had never been approved by the House of Lords. In dismissing the appeal, Lord Diplock enunciated the following principles suggested by Viscount Dilhorne for future guidance of the courts:

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. 31/

30/ [1980] A.C. 402, 434 (1979).

31/ Id. at 437.

The other Law Lords were generally in agreement with the judgment of Lord Diplock, with some reservations. Viscount Dilhorne disapproved of the statement of Lord Widgery in Jeffrey v. Black on the extent of the discretion, as it was not supported by authority. In Viscount Dilhorne's view, the opinion in that case conflicted with the Kuruma rule that the court is not concerned with how evidence is obtained. Lord Fraser, while being in agreement with the two propositions set out by Lord Diplock, stated that the discretion should "be sufficiently wide and flexible to be capable of being exercised in a variety of circumstances . . . which cannot be forseen."[32/] Lord Scarman thought that the dicta in Kuruma and later cases concerning obtaining evidence by deception or trick must be treated as relating exclusively to the obtaining of evidence from the accused.

In R. v. Sang, the House of Lords appears to have cleared a narrow path through the tangled dictum in Kuruma. Although the varying approaches of the Law Lords do not make it possible to draw a precise conclusion as to the exact scope within which the judicial discretion may be exercised, it is apparent that the Law Lords were inclined to exclude only that which was unreliable evidence and which might unfairly prejudice the accused. Their Lordships thus appear to have restricted the wide dictum of Lord Widgery in Jeffrey v. Black without embracing the view of the Court of Appeals, namely, that the discretion was residual only and exercisable only in cases of oppression by the police or an abuse of the legal process. In practice, however, since judges have rarely used the discretion to exclude evidence, the dictum in Sang is not likely to encourage them to change their approach.

32/ [1980] A.C. 402, 450 (1979).

SCOTLAND AND IRELAND

Until 1950, Scottish courts invariably admitted evidence which was illegally or improperly obtained. In a few cases, however, dicta were expressed that the evidence would not be admitted under all circumstances. These were relied on when in 1950, in a firm departure from the established rule, illegally obtained evidence was excluded by a seven member bench of the High Court of Justiciary in Lawrie v. Muir.[33/] The defendant in that case was prosecuted for selling milk in bottles belonging to other persons without their consent. The bottles were obtained by inspectors who had no authorization to inspect the defendant's shop. Upon being convicted on the evidence obtained from the search, he appealed on the question of the admissibility of the evidence. The Lord Justice General Cooper, speaking for a unanimous court, held that the evidence was inadmissible and demarcated the issue as lying between two conflicting interests; one, the citizen's right to be secure from illegal breaches of liberty; and two, the interest of the state to ensure that relevant evidence necessary for securing justice in a case is not kept out because of technical irregularities. In the court's opinion, neither of these interests was of overriding importance:

> The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps highhanded interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand, the interest of the State

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33/ [1950] J.C. 19 (1949).

> cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods. It is obvious that excessively rigid rules as to the exclusion of evidence bearing upon the commission of a crime might conceivably operate to the detriment and not the advantage of the accused, and might even lead to the conviction of the innocent; and extreme cases can easily be figured in which the exclusion of a vital piece of evidence from the knowledge of a jury because of some technical flaw in the conduct of the police would be an outrage upon common sense and a defiance of elementary justice. 34/

Referring to a dictum in an earlier case stating that "[a]n irregularity in the obtaining of evidence does not necessarily make that evidence inadmissable,"[35/] Lord Cooper thought that the word "necessarily" suggested that there might be circumstances in which such evidence would be inadmissible. A test could accordingly be applied to take into consideration the nature of the illegality and the circumstances in which it was employed. In the Lawrie case, the balance was tilted against the prosecution by the fact that the search had been conducted by inspectors who had very limited authority and who unlike policemen did not have the large residuum of common law discretionary powers.

The Lawrie decision has been applied in a number of cases, and some cases have excluded illegally obtained evidence while admitting it in others. The following criteria have been employed in the cases:

I. Could the irregularity be condoned or excused as being of a trivial kind or one that was dictated by urgency or other circumstances?

34/ Id. at 26-27.

35/ H.M. Advocate v. M'Guigan, [1936] J.C. 16 (1935).

In M'Govern v. H.M. Advocate,[36/] the police obtained scrapings from under a defendant's fingernails for the purposes of a chemical analysis, and subsequently arrested and charged the defendant for breaking open a safe with explosives. The analysis showed the presence of nitroglycerine, which was the explosive used in blowing open the safe. Prior to the charge, the police had also searched the defendant's house with a warrant. In excluding the evidence, it was held that the illegality in obtaining the scrapings could not be excused as it would have been very simple for the police to follow the proper procedure, as had been the case in the search of the premises.

In Hay v. H.M. Advocate,[37/] the introduction of the illegally obtained evidence of the defendant's tooth marks was permitted since a dentist or an injury to the teeth could have destroyed the evidence.

In McPherson v. H.M. Advocate,[38/] certain articles were recovered by the police from an accused's home after a search without a warrant while the accused was in custody but had not yet been charged. In holding that the evidence was admissible, the court stated:

> [T]here may be circumstances in which the interests of justice are such that as a matter of urgency the police may have to search premises without a warrant, even although the person concerned has not been charged with an offence, in order to ensure that evidence bearing on a crime of which they have cognisance and which is necessary to enable justice to be done is not lost and so withheld from the courts of law. . . . [T]he question of urgency is one to be determined by the police and if a challenge is made the test is whether in the given circumstances the police were entitled to treat the matter as one of urgency. 39/

36/ [1950] J.C. 33.

37/ [1968] J.C. 40.

38/ [1972] Scot. L.T. (Notes) 71.

39/ Id. at 72.

Another circumstance in which the use of illegal means in obtaining evidence was excused is found in cases where the enforcement authorities have acted in good faith. In Fairley v. Fishmongers of London,[40] an inspector of the respondent along with an enforcement officer of the Ministry of Food searched the premises of the appellant suspected of possessing salmon during the closed fishing season. The inspector could have applied and easily received a search warrant under the governing statute. The lower court decided that the inspector had acted only under a mistaken belief as to his powers and held that the evidence of possession resulting from the search was admissible. The High Court of Justiciary unanimously approved the decision and agreed with the lower court's finding that the inspector had acted in good faith.

Similarly, in Walsh v. MacPhail,[41] United States military authorities, acting in a mistaken belief regarding their authority to search the appellant's room at a military base in Scotland, were found to have acted in good faith. In looking at the interests of the accused and the public as a whole, the court held that the evidence of drugs found in the search was admissible.

II. Was there a deliberate attempt to obtain evidence illegally or was the evidence found by accident?

In H.M. Advocate v. Turnbull,[42] the police retained evidence for six months, under circumstances in which they could have been easily found out

40/ [1951] J.C. 14 (1950).

41/ [1978] Scot. L.T. 29.

42/ [1951] J.C. 96.

that the search warrant did not cover that particular evidence. The evidence was excluded since there had been a deliberate illegality. Conversely, in H.M. Advocate v. Hepper,[43] a stolen attaché case was held to be admissible as evidence as it had been found in the accused's house while the police were searching for other things with the permission of the accused.

III. How serious was the illegality of the seizure?

When a deliberate policy of a consistent breach of the law exists, the evidence is excluded, if by admitting it such flagrant breaches would be encouraged. Thus, in H.M. Advocate v. Turnbull, when the police were found to have deliberately retained illegal evidence for over six months, the court was concerned that the admission of evidence might "tend to nullify the protection afforded to a citizen by the requirement of a magistrate's warrant, and would offer a positive inducement to the authorities to proceed by irregular methods."[44]

IV. Were the means of obtaining evidence necessitated by the nature of the crime?

Some types of crime warrant a surreptitious manner of obtaining evidence. In Hopes v. H.M. Advocate, when the police recorded a conversation between the blackmailers and their victim, Lord Justice-General Clyde said: "if this kind of crime is to be stopped, methods such as the present one

43/ [1958] J.C. 39.

