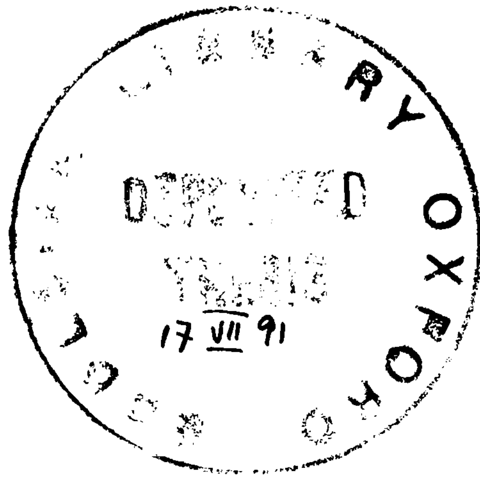

THE RELATION BETWEEN PRE-TRIAL EXECUTIVE IMPROPRIETIES AND THE OUTCOME OF THE CRIMINAL TRIAL

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ABSTRACT

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The Relation between Pre-Trial Executive Improprieties and the Outcome of the Criminal Trial

The issue of the implications which pre-trial police or prosecutorial improprieties should have for a criminal trial has not been the subject of serious consideration in English law. The courts have acknowledged that such improprieties may lead in certain circumstances to the exclusion of evidence or to a stay of proceedings, but have not properly identified the underlying rationales and principles. I expose the deficiencies in the existing law and indicate the path to reform.

My main argument is that where pre-trial executive impropriety is established, the court should consider what I have called the principle of legitimacy. This principle is premised on a recognition that criminal justice is concerned not only with the conviction of the guilty but also with the moral integrity of the criminal process. Thus, a decision as to whether a pre-trial executive impropriety should lead to exclusion or a stay (as the case may be) should be reached by weighing (1) the public interest in the conviction of the guilty against (2) the public interest in the moral integrity of the criminal process. If (2) outweighs (1) then the evidence should be excluded or the proceedings stayed (as the case may be).

The application of the legitimacy principle is discussed in detail, and the relation between exclusion and a stay is explained. I identify a number of guidelines which are of relevance to the application of the legitimacy principle, and some theoretical issues associated with the concept of judicial discretion are explored.

The specific issue of the application of the legitimacy principle to determine the circumstances in which pre-trial delay by the executive should lead to a stay of proceedings is addressed. The specific problem of entrapment is also examined, and it is suggested that English law ought to recognise a defence of entrapment.

CHAPTER 1

INTRODUCTION

Consider the following scenario. A suspect is charged with a criminal offence and brought to trial in a Crown Court. At the trial it is established that, when dealing with the case at the pre-trial stage, the police or prosecution have behaved improperly. This impropriety may, for example, have constituted a criminal or disciplinary offence, or a tort. The question therefore arises: What are the implications for the trial of this pre-trial misconduct? What is a trial judge able to do where pre-trial executive (that is, police or prosecutorial) impropriety is established? What should he be entitled to do? These, in essence, are the issues which form the basis of the present study. In other words, the concern of this thesis will be with the implications, for a criminal trial, of pre-trial executive improprieties.

Executive improprieties which occur at the trial itself are clearly of a different dimension. A trial judge possesses an inherent power to regulate proceedings,[1] and it is not doubted that this power may be exercised to control prosecutorial improprieties occurring at trial.[2] Suppose that in the course of cross-examining a defence witness, counsel for the prosecution puts to the witness questions which are needlessly offensive and insulting. It has been held that in this situation the judge clearly has a duty to admonish counsel and to inform the witness that the questions need not be answered. If counsel persists it may be necessary to exclude him from the court and to adjourn the proceedings. The judge may also instruct the taxing officer of the court that the misconduct should be reflected in what is properly allowed on taxation.[3] To take another example, it has been held that if the prosecution appears to be exercising its

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[1] Collier v Hicks (1831) 2 B & Ad 663, 668, 670, 672.

[2] For US discussion on prosecutorial misconduct in the courtroom, see A W Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges" 50 Texas LR 629 (1972); Note, "The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case" 54 Columbia LR 946 (1954); R G Singer, "Forensic Misconduct by Federal Prosecutors - and How It Grew" 20 Alabama LR 227 (1968).

[3] See generally R v Kalia (1974) 60 Cr App R 200, 211; R v Maynard (1979) 69 Cr App R 309, 317-8.

discretion with respect to the calling of a witness improperly, the trial judge may intervene and invite the prosecution to call the witness. If the prosecution refuses to do so, the judge himself may call the witness without the consent either of the prosecution or of the defence, if in his opinion this is necessary in the interests of justice.[4] I am not suggesting that the law relating to judicial control of executive misconduct in the courtroom is completely satisfactory at present; rather, the point is that the general responsibility of trial judges to deal with such misconduct is not doubted. Pre-trial executive misconduct is of a different dimension in that the appropriate judicial response to such impropriety is an issue which is far from settled in English law. Obviously, a trial judge may express disapproval of pre-trial executive misconduct, but the crucial issue is whether he should be entitled to go further than this, and if so, on what basis.

Until recently, responsibility for both the investigation and the prosecution of offences lay in the hands of the police. The Prosecution of Offences Act 1985 has changed this. There now exists in England and Wales a salaried service of public prosecutors, known as the Crown Prosecution Service, which is generally responsible for conducting criminal proceedings after the initial decision to proceed has been taken by the police.[5] Despite this separation of functions, it is unnecessary for the purposes of this study to distinguish between police and prosecutorial improprieties. Both the police

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[4] See generally R v Oliva (1965) 49 Cr App R 298; R v Tregear [1967] 2 QB 574; R v Cleghorn [1967] 2 QB 584; R v Roberts (1984) 80 Cr App R 89.

[5] S 3(2)(a) provides that a duty of the Director of Public Prosecutions (the head of the Crown Prosecution Service) is "to take over [emphasis added] the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force ...". See generally F Bennion, "The New Prosecution Arrangements: (1) The Crown Prosecution Service" [1986] Crim LR 3 and K W Lidstone, "The Reformed Prosecution Process in England: A Radical Reform?" (1987) 11 Crim LJ 296. It has been held recently that only the Crown Prosecution Service can take over a prosecution when a defendant has been arrested and charged by the police; a private prosecutor may not do so: R v Ealing Magistrates' Court, ex p Dixon [1989] 2 All ER 1050. Leave to appeal to the House of Lords was refused, but the following point of law was certified for their Lordships' consideration (id, 1055): "whether a private prosecutor is entitled to take over a prosecution when a defendant has been arrested and charged by the police except with the authority and on behalf of the Crown Prosecution Service." See also R v Jackson [1990] Crim LR 55 and R v Stafford Justices, ex p Customs and Excise Commissioners [1990] 3 WLR 656.

and the prosecution are agents of the executive. What is at issue, in effect, is the extent to which the judiciary can, and should, deal with improper executive actions which occurred at the pre-trial stage.