44/ [1951] J.C. 96, 103.

are necessary to detect and prove a particularly despicable type of crime, which is practised in secret and away from observation."[45/]

It is amply clear from these cases that the English and Scots law differ procedurally and substantively on the treatment accorded to illegally obtained evidence. It therefore did not behoove the Privy Council in Kuruma to cite Scots cases as following the rule of admissibility and to state in King (Herman) v. R. that "[t]he same end is reached in both jurisdictions though by a slightly different route."[46/] A Scottish judge emphatically rejected this in Chalmers v. H.M. Advocate by stating that:

> I am not to be taken as suggesting that English law is the same as Scottish, for it is not, the English Courts being in use to admit certain evidence which would fall to be rejected in Scotland and the procedure in the two countries being materially different. 47/

In the Irish decision in People v. O'Brien, the court articulated principles similar to those applied in the Scots cases.[48/] Justice Kingsmill Moore could not accept either the strict inclusionary or exclusionary approach and stated that:

> It appears to me that in every case a determination has to be made by the trial judge as to whether the public interest is best served by the admission or by the exclusion of evidence of facts ascertained as a result of, and by means of, illegal actions, and that the answer to the question depends on a consideration of all the circumstances.

45/ [1960] J.C. 104, 110.

46/ [1969] 1 A.C. 304, 315 (P.C. 1968) (Jamaica).

47/ [1954] J.C. 66, 77, 78.

48/ [1965] I.R. 142.

> On the one hand, the nature and extent of the illegality have to be taken into account. Was the illegal action intentional or unintentional, and, if intentional, was it the result of an ad hoc decision or does it represent a settled or deliberate policy? Was the illegality one of a trivial and technical nature or was it a serious invasion of important rights the recurrence of which would involve a real danger to necessary freedoms? Were there circumstances of urgency or emergency which provide some excuse for the action? 49/

Of these interests the court was disposed to emphasize the public interest that the law should be observed even in the investigation of crime. Justice Walsh expressed the view that a deliberate and conscious breach of a person's constitutional rights would make the evidence obtained absolutely inadmissible, whereas evidence obtained without a deliberate and conscious violation of a person's constitutional rights would not be excludable only by reason of the violation. Thus, in a later case, a genuine error in the address shown on a search warrant was held not to make the evidence obtained from the search inadmissible.[50/]

49/ Id. at 160.

50/ The People v. Madden, [1977] I.R. 336 (1976).

CANADA

Although final appeals to the Judicial Committee of the Privy Council were abolished by an Act of Parliament in 1949,[51/] the Supreme Court of Canada has generally continued to voluntarily adhere to decisions of the Privy Council and the House of Lords in matters of the common law to such an extent that its own decisions commonly read as if they were those of a lower English court.[52/] At the same time, the Supreme Court has tended to interpret English precedents and the Canadian Criminal Code[53/] quite narrowly, overruling the immediately inferior courts of appeal for the provinces in favor of the Crown in a number of significant cases. In 1970, these two judicial leanings were brought together by a majority of the Supreme Court in the leading Canadian case dealing with the admissibility or illegally and unfairly obtained evidence, R. v. Wray,[54/] wherein it

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51/ An Act to Amend the Supreme Court Act, 1949 Can. Stat. c. 37, § 3, now The Supreme Court Act, Can. Rev. Stat. c. S-19, § 54 (1970). The power to abolish or limit appeals to the Privy Council had been conferred on the Parliaments of Canada, Australia, and New Zealand by the Statute of Westminister, 1931, 22 & 23 Geo. 5, c. 4.

52/ Prior to being named to the Supreme Court in 1973, Chief Justice Bora Laskin explored some of the reasons for this relative lack of judicial creativity in Canada. B. Laskin, The British Tradition in Canadian Law 49-59 (1969).

53/ Rev. Stat. Can., c. C-34 (1970), as amended. Under the Canadian constitution, the entire field of criminal law falls under federal jurisdiction. The provinces, however, can make laws respecting "quasi-criminal" offenses such as highway traffic violations, contraventions of municipal ordinances, and breaches of otherwise valid provincial laws. The British North America Act, 1867, 30 & 31 Vict., c. 3, §§ 91(27) & 92(15).

54/ 11 D.L.R. 3d 673 (1970).

rejected the argument for the defense that, in Kuruma v. R.,[55] Lord Goddard had approved of a balancing test for weighing the relevancy of evidence in a criminal trial with the severity of any illegal or oppressive conduct that may have occurred at the time the evidence was obtained. Instead, the Supreme Court held that truly relevant physical evidence, as opposed to evidence of confessions, must be admitted under the Kuruma decision and other English precedents. In so holding, the Supreme Court established an inclusionary rule that, even after R. v. Sang,[56] is still broader and less ambiguous than the English inclusionary rule. This decision, as well as the subsequent denial of the applicability of the Canadian Bill of Rights[57] to the question of the admissibility of evidence in Hogan v. R.,[58] has been widely criticized in Canada for being overly restrictive and has resulted in minor statutory reform as well as a proposal for a major revision. Nevertheless, the rules set out by the Supreme Court in R. v. Wray and Hogan v. R. still state the basic common law of Canada.

In the case of R. v. Wray, the accused was charged with having murdered a service station attendant during the course of a robbery. There were no witnesses to the shooting, but the accused was suspected for

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55/ [1955] A.C. 197 (P.C.) (Ken.).

56/ [1980] A.C. 402 (1979).

57/ Can. Rev. Stat., c. 44 (1960), as amended by 1970-71-72 Can. Stat., c. 38, § 29.

58/ 48 D.L.R. 3d 427 (1974).

unreported reasons and, just over one month after the crime, was brought to a police station for a day of questioning. After several hours of interrogation, the accused was taken to a lie detector operator who posed as a sort of independent psychologist, misleading the accused as to the nature of the examination and the evidence that the police had already obtained pertaining to the case. Furthermore, the accused was coaxed with false statements that his answers, which were being secretly recorded, could not be later used against him. Meanwhile, the police outside blocked several attempts by the accused's lawyer to speak to his client as they felt the accused was about to confess and they might recover the murder weapon. Finally, the accused signed a statement that he threw the rifle into a swamp where he subsequently helped the police retrieve it. However, the accused apparently never confessed to the crime itself.

At the trial, the defense successfully argued that the signed statement was an inadmissible confession as it had not been voluntarily made. Without this evidence, the Crown's case collapsed and the charge was withdrawn from the jury. On appeal to the Court of Appeal for Ontario,[59] the Crown conceded that the signed statement might not have been admissible, but contended that under a rule that had been established by the High Court in the 1949 case of R. v. St. Lawrence,[60] it should have been allowed to

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59/ R. v. Wray, [1970] 2 Ont. 3 (C.A. 1969).

60/ [1949] Ont. 215 (H.C.).

prove how the police had come to recover the murder weapon. In this connection, the Crown quoted the following passage from R. v. St. Lawrence:

> Where the discovery of the fact confirms the confession--that is, where the confession must be taken to be true by reason of the discovery of the fact--then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible. 61/

Judge Aylesworth agreed that, under the above rule, the Crown would normally have been allowed to adduce evidence that the accused had led them to the rifle; however, he also held that the rule is subject to the exception that a trial judge always has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against an accused. Then, after reviewing the transcript of the lie detector test, Judge Aylesworth concluded that the confession had indeed been "procured by trickery, duress and improper inducements" 62/ and that the trial judge had therefore been justified in invoking his discretion. In other words, the Court of Appeals' decision was based squarely on the plain wording of Lord Chief Justice Goddard's dictum in Kuruma.

On the further appeal to the Supreme Court, 63/ the most important issue was not whether the signed statement was admissible or whether R. v. St. Lawrence was a correct statement of the law, but rather, whether the trial

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61/ Id. at 228.

62/ R. v. Wray, [1970] 2 Ont. 3, 5 (C.A. 1969).

63/ R. v. Wray, 11 D.L.R. 3d 673 (1970).

judge had acted properly in excluding the evidence of the accused's assistance. The minority of three, led by Chief Justice Cartwright, felt that the behavior of the police was of the sort that would tend to "bring the administration of justice into disrepute" 64/ and that the evidence was rightfully excluded.

The majority of six, however, took quite a different view of what Lord Chief Justice Goddard had meant by the phrase "operate unfairly against the accused." After tracing the development of English law, they concluded that there was no authority "which supports the proposition that a trial Judge has a discretion to exclude admissible evidence because, in his opinion, its admission would be calculated to bring the administration of justice into disrepute." 65/ As to what Lord Goddard had meant in Kuruma, Justice Martland wrote as follows:

> Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial Judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the Court and of substantial probative value may operate unfortunately for the accused, but not unfairly. It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly. 66/

It would appear that examples of the type of "tenuous" evidence that Justice Martland had in mind might have been inflammatory photographs of the victim or evidence tended primarily to discredit the character of

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64/ Id. at 685.

65/ Id.

66/ Id. at 689-690.

the accused where the defense had not brought the issue of character into play. Thus, it seems that the majority was really thinking of the normal rules of evidence regarding relevancy and admissibility and not that those rules might be qualified by any proof of illegality. This interpretation is supported by the following quote, wherein Justice Martland distinguished the English cases of R. v. Court 67/ and R. v. Payne 68/:

> In cases such as R. v. Court and R. v. Payne, I think confusion has arisen between "unfairness" in the method of obtaining evidence, and "unfairness" in the actual trial of the accused by reason of its admission. The result of those two cases was, in effect, to render inadmissible evidence which the ratio decidendi of the Kuruma case had held to be admissible. The view which they express would replace the Noor Mohamed test, based on the duty of a trial Judge to ensure that the minds of the jury be not prejudiced by evidence of little probative value, but of great prejudicial effect, by the test as to whether evidence, the probative value of which is unimpeachable, was obtained by methods which the trial Judge, in his own discretion, considers to be unfair. Exclusion of evidence on this ground has nothing whatever to do with the duty of a trial Judge to secure a fair trial for the accused. 69/

In the result, a new trial was ordered and the trial judge was directed that evidence as to how the police retrieved the gun should be admitted, but not the confession itself. In other words, the Crown could prove that the accused had led the police to the gun, but not introduce as evidence the fact that he had said he had thrown it there. Of course, in the instant case, the distinction was very artificial. After all, it was unlikely a jury would conclude that the accused had exercised psychic powers

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67/ [1962] Crim. L.R. 697 (Crim. App.).

68/ [1963] 1 W.L.R. 637 (Crim. App.).

69/ R. v. Wray, 11 D.L.R. 3d 673, 691 (1970).

to assist in locating the weapon. Interestingly, at least according to Lord Scarman in R. v. Sang, it would appear that no part of the confession, whether proved by collateral facts or not, would have been admissible in England. 70/ Thus, in this respect, R. v. Wray would appear to be a wider inclusionary rule than R. v. Sang.

The majority's opinion in R. v. Wray has all but completely closed the door in Canada on the development of a doctrine of judicial discretion to exclude evidence on the basis of how it was obtained. The majority did not qualify its holding by attempting to minimize the impropriety of the police behavior or by stressing the gravity of the offense. Rather, the holding was clear and assertive: a Canadian trial judge has no discretion to exclude truly relevant evidence.

Given the British tradition in Canadian law and the national self-perception that Canadians are much more supportive, on the whole, of law enforcement agencies than are Americans, the United States exclusionary rule has few Canadian adherents within or outside of the legal profession. Consequently, the result arrived at through the majority's decision in R. v. Wray was not surprising. R. v. Wray was a case, after all, in which the overriding question was precisely whether someone who had, at the very least, been deeply implicated in a homicide should go free because the police broke the law in cracking the case. However, on a more technical, strictly legal level, reactions in Canada to the Supreme Court's decision in R. v. Wray have generally been critical, and even one commentator, who did prefer the majority opinion, recognized

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70/ R. v. Sang, [1980] A.C. 402 (1979).

that the reading of English precedents was not altogether convincing.[71/] Another noted that the majority failed completely to examine "the fundamental principles involved" and to indicate why in the conflict between the rules regarding confessions and physical evidence, it preferred the latter.[72/] Finally, at a conference on the Canadian law of evidence held at Dalhousie University in 1976, not one of the participating judges or professors fully supported the inflexible inclusionary rule, and the majority of the participants advocated some form of fundamental statutory reform.[73/] In fact, during the course of one discussion, Justice Jones of the Supreme Court of Nova Scotia (Trial Division) is reported to have stated that "[In the view of some,] [t]here is no discretion left, but I must say that is a view I can't agree with, and no matter what the courts of appeal say, about 90 percent of the cases never get there and trial judges are going to exercise that discretion I am sure, come hell or high water."[74/] Such a statement might not reflect the actual practice of trial judges and, as a matter of record, the Crown has not had to appeal acquittals by recalcitrant trial judges who have refused to allow relevant evidence to be presented because of the manner in which it was obtained. Nevertheless, such a statement is indicative of a widespread sentiment that trial judges should have greater control over trials than is left to them by R. v. Wray.

71/ Weinberg, "The Judicial Discretion to Exclude Relevant Evidence," 21 McGill L.J. 1 (1975).

72/ Roberts, "The Legacy of Regina v. Wray," 50 Can. B. Rev. 19 (1972).

73/ Infra, pp. 63-65.

74/ Jones, "General Discussion," Current Trends in Evidence 73 (1976).

After the decision in R. v. Wray, it was pointed out that a way to exclude illegally obtained evidence might still be found by invoking the Canadian Bill of Rights.[75/] This statute, however, is not a constitutional document but merely an Act of Parliament that has not had a very glorious history since it was first passed in 1960. In fact,[76/] the subsequent attempt to apply the Canadian Bill of Rights to the problem of illegally obtained evidence only led to a further gutting of the statute by the Supreme Court in the case of Hogan v. R.[77/] The accused in this case had been arrested and taken to a police station for a breath test where he asked to be allowed to speak to his lawyer who had come to the station. The police refused, informing him that he would be charged with failing to give a breath sample if he did not immediately comply. The accused did then blow into the machine and was convicted on that evidence.

On appeal, the defense argued that the police behavior had violated § 2 of the Canadian Bill of Rights which provides as follows:

> [N]o law of Canada shall be construed or applied so as to . . .
> (c) deprive a person who has been arrested or detained . . .
> (ii) of the right to retain and instruct counsel without delay, . . . 78/

In dismissing the appeal for the majority, Justice Ritchie first noted that there were no grounds for excluding the evidence at common law, thereby reaffirming the rule in R. v. Wray. Then, as to the Canadian Bill of Rights,

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75/ Supra note 72, at 38.

76/ Can. Stat., c. 44 (1960), as amended by 1970-71-72 Can. Stat., c. 38, § 29.

77/ 48 D.L.R. 3d 427 (1974).