Much has been written, both in England and elsewhere, on the problem of improperly obtained evidence. Yet it is clear that impropriety in the obtaining of evidence is merely one aspect of the wider problem of pre-trial executive misconduct. The aim of this work will be to consider not only the problem of impropriety in the obtaining of evidence but also such improprieties as "illegal extradition", pre-trial delay and entrapment, and the appropriate judicial responses to these. The proper principles on which an application for the exclusion of evidence or a stay of proceedings on the ground of pre-trial executive impropriety should be determined are identified. It is also argued that English law should recognise a defence of entrapment.

Although the chief concern of this thesis will be with how pre-trial executive improprieties should be dealt with by a trial judge in a Crown Court, much of the discussion will be of general relevance to summary proceedings in a magistrates' court.[6] As Lord Scarman said in R v Sang[7] in relation to the judicial discretion to exclude evidence to ensure a fair trial:

> The development of the discretion has, of necessity, been largely associated with jury trial. In the result, legal discussion of it is apt to proceed in terms of the distinctive functions of judge and jury. No harm arises from such traditional habits of thought, provided always it be borne in mind that the principles of the criminal law and its administration are the same, whether trial be (as in more than 90 per cent of the cases it is) in the magistrates' court or upon indictment before judge and jury. The magistrates are bound, as is the judge in a jury trial, to ensure that the accused has a fair trial according to law; and have the same discretion as he has in the interests of a fair trial to exclude legally admissible evidence.[8]

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[6] That is, where the offence in question is either a summary offence or an indictable offence tried summarily. (By virtue of the Magistrates' Court Act 1980, s 17 and Schedule 1, certain offences are triable either on indictment or summarily.)

[7] [1980] AC 402.

[8] Id, 456.

Whilst it is not proposed to produce a comparative study,[9] the position in other jurisdictions will be examined where it is felt that such examination throws fresh light on the issues discussed. Of particular interest are the US Fourth Amendment exclusionary rule and Sixth Amendment right to a speedy trial, section 24 and other relevant provisions of the Canadian Charter of Rights and Freedoms, and the Irish and Australian approaches to the problem of improperly obtained evidence.

It is proposed to exclude from discussion the specific subject of confessional evidence, which in itself deserves a dissertation. Moreover, the law of confessions has been the focus of much attention already, and is now encapsulated in section 76 of the Police and Criminal Evidence Act 1984. The aim of this thesis is to explore aspects of the topic which are more unsettled and/or which have not been the subject of adequate analysis in England.

Finally, it is important to appreciate the context in which the problem of executive impropriety is being discussed in the thesis. The concern is solely with the relation between pre-trial executive improprieties and the outcome of the criminal trial; it is not with the problem of executive impropriety generally. The importance of the present study lies in its identification of the ways in which, and the bases on which, trial courts should respond to those (comparatively few) executive improprieties which culminate in a charge, a plea of not guilty, and a criminal trial.

Except where a contrary intention appears, words importing the masculine gender should be read as including the feminine.

The law as stated is based generally on materials available at the Bodleian Law Library, University of Oxford in October 1990. Research for the purposes of the thesis was also undertaken at the Law Libraries of the University of New South Wales and of

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[9] Such a study has been already undertaken in relation to improperly obtained evidence: see Y-M J R Morissette, "Improperly Obtained Evidence Other Than Confessions - A Comparative Study: England, Canada, Scotland, Northern Ireland, Eire, Australia, New Zealand and the United States" (DPhil Thesis, University of Oxford, MS DPhil c 2279, 1977).

Harvard University.

CHAPTER 2

THE ENGLISH POSITION

A study of the implications of pre-trial executive improprieties for the outcome of a criminal trial requires, as a preliminary step, a brief description of the traditional avenues of redress available to victims of police or prosecutorial misconduct. This will be the substance of the first part of this chapter. In the second part of the chapter I shall examine the approach adopted by the English courts to determining the relation between pre-trial executive improprieties and the outcome of the criminal trial.

A. THE PHENOMENON OF POLICE AND PROSECUTORIAL IMPROPRIETIES

The frequency with which police and prosecutorial improprieties occur is, of course, practically incapable of accurate determination. However some indication, albeit crude, of possible forms of impropriety may be provided by statistics on complaints about the police.[1] In 1989, 5 283 cases involving 11 155 separate complaints from England and Wales were brought to a conclusion by the Police Complaints Authority:[2]

1. Incivility	1 559
2. Assault	3 270
3. Irregularity in procedure	1 098
4. Traffic irregularity	125
5. Neglect of duty	1 082
6. Corrupt practice	60
7. Mishandling of property	282
8. Irregularity in relation to evidence/perjury	570
9. Oppressive conduct or harassment	1 042
10. Irregular arrest	910
11. Irregular stop/search	836
12. Irregular search of premises	99
13. Other	222
Total	11 155

If the impropriety in question constituted a tort or crime, an avenue of redress available to the person aggrieved is the initiation of a civil or criminal action against the

[1] It would appear that most victims of police misconduct do make complaints: J Harrison, Police Misconduct: Legal Remedies (1987) 2.

[2] Police Complaints Authority, Annual Report 1989 (1990).

party responsible for the impropriety. The most common tort actions are likely to be for assault, false imprisonment, malicious prosecution, trespass to land and seizure of goods. The elements of these torts have been adequately discussed by other commentators[3] and need therefore be described only very briefly here.[4]

Assault

The plaintiff must prove that the police intentionally used some physical force against him which was not justified by law. This physical force need not actually result in pain or physical injury. The police may have a defence to assault if (1) they used only reasonable and necessary force; or (2) they acted in self-defence; or (3) the plaintiff consented to the use of force.

False imprisonment

This is confinement without lawful justification. The onus of proving the confinement lies on the plaintiff, while the police have the onus of proving that they had a lawful excuse. Harrison points out that while three remedies for false imprisonment are available in theory - self-help (that is, escape), habeas corpus and damages - damages represent the usual remedy. There are dangers, both physical and legal, associated with attempting to resort to self-help, while habeas corpus is suitable only for serious cases and in any event has no relevance once the false imprisonment has come to an end.

Malicious prosecution

This is difficult to prove. As Harrison points out, it must be shown that:

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[3] See in particular D Feldman, The Law Relating to Entry, Search and Seizure (1986) Ch 15; J Harrison, Police Misconduct: Legal Remedies (1987) Ch 5; L Lustgarten, The Governance of Police (1986) 132-8.

[4] The references cited in the preceding footnote are the source of much of the information presented here. My aim is merely to provide a rough sketch of the possible tort actions; a detailed study of these deserves a separate dissertation.

- damage (loss of reputation, the risk of loss of "life, limb or liberty" or financial loss) has been sustained because
- the police prosecuted and
- the prosecution ended in favour of the person suing for malicious prosecution and
- the prosecution lacked reasonable and probable cause and
- the police acted maliciously.

Trespass to land

Trespass is committed if the police enter or remain on land possessed by the plaintiff without consent or lawful authority.

Seizure of goods

If the police unlawfully seize goods belonging to someone, he can claim damages and the recovery of the goods. The claim may be for "trespass to goods" or for "conversion".

* * *

There have been several instances of substantial compensation being awarded to victims of police misconduct. Damages of several thousands of pounds are now common in serious cases,[5] and in some cases exemplary damages have been awarded. In George v Commissioner of Police of the Metropolis,[6] police officers unlawfully entered the home of Mrs Clementine George to look for her son. Having entered, one or more of the officers hit Mrs George with their fists and kicked her. As a result she suffered bruising and tenderness over a number of parts of her body, and although the injuries had healed by the time of trial "she was still frightened every time she heard a knock at the door." It was held that the appropriate figure to compensate the plaintiff

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[5] Note 1 supra, 3.
[6] The Times, 31 March 1984.

for the trespass and assault was £6 000, but that as this was insufficient "to punish the defendant for the outrageous behaviour of his officers", exemplary damages of £2 000 would be awarded "to mark the court's disapproval of the officers' actions and to stop their repetition by others."[7]

The importance of such a compensatory jurisdiction should not, of course, be underestimated. It must be remembered, however, that by no means all victims of police misconduct stand in precisely the same position as potential tort plaintiffs. Suppose that in the course of investigating a crime, police officers subject Mrs Jones, a suspect, to improper treatment. Suppose further that Mrs Jones is subsequently charged with the crime and brought to trial. If Mrs Jones is convicted and imprisoned she faces the almost insurmountable task of conducting a civil suit from a prison cell.[8] In practice "[p]otential plaintiffs who are in prison ... usually must wait until they are released to get their tort remedy", and, as a result of the delay, "the cause of action and its supporting evidence may grow stale".[9] US experience suggests that such suits have a low probability of success.[10] Moreover, Mrs Jones's conviction may result in mitigation of damages or may even bar an action altogether. The US law relating to 42 USC section 1983, which entitles a person deprived of his Constitutional rights to institute a tort action for damages,[11] is of interest in this regard. A number of cases have held that a guilty plaintiff cannot recover in an action for false imprisonment or malicious

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[7] See also Connor v Chief Constable of Cambridgeshire, The Times, 11 April 1984, and see generally P R Ghandhi, "Punitive Damages Against the Police" (1990) 134 SJ 357. For examples of damages awarded in cases of false imprisonment, see note 1 supra, 74-5.

[8] See C Foote, "Tort Remedies for Police Violations of Individual Rights" 39 Minn LR 493, 507-8 (1955) on the US position.

[9] Id, 508.

[10] Comment, "The Tort Alternative to the Exclusionary Rule in Search and Seizure" 63 J Crim L, Criminol and Pol Sc 256, 261 (1972).

[11] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

prosecution under 42 USC section 1983.[12] In the case of malicious prosecution, even though the earlier proceedings will have terminated in the plaintiff's favour, the defendant is permitted actually to retry the guilt of the plaintiff, and in a civil action. The supposed rationale for effectively barring a guilty plaintiff's section 1983 action for false imprisonment or malicious prosecution is that such immunity from liability will encourage more efficient police action in apprehending and prosecuting offenders:[13]

> Harsh as this rule may seem, especially where the tort plaintiff alleges that probable cause for his arrest was made to appear only because of police perjury, it nevertheless reflects a policy choice that has survived repeated attack over a period of many years. Society chooses to allow a criminal judgment of conviction to immunize arresting officers from liability in civil litigation for arrest without probable cause, in part because it is so unlikely that a conviction will be obtained in circumstances where the arrest was without probable cause, ... and in part because of the impact, perhaps marginal, that the policy has in furthering the highly-valued goal of apprehending offenders. See 1 Harper and James, The Law of Torts § 4.12.[14] The theory is that some extra number of offenders will be caught if the police officer is willing to arrest, knowing

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[12] See Bradford v Lefkowitz 240 F Supp 969, 975 (SDNY 1965) ("[t]he plea of guilty and the service of the sentence imposed effectively bar an action of false imprisonment or of malicious prosecution"); Pouncey v Ryan 396 F Supp 126 (D Conn 1975); Raffone v Sullivan 436 F Supp 939 (D Conn 1977); Griffen v City of Mount Vernon 553 F Supp 1047, 1049 (SDNY 1983) ("[i]t is well settled that a plea of guilty is an effective bar to a subsequent § 1983 action based on a claim of false arrest and false imprisonment").

[13] Pouncey v Ryan 396 F Supp 126, 127 (D Conn 1975).

[14] Harper and James write of "immunity as a premium for getting the right man or telling the right thing. The defendant in all of these cases is right. Regardless of the general questionable or even unjustifiable character of his conduct, the defendant has done for society a good turn in the particular case. He took the risk of arresting or prosecuting an innocent person or making a false statement; but he was successful. Thus, although he arrests upon no reasonable grounds whatever or prosecutes not only without cause but even maliciously or states what he believes, even upon reasonable grounds, to be a lie, if it so turns out that he arrests or prosecutes a guilty person or unwittingly tells the truth, he is not liable. The law is practical business. No need for going into such questions as reasonable or probable cause or such subjective matters as motive or purpose. If the end accomplished does not justify the means, the success of the defendant's conduct at least justifies the law in ignoring the means of its accomplishment. The policy of apprehending and prosecuting offenders against the criminal law and of obtaining accurate information about persons is a strong one - so strong that he who purports to advance these policies takes, at most, only the risk of failure."

> that his arrest, without probable cause, will not subject him to liability if a conviction results.

It is to be hoped that this principle will never be imported into English law. To allow an individual right to be sacrificed to a social goal in this way is totally inappropriate. Dworkin has contended that to take rights seriously is to regard them as "trumps" which prevail over social goals.[15] As Dennis points out, the law does not allow a well-founded claim for damages for breach of contract to be defeated on the basis that the payment of the damages would be contrary to the public interest.[16] In England, where tort actions represent one of the only relatively effective avenues of redress for victims of police or prosecutorial misconduct, non-adoption of the US practice of barring guilty plaintiffs from obtaining damages for false imprisonment or malicious prosecution is particularly crucial.

Should Mrs Jones be acquitted of the charge against her, there will still be obstacles in her path to obtaining a civil remedy. In particular, she may fear the further loss of privacy associated with an action, or subsequent police victimisation.[17] By bringing an action she would be making known the fact that she had been under suspicion.