78/ Can. Stat., c. 44 (1960).

he simply noted that it did not contain any expressed exclusionary rule and concluded that one could not be inferred. Neither Justice Ritchie nor the other five concurring justices considered the public policy issues involved or Parliament's intent in passing a Bill of Rights. Instead, they relied on the narrow position that an exclusionary rule could not be read into the Canadian Bill of Rights as that would be a derogation of the common law rule. 79/

Justice Laskin, who had been appointed to the Court after R. v. Wray, attempted to characterize the Canadian Bill of Rights as "a half-way house between a purely common law regime and a constitutional one." 80/ Furthermore, he declared that nothing short of a sanction in the form of an exclusionary rule could give "reasonable assurance" that the police would respect the rights of individuals in the future. In this connection, the Justice took the rather unusual step of delving into the law of the United States and the history of its Bill of Rights, concluding as follows:

> It may be said that the exclusion of relevant evidence is no way to control illegal police practices and that such exclusion merely allows a wrongdoer to escape conviction. Yet where constitutional guarantees are concerned, the more pertinent consideration is whether those guarantees, as fundamentals of the particular society, should be at the mercy of law enforcement officers and a blind eye turned to their invasion because it is more important to secure a conviction. The contention that it is the duty of the Courts to get at the truth has in it too much of the philosophy of the end justifying the means; it would equally challenge the present law as to confessions and other out-of-Court statements by an accused. In the United States, its Supreme Court, after weighing over many years whether other methods than

79/ Hogan v. R., 48 D.L.R. 3d 427, 428-435 (1974).

80/ Id. at 443.

> exclusion of evidence should be invoked to deter illegal searches and seizures in state as well as in federal prosecutions, concluded that the constitutional guarantees could best be upheld by a rule of exclusion. 81/

Thus, Chief Justice Laskin, certainly a most renowned Canadian judge, and two other justices of the Supreme Court came to support, in general terms, the exclusionary rule of the United States over the inclusionary rule of England. The majority, however, did not perceive the Canadian Bill of Rights in the same light, were hardly as favorably disposed toward the United States' exclusionary rule, and, therefore, affirmed R. v. Wray.

81/ Id.

AUSTRALIA

As a result of the control previously exercised by Great Britain in the affairs of Australia, the Australian judicial system has a somewhat complicated hierarchy. Until 1968, the Judicial Committee of the Privy Council was the highest court of appeal to which an appeal could be brought from the Australian High Court or from the state supreme courts. Accordingly, Australian courts were bound to follow the decisions of the Privy Council, including those given on appeals from courts outside Australia. However, Australian Commonwealth (federal) legislation enacted in 1968 and 1975 severely restricted appeals to the Privy Council from the High Court. Appeals from state supreme courts were unimpaired, but under other legislation, they are now confined to questions under state law. This development left two choices for the Australian High Court in deciding the applicability of earlier Privy Council decisions. It could either, like the Supreme Court of Canada, consider itself as being of the same status as the Privy Council and--as in the case of its own decisions--able to depart from them, or, alternatively, it could treat the Privy Council's earlier decisions as binding unless they were distinguishable. As will be seen, in relation to the treatment of the rule in Kuruma, the Court has opted for the former course.

Until recently, the Australian states administering the criminal law in their jurisdictions have generally followed the inclusionary rule of English law. Australian authorities illustrating the rule, however,

are very few. In McLean v. Cahill, the general rule was stated that evidence in the possession of a party may be produced without explaining the means by which it was obtained and that it is "not made inadmissible by shewing that it was obtained improperly or even illegally."[82/] The court agreed, however, that while "the interests of justice may be furthered . . . by obtaining the evidence necessary to ensure a conviction, the general interest of the whole community is best served if the law can be administered without anything which savours in the least degree of oppression, trickery, or sharp practice."[83/] In R. v. McNamara,[84/] the court approvingly cited the Privy Council's opinion in Kuruma on the test of admissibility as being that of relevancy alone. In Wendo v. R.,[85/] non-compliance with statutory prescriptions on the taking of statements was held not to make the evidence inadmissible. The court relied on the Kuruma rule, but Chief Justice Dixon stated in dictum that "I do not think that in this or any other jurisdiction the question [of the admissibility of illegally obtained evidence] has been put at rest by Kuruma v. R."[86/]

82/ [1932] S. Austl. St. R. 359.

83/ Id. at 361.

84/ [1963] Vict. 402.

85/ 109 C.L.R. 559 (1963).

86/ Id. at 562.

Beginning in 1970, the Australian position has shifted closer to the middle ground found in the Scots and Irish law. This shift was reflected in R. v. Ireland,[87/] which without direct reference to Kuruma, propounded what later was explained as being a new rule. In that case, the respondent was charged and found guilty of murder in South Australia. On appeal, a new trial was ordered on grounds that certain evidence, i.e., answers obtained during an interrogation, photographs of scratches on the hand of the defendant, and the results of a medical examination obtained in breach of statutory requirements should not have been admitted. On application by the Crown for leave to appeal, the High Court of Australia found the following principles applicable to the question of admissibility:

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion. 88/

The law enunciated in R. v. Ireland was referred to with approval in Merchant v. R.,[89/] but the full import of the decision was not realized until the High Court had the opportunity to consider the question

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87/ 126 C.L.R. 321 (1970).

88/ Id. at 335.

89/ 126 C.L.R. 414, 417-418 (1971).

again in Bunning v. Cross.[90] This decision involved a charge of driving while intoxicated, and the magistrate excluded the evidence of a breath-analyzer test solely because it had been unlawfully obtained. The test had been conducted at a police station. Legislation empowered the police to carry out a test at the station only if an on-the-spot test was positive, the motorist refused to take the test, or there were reasonable grounds for believing that the motorist was driving while under the influence of alcohol. None of these circumstances was found to have been present. On appeal, the case was referred back to the magistrate for the exercise of his discretion and with the direction that the evidence could be excluded only if it unfairly prejudiced the accused. On referral back, the magistrate exercised discretion in favor of rejection of the evidence and again dismissed the charge. A further review by the High Court found the magistrate could not have correctly exercised the discretion to exclude the evidence, and the case was remanded to be dealt with according to the law. On appeal, this time by the accused, the majority of the members of the High Court decided that the magistrate's exercise of discretion could not be upheld since he had not considered the question of the competing requirements of the public need to secure the conviction of an offender and the unfairness to the defendant as had been stated by Chief Justice Barwick in R. v. Ireland. Had the competing requirements been considered, the court decided that the

90/ 19 Austl. L. R. 641 (1978).

only conclusion that could have been reached was that there was nothing to outbalance the public interest in the enforcement of the law. Justices Stephen and Aicken, with whom Chief Justice Barwick agreed, referred to the above quoted passage from the judgment in the Ireland case and said that the statement represented the law in Australia. Thus, the law expounded by the Privy Council in Kuruma was inconsistent, and the judges preferred to follow R. v. Ireland. The court re-emphasized that the object of the exercise of discretion was 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."[91] The relevance of the competing policy considerations was considered to be of special importance in an age of sophisticated crime and detection techniques involving electronic surveillance, eavesdropping, and scientific methods of identification. These sophisticated detection techniques made the exercise of discretion essential as, in the opinion of the court, the authorities could not always be assumed to maintain an attitude of concern towards the rights of citizens. The court stated:

> There is no initial presumption that the State, by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired. 92/

91/ Id. at 659.

92/ Id.

The judgment also cited with approval the statement by Justice Holmes in Olmstead v. United States that it may be "a less evil that some criminals should escape than that the Government should play an ignoble part."[93/] The court finally went on to discuss the following factors which were relevant in the instant case in the exercise of the discretion:

1) The police had acted in a mistaken belief of their powers in administering the breath test.

2) The nature of the illegality did not affect the cogency of the evidence. Generally, the question of cogency was not relevant whether the illegality was intentional or reckless, but an exception arose when the evidence was vital and of a perishable nature.

3) The police could have easily required the accused to do lawfully what they unlawfully required him to do. However, a deliberate "cutting of corners" would affect the admissibility of illegally obtained evidence.

4) The offense under consideration, although not the most serious one, was one which had caused concern in Australian legislatures, and its commission could result in the loss of life of another user of the highway. A comparison of the seriousness of the offense and of the illegal police conduct was therefore relevant.

5) The legislation had deliberately restricted the police in the exercise of the authority to administer breath tests. This factor favored the rejection of the evidence if those restrictions were not complied with.