Similar practical difficulties are likely to confront Mrs Jones if she should decide to initiate a criminal prosecution against the police instead of, or in addition to, seeking a civil remedy. Of course, an important consideration in the initiation of any criminal prosecution is that the exercise of prosecutorial discretion may effectively preclude the prosecution.[18] Further, a prosecution brought against the police may fail because of the

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[15] See R Dworkin, Taking Rights Seriously (1977) Ch 4; R Dworkin, "Principle, Policy, Procedure" in Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross (1981).

[16] I H Dennis, "Reconstructing the Law of Criminal Evidence" (1989) 42 Current Legal Problems 21, 30.

[17] J D Heydon, "Illegally Obtained Evidence (2)" [1973] Crim LR 690, 693.

[18] In the US it has been remarked that "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered": Wolf v Colorado 338 US 25, 42 (1949) per Murphy J (dissenting).

sympathy felt by the magistrate or the jury for the police officer in the dock.[19-23]

Hence the reality is that, in England, "there are very few instances in the reports of the conviction on criminal charges of police officers responsible for an illegality in the obtaining of evidence."[24] Indeed it would appear that the instances in the English reports of convictions of police officers relate essentially to situations where the officers

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[19-23] Note 17 supra. As Billy and Rehnborg point out (M Billy, Jr and G A Rehnborg, Jr, "The Fourth Amendment Exclusionary Rule: Past, Present, No Future" 12 Am Crim LR 507, 525 n 120 (1975)), "[p]roving the elements of malice or willfulness, where necessary, and persuading a jury to convict are difficult."

[24] P G Polyviou, Search and Seizure: Constitutional and Common Law (1982) 319.

have acted illegally, not while performing their duty, but by failing or neglecting to perform their duty.[25]

Civil and criminal actions aside, a further avenue of redress available to victims of police misconduct is provided by the police complaints provisions of the Police and Criminal Evidence Act 1984. Section 83 of the Act abolishes the old Police Complaints Board, replacing it with the Police Complaints Authority. Any complaint alleging that the conduct complained of resulted in death or serious injury,[26] or any complaint of a description specified in regulations,[27] must be referred to the Authority. "Serious injury" is defined as "a fracture, damage to an internal organ, impairment of bodily function, a deep cut or a deep laceration."[28] The Authority must supervise the investigation of (1) any complaint alleging that the conduct of a police officer resulted in death or serious injury;[29] (2) any other description of complaint specified in regulations;[30] and (3) any other complaint the investigation of which they consider that it is desirable in the public interest that they should supervise.[31] At the conclusion of an investigation which the Authority has supervised, the investigating officer must submit a report on the investigation to the Authority.[32]

In 1989 5 008 cases were referred to the Authority. The Authority undertook the supervision of 879 (17.6 per cent) of these. In 398 cases supervision was

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[25] See, eg, R v Dytham [1979] 3 All ER 641. The defendant, a police constable, was on duty in uniform near a club when a man who was ejected from the club was beaten and kicked to death by a number of men in the gutter outside the club. At no stage did the defendant attempt to intervene in the assault and when it was over he merely drove away. The Court of Appeal, applying R v Wyat (1705) 1 Salk 380, affirmed the defendant's conviction of the common law offence of misconduct in public office. See also Crouther's Case (1599) 78 ER 893 ("A constable may be indicted for refusing, on notice, to pursue a felon, but the place of notice must be [alleged]").

For details of a recent example of the conviction of police officers, see R East, "Police Brutality - Lessons of the Holloway Road Assault" (1987) 137 NLJ 1010.

[26] S 87(1)(a)(i).

[27] S 87(1)(a)(ii).

[28] S 87(4).

[29] S 89(1)(a).

[30] S 89(1)(b).

[31] S 89(2).

[32] S 89(6)(a).

compulsory and in the remaining 481 it was considered desirable that the investigation should be supervised in the public interest.[33]

It is the duty of the Authority to determine whether the report of an investigation indicates that a criminal offence may have been committed,[34] and if so, whether the offence is such that the officer ought to be charged with it.[35] If it is determined that the officer ought to be charged, it will be the duty of the Authority to direct the chief officer to send the DPP a copy of the report,[36] and the chief officer must comply with any such direction.[37] The Authority did not make any such directions in 1989.[38]

Where the chief officer of police has not preferred disciplinary charges and does not propose to do so, the Authority may recommend that he prefer such disciplinary charges as it may specify,[39] and if he is still unwilling, direct him to do so.[40] In 1989 53 disciplinary charges were recommended by the Authority in relation to 20 cases in which the deputy chief officer had initially recommended no disciplinary charge. The Authority's recommendations were accepted in respect of 43 of these charges, the remaining 10 being directed by the Authority.[41]

Where a police officer has been convicted or acquitted of a criminal offence "he shall not be liable to be charged with any offence against discipline which is in substance the same as the offence of which he has been convicted or acquitted."[42] The reverse does not, however, apply: disciplinary proceedings may be followed by criminal proceedings.[43]

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[33] Note 2 supra.
[34] S 92(1)(a).
[35] S 92(1)(b).
[36] S 92(2).
[37] S 92(5).
[38] Note 2 supra.
[39] S 93(1).
[40] S 93(3).
[41] Note 2 supra.
[42] S 104(1).
[43] S 104(2).

Some 664 (12.6 per cent) of the 5 283 cases completed by the Authority in 1989 resulted in some form of criminal or disciplinary action, ranging from charges being preferred to advice being given.[44]

These provisions represent, in essence, a serious attempt to provide a streamlined complaints procedure. Inherent in any such system, however, are a number of inevitable problems.[45] There will always be groups in society which are reluctant to bring complaints either for fear of reprisals or retaliation or for fear that their future conduct may become the subject of special scrutiny. Concern has been expressed, too, that the Police Complaints Authority is insufficiently independent from the police:[46] what is required is

> a truly independent complaints body, with its own staff of investigators, who can decide for themselves whether and when to investigate complaints. Such a body would vastly eradicate the cynicism and derision the present complaints system is viewed with - not to mention help cut out the sarcastic jokes about police misconduct with which the present complaints system is riddled.[47]

More specifically, the following difficulties with the present police complaints system may be identified, and it is these difficulties which need to be addressed when considering what reforms to the system are necessary:[48]

1. The Police Complaints Authority is insufficiently independent from the police.

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[44] Note 2 supra.

[45] See generally L H Leigh, Police Powers in England and Wales (2nd ed 1985) 286.

[46] See M Tregilgas-Davey, "The Police and Accountability: Part 1" (1990) 140 NLJ 697; M Tregilgas-Davey, "The Police and Accountability: Part 2" (1990) 140 NLJ 738.

[47] M Tregilgas-Davey, "The Police and Accountability: Part 2" (1990) 140 NLJ 738, 740.

[48] A Hall, "Time for a Change?" [August 1990] Legal Action 7.

2. The "informal resolution process" permitted by section 85 of the Police and Criminal Evidence Act has resulted in about 20-30 per cent of public grievances against the police being disposed of in this way, rather than in accordance with the formal complaints procedure. There is some evidence of unreasonable pressure being exerted on complainants to withdraw allegations and to have their complaints resolved informally.

3. The desire to protect colleagues who are the subject of complaints may result in the "closing of ranks" by police officers.

4. It is difficult to identify perpetrators in instances of "group violence" by the police, and there is no disciplinary offence specifically directed to the problem.

5. There is, as we have seen earlier, a "double jeopardy" principle which protects an officer who has been prosecuted unsuccessfully from being disciplined for the same offence.

6. The relevant standard of proof in police disciplinary proceedings is the criminal one, whereas it is the civil standard which is generally applied in proceedings involving discipline in the employment context.

7. Documents created by investigators in the course of the investigation of complaints may be used later by the police in defending civil or criminal proceedings.

The availability of legal aid[49] is an important consideration in ascertaining the accessibility to aggrieved persons of tort and criminal actions and complaints procedures. Civil legal aid is obtainable if the applicant qualifies on financial grounds (this involves an examination of his income, capital and financial commitments) and if it is considered that the merits of the case warrant the granting of aid. Examination of the merits of the case involves an evaluation of whether there are reasonable grounds for bringing the case (that is, is the case sufficiently strong to have a reasonable chance of success?) and whether it is reasonable for aid to be granted in the circumstances of the case. An alternative to civil legal aid is the legal advice and assistance (or "green form") scheme which can assist in paying for a lawyer to provide legal advice and to help commence proceedings. It does not, however, pay for a lawyer for representation in court. Qualification is based on financial grounds but a reasonable prospect of success is not required to be demonstrated.

The above review demonstrates, therefore, that there are in theory several avenues of redress open to victims of police or prosecutorial misconduct. In addition, legal aid is available in certain circumstances to facilitate the commencement of actions. But in practice there are likely to be limitations on the accessibility to victims of the traditional avenues of redress, as we have seen. However it is not germane to the thesis to examine these limitations in detail; our concern is with the appropriate judicial response to those improprieties which actually culminate in a criminal trial.

B. THE JUDICIAL RESPONSE

1. Introduction

It is now proposed to examine the prevailing English approach to the implications of pre-trial executive improprieties for the outcome of a criminal trial, with

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[49] See note 1 supra, 196-203.

a view to demonstrating that this area of the law is now ripe for reform. The English courts have acknowledged that pre-trial executive impropriety may lead in certain circumstances to the exclusion of evidence or a stay of the proceedings, and each of these procedural measures (exclusion and stay) will be discussed in turn.

2. Exclusion of Evidence

(a) Introduction

Where pre-trial executive impropriety has occurred the most common application made by defence counsel is for the exclusion of any evidence which may have been obtained as a result of the impropriety. In this section it is proposed to discuss the English approach to improperly obtained evidence, and to point out the internal inconsistencies of the law in this area. The key judicial pronouncements in the area - the 1955 Privy Council decision in Kuruma v R[50] and the 1979 House of Lords case of R v Sang[51] - will be analysed. Some cases decided subsequent to Sang will then be examined and, finally, the relevant provisions of the Police and Criminal Evidence Act 1984 will be discussed.

(b) Kuruma v R

(i) The General Rule: All Relevant Evidence Admissible

The Privy Council stated that evidence which is relevant to the matters in issue is admissible and the court is not concerned with how it was obtained.[52] In support of its statement the Privy Council referred[53] to the remark of Crompton J in R v Leatham[54]

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[50] [1955] AC 197.
[51] [1980] AC 402.
[52] [1955] AC 197, 203.
[53] Ibid.
[54] (1861) 8 Cox CC 498.

that "[i]t matters not how you get it; if you steal it even, it would be admissible",[55] and continued:

> Lloyd v Mostyn[56] was an action on a bond. The person in whose possession it was objected to produce it on the ground of privilege. The plaintiff's attorney, however, had got a copy of it and notice to produce the original being proved the court admitted the copy as secondary evidence. To the same effect was Calcraft v Guest.[57] There can be no difference in principle for this purpose between a civil and a criminal case.[58]

Two fundamental criticisms may be made of this reasoning of the Privy Council. First, it is obviously inaccurate to state that all evidence which is relevant to the matters in issue is admissible. This statement overlooks the fact that evidence of certain descriptions, such as hearsay evidence, is inadmissible at law irrespective of its relevance.

Second, it is inappropriate to treat the decision in Calcraft v Guest as authority for the proposition that, in civil litigation, the fact that evidence has been obtained improperly is immaterial. It appears that the effect of Calcraft can be thwarted by obtaining an injunction to prevent the use of the improperly obtained material.[59]

In any event, the continued validity of Calcraft v Guest has been thrown into doubt by the recent case of ITC Film Distributors v Video Exchange Ltd.[60] When motions in a copyright action were being heard in court, one of the defendants obtained by a trick documents brought into court by the plaintiffs' solicitors. It was held that

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[55] Id, 501.
[56] (1842) 10 M & W 478.
[57] [1898] 1 QB 759.
[58] [1955] AC 197, 203-4.
[59] Lord Ashburton v Pape [1913] 2 Ch 469; Goddard v Nationwide Building Society [1986] 3 WLR 734; Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027; English and American Insurance Co Ltd v Herbert Smith [1988] FSR 232. See generally C Tapper, "Privilege and Confidence" (1972) 35 MLR 83; J D Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 MLR 601; N H Andrews, "The Influence of Equity upon the Doctrine of Legal Professional Privilege" (1989) 105 LQR 608.
[60] [1982] 2 All ER 241. See generally T R S Allan, "Filching Your Opponent's Papers in Court: When Privilege Cannot be Defeated by a Trick" (1983) 133 NLJ 665.

"the public interest that the truth should be ascertained, which is the reason for the rule in Calcraft v Guest", must be balanced "against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents, whether by stealth or by a trick, and then used by them in evidence." Accordingly, the defendant was not permitted to use the documents (except for those which the judge had already seen) in evidence.[61]

It is not suggested, of course, that the principle underlying the decision in ITC Film Distributors is necessarily sound or that it should be transferred into the criminal context. Rather, the point is merely that in the light of ITC Film Distributors, it may no longer be true that impropriety in the obtaining of evidence is immaterial in civil litigation.

(ii) The Exclusionary Discretion

The Privy Council recognised, however, an exception to the supposed principle that all relevant evidence is admissible:[62]

> 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. This was emphasized in the case before this Board of Noor Mohamed v The King,[63] and in the recent case in the House of Lords, Harris v Director of Public Prosecutions.[64] If, for instance, some admission of some piece of evidence, eg, a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out. It was this discretion that lay at the root of the ruling of Lord Guthrie in HM Advocate v Turnbull.[65]

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[61] [1982] 2 All ER 241, 246. It was also said that "for a party to litigation to take possession by stealth or by a trick of documents belonging to the other side within the precincts of the court is probably contempt of court," and "if it is contempt of court, then the court should not countenance it by admitting such documents in evidence."