93/ 277 U.S. 438, 470 (1928), cited id. at 661.

The decisions in R. v. Ireland and Bunning v. Cross have changed the focus of the discretion to exclude evidence from the sole question of unfairness to the accused to the broader one of public policy. The factors employed in such discretionary decisions in Australia are similar to those employed in Scotland and Ireland.

NEW ZEALAND

In contrast to Canada and Australia, New Zealand has not abolished or severely limited final appeals to the Judicial Committee of the Privy Council. In fact, a recent Royal Commission on the Courts recommended their preservation for reasons of tradition, respect for the quality of the court in London, and the desirability of having a two-tiered appellate structure above the nation's highest trial court.[94/] Consequently, the Privy Council's decisions remain, in the absence of any domestic statutory reform, binding upon the courts of New Zealand. Furthermore, although their status is not quite as definite, House of Lords decisions, particularly subsequent interpretations of Privy Council cases, are customarily treated as also being dispositive of an issue.[95/]

94/ New Zealand Royal Commission on the Courts, Report 79-80 (1978). While the Commission professed to be neutral on the question of Privy Council appeals because it was outside their terms of reference, the recommendation that such appeals not be "lightly abolished" and other statements seem to clearly lean in favor of preservation.

The Royal Commission also recommended several changes to the domestic court structure which have since been implemented by the Judicature Amendment Act, 1979, (1979 Stat. N.Z. No. 124). First, the Court of Appeal remains the highest domestic court, but its membership has been increased from five to six. In effect, this means that there are now five participating members as the Chief Justice, who as an ex officio member of the Court of Appeal, has traditionally sat on the High Court. Prior to 1979, this 26 member tribunal, which is an intermediate appellate court as well as the highest trial body, was known as the Supreme Court.

95/ For a discussion of the rules of stare decisis regarding House of Lords decisions, see J. O'Keefe & W. Farrands, Introduction to New Zealand Law 55-57 (3d ed. 1976).

This is not to say, however, that the common law of New Zealand can be completely subsumed to that of England. A perfect example of this is the different approaches of the two countries' courts to the question of the admissibility of illegally or unfairly obtained evidence. While the authority of Kuruma and other Privy Council decisions concerning the law of evidence[96/] has never been challenged, Lord Goddard's famous dictum that a "judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused"[97/] has received an increasingly more liberal interpretation in New Zealand than it has in either England or Canada. Moreover, judicial discretion to exclude evidence has been invoked in three reported instances. In short, New Zealand's courts have not yet stiffened in resistance to appeals based on the alleged illegality of the Crown's evidence; rather, they have kept in hand the flexibility offered by Lord Goddard, whether this was his intention or not, and they have given an increasing amount of attention to questions of public policy.

The first reported New Zealand decision to consider the rule in Kuruma on the question of the admissibility of unfairly obtained evidence was that of the Supreme Court in Daily v. Police,[98/] a 1966 appeal against a conviction for drunken driving. The appellant, who had been involved in an

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96/ The subject was also considered in King (Herman) v. R. [1969] 1 A.C. 304 (P.C. 1968) (Jamaica).

97/ [1955] A.C. 197, 204 (P.C.) (Ken.).

98/ [1966] N.Z.L.R. 1048 (N.Z.S.C.).

accident prior to his arrest, contended that he had neither consciously consented to giving a blood sample nor been warned that the results could be used against him. In arguing for the exclusion of the blood analysis, counsel cited the English case of R. v. Payne[99/] as being directly on point. The Chief Justice reviewed the facts and found that the accused had in fact consented and that the consent had not been obtained, as in R. v. Payne, through misrepresentations of the law. Therefore, he found that the evidence had not been "unfairly" obtained. However, in upholding the conviction, the Chief Justice qualified his decision in the following, fairly strong terms:

> I wish to make it clear that this judgment is no warrant to the police or to medical practitioners dealing with persons suspected of driving while intoxicated to take blood samples without consent or explanation of their purpose. . . . It is still the duty of those concerned with law enforcement to treat suspected persons with courtesy and consideration. Where necessary in the interests of justice the Courts will always use their discretion to exclude evidence which would operate unfairly against an accused person. 100/

Therefore, R. v. Payne was apparently approved of in principle, though the facts were not found to be analogous.

Since 1966, there have been several other cases in which New Zealand judges have declined to exercise their discretion to exclude evidence that was alleged to have been unfairly or illegally obtained but which are, nevertheless, instructive. In Mathewson v. Police,[101/] the accused was charged with bookmaking after the police had entered her home with a search warrant. During the raid, the police answered the telephone calls of several

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99/ [1963] 1 W.L.R. 637 (Crim. App.)

100/ [1966] N.Z.L.R. 1048, 1052 (N.Z.S.C.).

101/ [1969] N.Z.L.R. 218 (N.Z.S.C. 1968).

would-be bettors and later sought to introduce the conversations as evidence against the accused. The defense pointed out that the search warrant had not authorized the police to answer the telephone, but Chief Justice Wild found no objection had been made to the police behavior and that the search warrant, itself, was valid. At the same time, the question of whether the evidence would have been inadmissible if there had been no search warrant at all was left open.

In McFarland v. Sharp and Another,[102] the subject of illegal search and seizures was raised in civil proceedings. As in Mathewson v. Police, the police had entered a private home with a valid search warrant, and, in this instance, they had seized documents that were evidence of illegal bookmaking but were not covered by the warrant. The plaintiff petitioned for a writ prohibiting the Crown from proceeding against him on a charge of bookmaking. A judge of the Supreme Court held that the determination of whether the evidence would operate unfairly against the plaintiff would have to be made by the trial judge, though it would then be subject to review. A further appeal to the Court of Appeal was dismissed with New Zealand's highest domestic court agreeing that the evidence was neither per se admissible or inadmissible.[103]

102/ [1972] N.Z.L.R. 64 (N.Z.S.C. 1971).

103/ [1972] N.Z.L.R. 838 (N.Z.Ct. App.).

The most recent reported consideration of Kuruma v. R. occurred in R. v. Lee,[104] involving a seaman charged with importing heroin into the country after he had been searched by a customs agent. The search was illegal because the accused had not been informed that he had a right to be taken to a Justice of the Peace instead of being searched immediately. Having made this determination, Judge Chilwell wrote as follows:

> Was there any unfairness in this case? I have already indicated that to my mind the search was rather more technically illegal than unfairly illegal. Further factors are that the search went no further than the particular immediate area, viz, the right ankle, the subject of lack of co-operation by the searchee. No attempt was made to search his other ankle or any other part of his body. Section 213 (5) was complied with within a very few minutes after the illegal search. The search was carried out by a customs officer whose professional curiosity had been aroused by the conduct of the accused. Had he not conducted the search there is a distinct possibility that the very small quantity of heroin found in his sock could have been disposed of. . . .
>
> The factors to which I have referred could be compared with a hypothetical set of facts -- the complete stripping and searching of the accused at the foot of the gangway. The court can conceive of such circumstances where it could be said that the searching officer had stepped beyond the line of what is fair and in such a case the court might well exercise its discretion to exclude the evidence of the finding of restricted goods.[105]

Thus, the trial judge found that the accused had not been treated unfairly. One New Zealand commentator has written of this decision that "[t]o his Honour's credit, . . . an attempt was made to gauge the seriousness of the illegality and the bona fides of the customs officer . . . ; [however],

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104/ [1978] 1 N.Z.L.R. 481 (N.Z.S.C. 1977).

105/ Id. at 487-488.

[t]he fact that Parliament, in granting the Customs Department specific search powers under the Act had already decided what types of searches would be fair was not discussed by his Honour."[106/] Parliamentary intention is a double-edged sword, however. The deciding judge could counter that Parliament had drafted technical rules, realizing that, in the English tradition, a breach of those rules does not make any evidence obtained automatically excludable. In any event, Judge Chilwell did balance the illegality with the seriousness of the offense in determining whether the evidence was unfair or not, and he noted that the courts of New Zealand had been giving more and more attention to questions of public policy.