[62] [1955] AC 197, 204.

[63] [1949] AC 182, 191-2.

[64] [1952] AC 694, 707.

[65] [1951] SLT 409.

The facts in Kuruma were that the appellant had been convicted of being in unlawful possession of two rounds of ammunition contrary to regulation 8A(1) of the Emergency Regulations 1952 of Kenya, and appealed on the ground that the evidence proving that he was in possession of the ammunition had been obtained illegally and should have been excluded. Regulation 29 of the Emergency Regulations provided that "any police officer of or above the rank of assistant inspector with or without assistance and using force if necessary ... may stop and search ... any individual whether in a public place or not if he suspects that any evidence of the commission of an offence against this regulation is likely to be found on such ... individual and he may seize any evidence so found." However, neither of the police officers who searched the appellant was of or above the rank of assistant inspector. It was held by the Privy Council that the evidence in question had been correctly admitted, on the basis that this was not a case in which it would have been proper to exclude the evidence on the ground that its admission would be unfair to the accused.

Again, a number of criticisms may be made of the reasoning of the Privy Council. First, the reference to the cases of Noor Mohamed and Harris is confusing and unhelpful. Noor Mohamed and Harris are both decisions on the admissibility of similar fact evidence rather than decisions on improperly obtained evidence. The "similar facts" principle[66] requires that evidence of a defendant's prior convictions or other prior acts of misconduct be admissible only where the evidence has sufficient probative value to outweigh its prejudicial effect. The reason for the existence of the principle is the danger that a jury, when confronted with evidence of the defendant's prior misconduct, may decide - consciously or subconsciously - that the defendant is deserving of punishment for these past transgressions, and so exaggerate the probative force of the

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[66] See generally DPP v Boardman [1975] AC 421. Note, however, that it is doubtful whether courts have fully appreciated the impact of Boardman: see generally R v Williams (1986) 84 Cr App R 299; R v Lunt (1986) 85 Cr App R 241; P Mirfield, "Similar Facts - Makin Out?" [1987] CLJ 83.

evidence in question. Such considerations are clearly absent in the case of improperly obtained evidence.

Further, it is surprising that the Privy Council should have cited the Scottish case of HM Advocate v Turnbull as an example of discretionary exclusion but failed to apply the careful and detailed reasoning employed in that case to the facts of Kuruma. In Turnbull a warrant was obtained to search the office of Turnbull, an accountant, for documents relating to the affairs of a certain client. Pursuant to the warrant, a large number of documents were removed for later inspection. However, the authorities retained not only the documents relating to the affairs of the said client, but also those relating to the affairs of other clients. As a result of the information obtained Turnbull was charged with several offences of fraud and attempted fraud. It was held that the improperly obtained documents were not admissible in evidence. In reaching this conclusion, several considerations relating to the removal of the documents were taken into account by Lord Guthrie. First, there were no circumstances of urgency. Second, the actions of the police officers were clearly deliberate; they "did not accidentally stumble upon evidence of a plainly incriminating character in the course of a search for a different purpose." Third, to hold that the evidence was admissible "would ... tend to nullify the protection afforded to a citizen by the requirements of a magistrate's warrant, and would offer a positive inducement to the authorities to proceed by irregular methods." Fourth,

> when I consider the matter in the light of the principle of fairness to the accused, it appears to me that the evidence so irregularly and deliberately obtained is intended to be the basis of a comparison between the figures actually submitted to the Inspector of Taxes and the information in the possession of the accused. If such important evidence upon a number of charges is tainted by the method by which it was deliberately secured, I am of opinion that a fair trial upon these charges is rendered impossible.[67]

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[67] [1951] SLT 409, 411-2 (emphasis added).

The decision in Turnbull was thus reached after careful examination of a number of considerations, only one of which was that it would be unfair to the accused to admit the evidence.

In sum, the Privy Council in Kuruma failed properly to articulate the basis on which relevant but improperly obtained evidence may be excluded in the exercise of discretion, other than by stating that such evidence may be excluded if its admission would be unfair to the accused. Evidence obtained by a trick was cited by the Privy Council as an example of evidence excludable on the ground that its admission would be unfair to the accused. But the Court failed to explain why a trick can lead to the exclusion of evidence whereas the illegality in Kuruma did not.

(c) R v Sang

As a preliminary to examination of the decision of the House of Lords in R v Sang, it is convenient to look briefly at three post-Kuruma decisions which were the subject of comment in Sang. In the first of these, Callis v Gunn,[68] fingerprint evidence was obtained from a defendant who had not been cautioned that he could refuse. The evidence was held to be admissible, Lord Parker CJ observing that

> in considering whether admissibility would operate unfairly against a defendant one would certainly consider whether it had been obtained in an oppressive manner by force or against the wishes of an accused person. ... [The] discretion ... would certainly be exercised by excluding the evidence if there was any suggestion of it having been obtained oppressively, by false representations, by a trick, by threats, by bribes, anything of that sort.[69]

In R v Payne,[70] the defendant consented to being examined by a doctor on being assured by the police that he would not be examined as to his fitness to drive but only in his own interests. At his trial, however, evidence of the doctor that the defendant

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[68] [1964] 1 QB 495.

[69] Id, 501-2 (emphasis added).

[70] [1963] 1 WLR 637. See also the almost identical case of R v Court [1962] Crim LR 697.

had been unfit to drive was adduced. Lord Parker CJ, speaking for the Court of Criminal Appeal, held that this evidence should have been excluded in the exercise of discretion.

In the more recent case of Jeffrey v Black[71] the defendant was arrested for stealing a sandwich. The police officers proceeded, without his consent and without a search warrant, to search his lodgings, where cannabis and cannabis resin were found. He was charged with possession of the drugs. It was held on appeal that the evidence should have been admitted. However, Lord Widgery CJ observed that

> 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.[72]

In R v Sang,[73] the House of Lords had before it a question certified for its consideration by the Court of Appeal:

> Does a trial judge have a discretion to refuse to allow evidence - being evidence other than evidence of admission to be given in any circumstances in which such evidence is relevant and of more than minimal probative value.[74]

The Law Lords unanimously endorsed[75] the answer formulated by Viscount Dilhorne:

> (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.[76]

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[71] [1978] QB 490.

[72] Id, 498 (emphasis added).

[73] [1980] AC 402. See also Scott v R [1989] 2 WLR 924.

[74] [1980] AC 402, 424. The other issue before the House of Lords, that of entrapment, will be discussed in Chapter 6.

[75] Id, 437 per Lord Diplock; 442 per Viscount Dilhorne; 445 per Lord Salmon; 450 per Lord Fraser; 457 per Lord Scarman.

[76] Id, 437 (emphasis added).