The above readings of Kuruma v. R. are in sharp contrast to those of the Supreme Court of Canada in R. v. Wray[107/] and the House of Lords in R. v. Sang.[108/] Yet, dicta are not holdings. Therefore, it is the cases in which discretion has been exercised that are of greatest importance in assessing the law of New Zealand regarding the admissibility of illegally obtained evidence.

The first case in which the discretion to exclude evidence was invoked by a New Zealand judge was Police v. Hall,[109/] a 1976 appeal against a

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106/ Doyle, "The Discretion to Exclude Unfairly Obtained Evidence," 1978 N.Z.L.J. 25, 31.

107/ 11 D.L.R. 3d 673 (1970).

108/ [1980] A.C. 402 (1979).

109/ [1976] 2 N.Z.L.R. 678 (N.Z.Ct. App.).

conviction for impaired driving. The accused, a 17 year-old, was arrested and taken to a police station where he was not allowed to make any telephone calls and where he was examined by a doctor without his consent. Additionally, the doctor took a blood sample, but the results were never produced at trial as it had apparently been lost. On appeal, it was revealed that the practice of both taking a blood sample and conducting an examination in such cases had been directed by the local magistrate. As to this directive, the Court of Appeal wrote that "it must normally be regarded as inappropriate for a judicial officer, whether judge or magistrate, to control executive officers in their decisions as to the initiation of prosecutions."[110/] Taking all of these facts together, the Court of Appeal wrote as follows:

> We have referred to the need to avoid any unfairness by subjecting a person to a general medical examination without his consent. In this case the failure to obtain consent, particularly as the doctor described the appellant as argumentative, taken together with other features of the case, leads us to think that what occurred was unsatisfactory. The other features are the refusal, for no reason, to allow this youthful defendant to telephone for the advice of his father or his solicitor; the loss of the blood sample; and the possible influence upon the whole conduct of the prosecution of the practice already discussed. The cumulative effect of these matters is such that, in our opinion, the doctor's evidence of his examination should have been excluded in the court's discretion in the interests of fairness. [111/]

For these reasons, the conviction was quashed.

110/ Id. at 683.

111/ Id. at 684.

The second case in which the discretion was applied was the appeal to the Supreme Court in R. v. Pethig.[112] The facts, briefly stated, were that a police officer had "encouraged or stimulated" the accused into assisting him in purchasing drugs. In the United States the defense would, of course, have been one of entrapment--a subject which, in itself, is outside the scope of this study. In New Zealand, however, the Supreme Court considered the motion to exclude the policeman's testimony from the perspective of whether the evidence would operate "unfairly" against the accused, and it determined that the policeman's behavior had been so onerous that it should not be admitted. The Supreme Court did not create an absolute defense of entrapment, and the Crown might still have been able to adduce evidence from other witnesses to obtain a conviction. In practice, treating entrapment as an absolute defense or as an evidentary problem might not often affect the outcome, but it is significant that New Zealand has treated it as the latter. This significance can perhaps be best seen by considering an earlier case involving entrapment that set up R. v. Pethig.

In R. v. Capner,[113] the defense counsel, who was a strong proponent of wide judicial discretion to exclude evidence, sought to broaden the rule and establish a precedent prior to that of Police v. Hall in a rather left-handed manner. Mr. Barlow argued that, since discretion was never invoked, the truth was that a judge has no authority to exclude evidence if it is

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112/ [1977] 1 N.Z.L.R. 448 (N.Z.S.C. 1976).

113/ [1975] 1 N.Z.L.R. 411 (N.Z.Ct. App. 1974); See also, Barlow, "Entrapment and the Common Law: Is There a Place for American Doctrine of Entrapment?" 41 Mod. L.R. 266 (1978).

relevant to the case at hand. Therefore, he contended, the court should create a defense of entrapment modeled after the laws of the United States. In the alternative, he challenged the court to demomstrate that there was an overriding discretion in the judiciary by invoking it. Obviously, a little perturbed at this attempt to nail the court down, the President of the Court of Appeal responded as follows:

> We have no intention of complying with Mr. Barlow's request for a statement of a rule of law in this area. The field is a very fluid one where it is always necessary to draw the line, . . . Let us say quite plainly that in this country a trial Judge does have that overriding discretion. It has been recognised in a long series of rulings extending over a number of areas of the law of evidence. It may well be that there is some doubt in England as to the extent to which the discretion applies in circumstances where the evidence has been obtained by a police officer who acted unfairly or instigated the offence. . . . However, in this country we have not hesitated to develop the use of this discretion, and we think that that it is a desirable attitude. To deny the discretion would be to take away something which acts very much in the interests of accused persons. 114/

Thus, R. v. Capner is instructive in two ways. First, it reaffirmed the existence of judicial discretion in broad terms, and, second, it was a clear statement that the New Zealand judiciary itself considers the New Zealand approach to be more flexible than that of England.

This flexible approach was most recently followed in R. v. Fleeting (No. 2)[115] in which testimony given at a preliminary hearing was not allowed to be entered into the record at trial as the witness had left the country and to admit his statements would have been "unfair." The case did not involve any illegal police behavior, but it did affirm Police v. Hall.

114/ Id. at 413-414.

115/ [1977] 1 N.Z.L.R. 349 (N.Z.S.C. 1976).

There have not been any reported decisions from New Zealand in which evidence was allegedly obtained through outrageous or violent police misconduct. Also, in none of the cases in which the fairness of the evidence was challenged and excluded was the purported crime of a violent nature or an automatically indictable offense.[116] Consequently, there are no cases in which a person charged with a serious crime has been set free in the interests of public policy. At the same time, New Zealand's courts have interpreted Kuruma more liberally on the point of judicial discretion than have the courts of England and Canada. Of course, a New Zealand decision might always be appealed to the Privy Council, and, in light of R. v. Sang, it would seem likely that the Privy Council would reinterpret Lord Goddard's meaning more restrictively than New Zealand's Court of Appeal. Such a hypothetical situation, however, could also lead to a statutory reform of the Evidence Act.[117] In any event, New Zealand's judiciary has, to date, shown a significant degree of independence of thought and a desire to remain more flexible in weighing the relevancy of evidence with interests of fairness and public policy.

116/ As have most other countries in the Commonwealth, New Zealand has replaced the common law distinction between felonies and misdemeanors with a similar, statutory system of "indictable" and "summary" offenses.

117/ 2 Repr. Stat. N.Z. 339 (1979).

BALANCING THE CONFLICTING INTERESTS

The four rules outlined in this survey--the United States, Anglo-Canadian, Scots-Irish, and Australia-New Zealand--offer a wide scope for comparison of the various approaches. Each rule has developed in response to prevalent social conditions and the public attitude toward crime enforcement of criminal laws as reflected in judicial thought.

In England it is believed that relevance and reliability of the evidence overcome any irregularity in the means of obtaining it. Reliability is not judged by a fixed standard, and although real evidence, unlike the testimony of a person, can be unimpeachable in conveying the truth, in the end a belief in the existence of a thing must depend on the testimony of those who claim to have found it. Thus, in Kuruma, keeping in view the troubled times in Kenya during which the case arose, the reliability of the evidence was questionable. The legislature, by allowing only senior officers to conduct searches, was acting in furtherance of the notion that the higher police ranks could be trusted not to plant evidence. The Privy Council thus substituted its own standard of reliability and chose to overlook factors that tended to cast doubt on the prosecution's case of possession of the evidence.