The significance of this formulation for our purposes lies in its assertion that, in general, evidence can only be excluded on the ground that it was obtained improperly or unfairly if it was obtained from the accused after the commission of the offence. That is to say, any evidence obtained improperly during the commission of the offence is not excludable. The rationale of this limitation was not explained by the House of Lords. Thus it was held in Sang that evidence of the commission of an offence which had been incited by an agent provocateur was not excludable.[77] Similarly, it was held by the House of Lords in the later case of Morris v Beardmore[78] that evidence of the accused's criminal conduct, which was given by a witness who himself observed that conduct, was not subject to the exclusionary discretion. Another consequence of the limitation of the exclusionary discretion to evidence obtained after the offence is that evidence obtained improperly during the commission of the offence by such means as telephone tapping or bugging of the accused's residence would not be excludable. Why such evidence should not be subject to exclusion is not at all obvious.

The question still remains: In what circumstances should evidence obtained after the offence be excluded on the ground that it was obtained improperly or unfairly?

In answering this question, the House of Lords was in agreement with the Privy Council in Kuruma in regarding evidence as excludable on the ground that it had been improperly obtained only if its admission would be unfair to the accused. In other words, the question is whether the admission of the evidence would render the trial "unfair". However, there was little agreement among the five Law Lords in Sang as to the circumstances in which the admission of improperly obtained evidence would render a trial unfair.[79] Leaving aside the equivocal speech of Lord Salmon, at least three views may be found among the four remaining speeches. The view of Viscount Dilhorne was,

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[77] See further Chapter 6.

[78] [1981] AC 446.

[79] See P G Polyviou, "Illegally Obtained Evidence and R v Sang" in Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross (1981) for a more detailed account of the speeches.

in effect, that improperly obtained evidence should be excluded only if its reliability was in doubt.[80] Lord Diplock and (semble) Lord Scarman regarded as excludable evidence obtained by means which compromised the accused's right against self-incrimination, but not evidence obtained as the result of an illegal search. Finally, Lord Fraser recognised a discretion to exclude evidence obtained by unfair, oppressive or morally reprehensible means, exercisable in the case of evidence obtained from an accused or from premises occupied by him. Thus a majority of the Court would appear to have accepted that evidence obtained after the offence by means which compromised the accused's right against self-incrimination may be excluded in the exercise of discretion. This "self-incrimination" principle must accordingly be regarded as the nearest thing to a ratio of the case.[81]

The clearest statement of the "self-incrimination" principle is to be found in the speech of Lord Diplock. Lord Diplock regarded the statement of the Privy Council in Kuruma as not having been "intended to acknowledge the existence of any wider discretion than to exclude (1) admissible evidence which would probably have a prejudicial influence upon the minds of the jury that would be out of proportion to its true evidential value; and (2) evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminatory effect."[82] Thus, the document "obtained from a defendant by a trick" referred to in Kuruma "is clearly analogous to a confession which the defendant has been unfairly induced to make".[83] The basis of this discretion, Lord Diplock thought, was "the maxim nemo debet prodere se ipsum, no one can be required to be his own

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[80] This was also the view of the Supreme Court of Canada in R v Wray (1970) 11 DLR (3d) 673. However, as will be discussed below, Wray must now be viewed in the light of s 24(2) of the Canadian Charter of Rights and Freedoms.

[81] Cf note 79 supra, 243; P G Polyviou, Search and Seizure: Constitutional and Common Law (1982) 335.

[82] [1980] AC 402, 436 (emphasis added).

[83] Id, 435.

betrayer or in its popular English mistranslation 'the right to silence.'"[84] It was for this reason, said Lord Diplock, that there was discretion to exclude evidence obtained by unfair inducement but no discretion to exclude evidence obtained as the result of an illegal search.[85] The decision in Payne was considered to have been "clearly based upon the maxim nemo debet prodere se ipsum."[86] Lord Diplock recognised that there were dicta (in Callis v Gunn and Jeffrey v Black) which took a wider view of the discretion, "but in so far as they do so they have never yet been considered by this House."[87] It would seem that Lord Diplock was saying that these dicta were incorrect, for he went on to assert[88] that - cases involving evidence obtained by unfair inducement aside a trial judge is concerned not with how prosecution evidence has been obtained but with how it is used at the trial.[89]

The essence of the Sang "self-incrimination" principle, then, is that evidence obtained by means which compromised the accused's right against self-incrimination is excludable while evidence obtained as a result of an illegal search is not. If it is accepted that reliable evidence is capable of prejudicing the fairness of proceedings, then why cannot evidence obtained as a result of an illegal search do so, when evidence obtained by means which compromised the accused's right against self-incrimination may do so? The reason, according to Lord Diplock, is historical:

> [T]he role of the trial judge in relation to confessions and evidence obtained from the defendant after commission of the offence that is tantamount to a confession ... has a long history dating back to the days before the existence of a disciplined police force, when a prisoner on a charge of felony could not be represented by counsel and was not entitled to give evidence in his own defence either to deny that he had made the confession, which was generally oral, or to deny that its contents were true. The underlying rationale of this branch of the criminal law, though it may originally have been based upon ensuring the reliability of confessions is, in my view,

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[84] Id, 436.
[85] Ibid.
[86] Id, 435.
[87] Id, 436.
[88] Ibid.
[89] Id, 436-7.

> now to be found in the maxim nemo debet prodere se ipsum ... That is why there is no discretion to exclude evidence discovered as the result of an illegal search but there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair.[90]

To give effect to an apparent anomaly for historical reasons, without working out its implications in the late twentieth century, is inadequate.[91] The law relating to the admissibility of confessional evidence is of relevance here. In an attempt to protect the right against self-incrimination, English law developed a rule whereby a confession made "involuntarily" would be inadmissible in evidence. An involuntary confession was one which was made "either because some person in authority 'exercised' fear of prejudice or 'held out' hope of advantage."[92] The admissibility of confessional evidence is now regulated by section 76(2) of the Police and Criminal Evidence Act 1984. If one were to look at that provision one would find that the common law "voluntariness" rule has been swept away. Section 76(2) provides:

> If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained -
> (a) by oppression of the person who made it; or

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[90] Id, 436.

[91] It is to be noted that one commentator has made it the general thesis of a recent article (A A S Zuckerman, "The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation" (1986) 102 LQR 43) that there is no good theoretical or practical reason for the continued retention of the right against self-incrimination. Zuckerman points out that English law is concerned generally with three rights: the right to freedom from physical and mental abuse; the right not to be convicted of an offence of which one is innocent; and the right against self-incrimination. These rights exist, however, against the public's interest in the apprehension and punishment of offenders (id, 43). In the case of the first right, "[s]ince convictions based on evidence obtained by torture or degradation undermine the very purpose of upholding the law, it follows that there is no conflict between the need to protect the citizen from crime and the policy of outlawing the fruits of torture and degradation": id, 45. Similarly, there is no conflict "between the right of the innocent not to be convicted and the social policy of punishing offenders, because this policy only demands the conviction of the guilty, not of the innocent": id, 46. In the case of the right against self-incrimination, however, there is a clear conflict. Beeause the innocent would be unlikely to refuse to co-operate with police investigations, the right against self-incrimination can be seen as existing mainly for the protection of the guilty, who are given the freedom not to provide information which could establish their guilt. This would fly in the face of the public interest in the conviction of offenders.