Another factor which has allowed the courts to maintain their approach on admissibility is that the police in England have generally been held in high regard by the public and have not resorted to excesses in their

methods of investigations. Additionally, the courts do not see it as their function to exercise a disciplinary role over the police. In R. v. Sang, Lord Diplock proffered the firm opinion that "if evidence was obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with."[118/] This, however, is not fully supported by the reality of prevailing conditions. As crime has risen markedly in some British cities, so has the reputation of the "bobby" become tarnished. The complacency engendered by a homogeneous society has given way to concern over the spread of lawlessness. The desperate conditions of poverty and crime in the inner cities of the United States are finding their counterparts on English soil. Public pressure on the police to enforce the laws leads to the belief that if criminals are to be apprehended, some "cutting of corners" in the civil liberties field is inevitable. Under the admissibility rule then, how is such conduct to be controlled? Criminal and civil actions against the police for illegalities are sound in principle but offer practical difficulties. A private or state prosecution against a police officer for an offense such as trespass may fail because of the sympathy of the magistrates and the jury towards the accused. Moreover, the majority of the victims of illegal searches and seizures are not likely to know how to bring an action,

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118/ [1980] A.C. 402, 436 (1979).

particularly if they are in prison as a result of the admission of illegally obtained evidence. The threat of civil actions is equally unsatisfactory in deterring illegal conduct. While the chief officer of a police force can be held responsible for a civil wrong committed by one of his officers, there is no personal liability and damages are payable out of a police fund. Substantial damages are likely to be granted only in cases of actual loss or malice. Aggravated damages are awardable in cases of unconstitutional conduct, but in the area of protection of rights of privacy, English law lags behind the law in the United States. For example, in the absence of a physical invasion of private property, no tort is involved in such practices as electronic surveillance.

The controls within which the police have powers to conduct legal searches have also been rendered uncertain by recent decisions in which the courts have attempted to maintain an acceptable balance between the protection of private rights and the detection of crime. These cases have made a departure from well settled rules of common law which authorize: (1) the seizure of only that property which is specified in a search warrant; and (2) in the absence of a warrant, searches only in cases of contemporaneous arrest of a person. The effect of these cases is (a) to allow the seizure of any goods which are believed to be the evidence of any crime when the premises are searched under a warrant; and (b) where access is gained to private premises without an arrest or a search warrant, to allow the seizure of

any property as evidence of a serious crime which is being investigated.[119] Thus, the scope of civil actions against the police is again narrowed.

The only practical means of controlling the abuse of police authority is provided by a disciplinary procedure that has recently improved. An independent body known as the Police Complaints Board consisting of persons other than members of the police forces in the United Kingdom has been set up to investigate complaints against the police.[120] The Board is empowered to prefer charges after a hearing before a disciplinary tribunal to determine the question of guilt. If a possible criminal offense is involved, the case may be sent to the Director of Public Prosecutions.[121] This procedure is capable, to an extent, of mitigating the harsh effects of an inclusionary rule. Some amelioration of the English position may also be in sight. A Royal Commission on Criminal Procedure is at present deliberating on various topics, including the powers and duties of the police and the rights and duties of suspects and accused persons, with a view to recommending changes in the law. A distinguished scholar has expressed the hope that the commission will recommend the adoption of the Scots rule[122] after clarifying and enlarging the police powers involving searches.

119/ See generally, L. Leigh, Police Powers in England and Wales 183 (1975); Bridge, "Search and Seizure: an Antipodean View of Ghani v. Jones," [1974] Crim. L. Rev. 218; Leigh, "Recent Developments in the Law of Search and Seizure," 33 Mod. L. Rev. 268 (1970); J. Cartridge, "A Constable's Duty and Freedoms of Person and Property," Fundamental Rights 161-174 (1973).

120/ The Police Act, 1976, c. 46.

121/ Neither the investigatory procedure under the 1976 statute, nor the former complaint procedure is felt to serve as an impediment to effective law enforcement to provide a method by which the police may be harassed by criminals. Leigh, supra note 119, at 220.

122/ Cross, "Discretion and the Law of Evidence: When it Comes to the 'Forsenic Crunch,'" 30 N. Ire. L.Q. 289, 305 (1979).

The United States exclusionary rule is born of circumstances different from those in England. Many American police, faced with a high level of crime, are thought to have notably less admirable attitudes towards procedural rules and individual rights than their counterparts in some other countries.[123] The exclusionary rule is therefore aimed at assuring the integrity of the criminal process and keeping in check the consequences arising from a possibly freewheeling attitude on the part of the police. Although the rule may result in the acquittal of some guilty persons, it may help to protect innocent persons from breaches of the law. The acquittal of guilty persons on account of the exclusion of evidence may lessen public sympathy for the law, but the general deterrent effect of criminal punishments is not diminished by the acquittals as "[a] criminally inclined person . . . could hardly count on the exclusionary rule in calculating his risks."[124] The rule also has the merit of vindicating an accused's right without his having to undertake separate proceedings. It is true, however, that the rule places an additional burden on the police, but the real difficulties faced by them arise from the substantive law of search and arrest.

123/ Cann & Egbert, "The Exclusionary Rule: Its Necessity in Constitutional Democracy," 23 How. L.J. 299, 316 (1980); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970).

124/ Schwartz, "Excluding Evidence Illegally Obtained: American Idiosyncracy and Rational Response to Social Conditions," 29 Mod. L. Rev. 635, 638 (1966).

The chief drawback of the exclusionary rule is that it achieves its purpose in an extreme manner. The rule treats unconscious, accidental, or trivial illegalities in the same manner as deliberate and serious illegalities. No allowance is made for a technical error such as that which occurred in the Irish case of The People v. O'Brien.[125/] Since all illegalities lead to automatic exclusion, it may cause the police to perjure themselves as to whether the procedural requirements of a search or arrest were satisfied. Also a court not having the choice of judging the extent of illegality in an individual case, may be tempted to reduce the protection of the substantive rules by holding that no illegality had occurred. Nor is the aim of deterring illegal police conduct attainable by excluding illegal evidence which has been obtained as a result of an accident or under urgent circumstances.

The United States and English approaches thus seem harsh and inflexible, unbefitting the great traditions of the common law requiring the doing of justice according to law, without undue emphasis on legal technicalities which obstruct the course of justice or yield unfair decisions. Neither rule enables the moulding of decisions which blend the two conflicting interests of the law--the interest of the citizens to protect their privacy and that of the state to control criminal conduct. Canada, despite its traditional allegiance to English common law, might have been expected

125/ [1965] I.R. 142 (1964). For example, the United States Supreme Court recently refused to review a state decision that excluded evidence on the ground that a wrong address appeared on the search warrant--11641 East Vernor instead of 11643 East Venor--even though the warrant properly described the apartment to be searched as a second floor east apartment. Michigan v. Conner, cert. denied 441 U.S. 943 (1979). This Michigan Court of Appeals decision appears in the Petitioner's Brief for Certiorari at 12 (No. 78-765).

to provide a first compromise. In fact, minorities in the Supreme Court of Canada were prepared in 1970 and 1975 to substantially adopt the United States approach. The majorities in those decisions, however, expressed the inclusionary rule in such unambiguous and forceful language that they may well have even "out Englished" the English. Yet, these latter opinions are not altogether surprising when viewed in light of the Court's traditional antagonism to judicial activism and defenses wholly unrelated to the fundamental question of the guilt or innocence of the accused. Ironically, a system outside the mainstream of common law furnishes the best means of achieving that compromise. The courts in Scotland have rejected the view that public interest requires the automatic admission of all evidence, including that obtained by illegal means. The Scots rule strikes a balance between the two interests by excluding such evidence unless the illegality is of such a nature that it can be excused. This is a much wider and more diffuse approach under which "if conduct must be deterred or punished, the Scots rule permits exclusion; if there is no point in impugning the police conduct the evidence will be admitted and the guilty convicted."[126/] The Scots precedents are, therefore, in closer harmony with the traditions of the common law.

126/ Heydon, "Illegally Obtained Evidence" 1 and 2, [1973] Crim. L. Rev. 603, 690, 697.

TOWARDS REFORM?

The recent reaffirmation by the House of Lords of the inclusionary rule in England, coupled with the notion of the English courts that both the English and Scots rule achieve the same results, appears to rule out any reform of the inclusionary rule in the direction of the Scots model. However, this judicial reluctance may yet be overcome by legislation. The recommendation by a distinguished scholar in the field of evidence that the Scots rule should be adopted in England[127] is directed to the Royal Commission on Criminal Procedure which is deliberating on the reform of that area of English law. In Professor Cross's view, the adoption of the Scots rule could appropriately be made once the police powers of search are clarified and broadened. The Commission's recommendations are expected to be published in early 1981, but it has been revealed that the report will favor the enactment of a comprehensive law to deal with all aspects of police powers.[128] This wide net expected to be cast by the Commission must surely cover the question of the treatment of illegally obtained evidence.

In Canada, since the Supreme Court's decision in R. v. Wray, Parliament has responded by statutorily reforming the Canadian law of evidence in one major respect. In 1974, the Criminal Code of Canada was amended by the insertion of the Protection of Privacy Act[129] to deal specifically with problems involving

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126/ Supra note 121, at 305.

128/ THE TIMES (London) 1 (Sept. 12, 1980).

129/ 1973-74 Can. Stat., c. 50.

wiretapping and other forms of surveillance. One key provision of the amended Criminal Code is § 178.16, which provides that private communications that have not been intercepted in accordance with the other sections of the Act are not admissible against the parties to the conversation unless the presiding judge finds that the defect was merely "an irregularity in procedure, not being a substantive defect or irregularity."[130/] In other words, this section thus provides for a modified exclusionary rule. Furthermore, evidence obtained, whether directly or indirectly, as a result of an unlawful interception, may be excluded by the trial judge if "he is of the opinion that the admission thereof would bring the administration of justice into disrepute."[131/] This modified inclusionary rule basically restates the minority's position in R. v. Wray.

Also in 1974, the Law Reform Commission of Canada, which is within the Department of Justice, released a working paper on The Exclusion of Illegally Obtained Evidence in which it weighed the policy arguments behind the exclusionary and inclusionary rules and came to the conclusion that legislation should be passed:

> [W]hich allows a judge to exercise a discretion to depart from this basic principle [that relevant evidence should not be excluded] and refuse to admit evidence obtained through a serious violation of a substantive law or fundamental right if, considering the circumstances and the gravity of the charge against the accused, the violation is the result of a deliberate voluntary act committed in bad faith, its admission would constitute a serious injustice to the accused or bring the administration of justice into disrepute. 132/

130/ Rev. Stat. Can., c. C-34 (1970), as amended.

131/ Id. § 178.16(2).

132/ Murrant, "Confessions and illegally obtained evidence: the current dilemmas," 19, 21 Current Trends in Evidence (1976) which summarizes Working Paper No. 10 of the of the Law Reform Commission on Canada (1974).

Then, in the following year, the Law Reform Commission released its proposed Evidence Code, § 15 of which reads as follows:

> (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.
> (2) In determinining whether evidence should be excluded under this section, all the circumstances surrounding the proceedings and the manner in which the evidence was obtained shall be considered, including the extent to which human dignity and social values were breached in obtaining the evidence, the seriousness of the case, the importance of the evidence, whether any harm to an accused or others was inflicted wilfully or not, and whether there were circumstances justifying the action, such as a situation of urgency requiring action to prevent the destruction or loss of evidence. 133/

These sections seem to adequately reflect the Commission's conclusions that the present laws of the United States and Canada are both extreme, albeit in opposite directions, and that a more flexible approach would be the most desirable one to adopt. To date, however, the proposed Evidence Code has not been presented to the House of Commons and, consequently, at common law in Canada, a trial judge does not presently have any discretion to exclude evidence on the basis that it was illegally or unlawfully obtained.

Of the remaining jurisdictions examined, Australia, as stated, has expanded the operation of a discretionary exclusionary rule and has moved towards the Scots-Irish model. Proposals are now being considered to provide a statutory framework for the approach. The Australian Law Reform

133/ The Law Reform Commission of Canada, Report on Evidence 22 (1975).

Commission upon conducting an inquiry into the powers of arrest, search and seizure proposed the following exclusionary rule, keeping in view the need for a proper balance between individual rights and liberties and effective law enforcement:

> [E]vidence obtained in contravention or in consequence of any contravention of any statutory or common law rule--including all the various rules of procedure that have been proposed in this report--should not be admissible in any criminal proceedings for any purpose unless the court decides, in the exercise of its discretion, that the admission of such evidence would specifically and substantially benefit the public interest without unduly derogating from the rights and liberties of any individual. The burden of satisfying the court that any illegally obtained evidence should be admitted should rest with the party seeking to have it admitted, i.e. normally the prosecution. 134/

The Criminal Investigation Bill, 1977, based on this proposal, was later introduced in the Commonwealth Parliament. The bill has now been referred to a committee and it is understood that some legislation may emerge from it. 135/

Reforms have also been advocated in some Australian states. A draft bill generally following the Commonwealth measure has been prepared by the New South Wales Law Reform Commission. Proceeding from the view that there must continue to be an exclusionary rule based on the courts' weighing of conflicting interests, this bill proposes that evidence vitiated by an

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134/ The Law Reform Commission, Criminal Investigation, Report No. 2 141 (1975).

135/ Johnstone, "The Exclusionary Rule and Other Controls Over the Abuse of Police Power," in American/Australian/New Zealand Law: Parallels and Contrasts 193 (1980). This paper was presented at the Sydney, Australia sessions of the American Bar Association Annual Convention, 1980.

illegality is inadmissible unless the court directs that it be admitted. In determining admissibility, the court may take into account factors such as the seriousness of the offense, and the nature, deliberateness, and seriousness of the illegal act.

The New South Wales bill differs from the proposal of the Criminal Law and Penal Methods Reform Committee of South Australia which had earlier recommended that illegally obtained evidence be excluded automatically unless it had been obtained by urgent entry or the illegality had not been directed against the accused. The New South Wales Commission thought that the South Australian proposal and the American exclusion rule presented one fundamental difficulty:

> [T]hey are too wide to achieve their purpose effectively. Their purpose is to diminish the utility of police misconduct and thus discourage future police misconduct. This purpose is scarcely promoted by excluding evidence where the misconduct was not intended and was not negligent . . . . Further, there are some illegalities of a trivial kind which are at least excusable, because of their value in prosecuting criminals. 136/

Thus, the New South Wales legislation would direct the trial judge to look behind the illegality in deciding whether he or she should exercise the discretion to exclude.

In New Zealand, the Torts and General Law Reform Committee does not appear to have yet considered the rule in Kuruma v. R., but it has followed developments in the law of evidence in other Commonwealth countries--

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136/ New South Wales Law Reform Commission, Working Paper on Illegally and Improperly Obtained Evidence 42 (1979).

especially in Australia and Canada--[137] and such statutory reforms abroad might well be eventually followed in New Zealand.

In conclusion, the Law Reform Commissions that have considered the problem of the admissibility of illegally obtained evidence in England, Canada, and Australia have uniformly rejected the extreme exclusionary and inclusionary rules in favor of a more flexible approach. Over the past 20 years, the highest courts in the common law countries surveyed in this study have diverged and, in the case of England-Canada v. the United States, have taken almost polar positions. In the future, however, statutory reforms may well bring the rules in these countries at least somewhat closer together, thereby restoring the precedential value of one another's decisions in this particular area of the law.

137/ See New Zealand, The Torts and General Law Reform Committee of New Zealand, The Rule in Hollington v. Hewthorn (1972), and New Zealand, The Torts and General Law Reform Committee, Professional Privilege in the Law of Evidence (1977).

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