[92] DPP v Ping Lin [1976] AC 574, 595 per Lord Morris.

> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
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> the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

In short, a confession is inadmissible under section 76(2) not if it was obtained by means which compromised the accused's right against self-incrimination, but if it was obtained by means which throw doubt on its reliability, or by oppression.[93] Thus the legislature has clearly cut down the right against self-incrimination in the area of confessional evidence. Viewed against this background, it would be strange if the discretionary exclusion of improperly obtained non-confessional evidence has continued, after the Police and Criminal Evidence Act 1984, to be directed solely to protection of the right against self-incrimination.

What, then, of the practical implications of the Sang self-incrimination principle? As we have seen, it was said that evidence is excludable on the ground that it was obtained by deception or by a trick, as illustrated by Payne, but not on the ground that it was obtained as the result of an illegal search. Clearly, "[i]t is strange that evidence obtained by a trick without illegality is apparently more likely to be excluded than evidence obtained in breach of a positive rule of law."[94] Indeed the Irish Supreme Court

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[93] S 76(8) provides: "In this section 'oppression' includes [emphasis added] torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)." It is to be noted that in R v Prager [1972] 1 WLR 260, the Court of Appeal had approved a definition of "oppression" as "something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary". This definition would seem to suggest that the purpose of the common law "oppression" doctrine was to protect the right against self-incrimination. However, in the recent case of R v Fulling [1987] 2 WLR 923 the Court of Appeal held, in considering the meaning of "oppression" in s 76(2)(a), that (id, 928) "the artificially wide definition of oppression" approved in Prager should not be adopted. Rather, "oppression" in s 76(2) was to be given its ordinary dictionary meaning. Thus the decision in Fulling would appear to confirm that s 76(2)(a) is directed more to protection of the right to freedom from physical and mental abuse than to protection of the right against self-incrimination. See also R v Davison [1988] Crim LR 442.

[94] J D Heydon, "Current Trends in the Law of Evidence" (1977) 8 Syd LR 305, 324.

observed in 1964 that a "trick" seemed a dubious ground for exclusion.[95] Of course, it is arguable that because a breach of the law is, in principle, remediable by means other than exclusion, the need for exclusion is not pressing where breaches of the law are concerned. If this is the line of reasoning implicit in Sang, then it is disappointing that it was not articulated and explained clearly. It is to be noted that the deception in Payne was, in fact, unintentional. The representation that the medical examination was to be conducted solely to see if the defendant was suffering from any illness or physical disability was true when made, but a change of policy occurred before trial and accordingly the doctor was called to give evidence that the accused had been unfit to drive.

(d) Subsequent Decisions

Subsequent decisions have treated the "self-incrimination" principle as the ratio of Sang. In R v Trump,[96] decided some five months after Sang, the Court of Appeal thought that a specimen of blood, unlawfully obtained by the police, was excludable in the exercise of discretion since "[g]iving the blood was very close to making an admission that the accused had consumed an excessive amount of alcohol."[97] It was held on the facts, however, that the trial judge had acted properly in not excluding the evidence.[98]

In the recent case of R v Apicella[99] the appellant was charged with three counts of rape and two counts of attempted buggery. Each of the victims had, as a result of the sexual attack, contracted an unusual strain of gonorrhoea. Whilst the appellant was in prison a sample of body fluid was taken from him by a physician, for diagnostic purposes. The physician assumed that the appellant was consenting but he was in fact

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[95] The People (AG) v O'Brien [1965] IR 142, 160.
[96] (1979) 70 Cr App R 300.
[97] Id, 305 (emphasis added).
[98] Ibid.
[99] (1985) 82 Cr App R 295.

merely submitting, having been told by a police officer that, as a prisoner, he had to submit. The appellant appealed against conviction on the ground that the body fluid had been taken from him without his consent. The Court of Appeal held that

> [t]he pertinent question in this case is whether the intended use of that evidence was likely to make the trial unfair. The appellant was not tricked into submitting to the examination in the way which led to this Court's predecessor in [Payne] to exclude evidence. In our judgment the prosecution's use of the evidence derived from the appellant's body fluid, taken in the circumstances it was, was not unfair. The judge was right in the exercise of his discretion not to exclude it.[100]

The precise ground on which this case was considered distinguishable from Payne is unclear. Why was there a trick in Payne but none here? In both cases, the evidence was obtained "without anyone giving any thought to the investigative process."[101] Presumably the distinction is that while the misrepresentation in Payne lay in informing the defendant that the doctor would not be giving evidence as to his fitness to drive, the misrepresentation in Apicella lay simply in telling the appellant that it was compulsory to submit to the examination.[102] If this is correct, it would seem rather a dubious ground of distinction. It is possible that it was the seriousness of the crimes charged in Apicella which prompted the Court of Appeal to hold that there had been no "trick" and that the evidence was accordingly admissible.

The nebulous nature of the Sang "self-incrimination" principle can be illustrated by the decision in R v Leckie and Ensley.[103] In this case the defendants sought the exclusion of certain identification evidence. The procedure contained in Rule 1 of the Home Office Circular No 109/1978 (Identification Parade Rules) was not complied with - in particular Form A (Notice to Suspect) was not served on the defendants, and neither defendant had the consequences of refusal to participate explained to him. One

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[100] Id, 300.
[101] Id, 298.
[102] See also M A Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?" (1990) 106 LQR 327.
[103] [1983] Crim LR 543.

of the defendants asked repeatedly to see his solicitor, but to no avail. The other defendant was not informed of his right to have a solicitor present had he been willing to participate in a parade, contrary to Rule 2 of the Circular. Both defendants were taken against their will to a police station where, although of West Indian extraction, they were each held in a separate cell and surrounded by three white policemen - in spite of paragraphs 5 and 6 of the "Administrative Guidance" section of the Circular. The "confrontation" involved the defendants being looked at by witnesses through a hatch in each cell door. After positive identification the defendants were charged with robbery.

It was held on the basis of the Sang "self-incrimination" principle that the identification evidence should be excluded: the defendants "had presented themselves unknowingly and unwarned to prejudicial evidence." The commentary on the case in the Criminal Law Review, after adverting to Lord Diplock's distinction between evidence obtained by an unfair inducement and evidence obtained as the result of an illegal search, makes the point that, arguably, the closer analogy in the present case is with the illegal search, the defendants having been forced rather than tricked. This simply goes to show, the commentary correctly suggests, that the distinction is not a tenable one. The arbitrariness of the distinction enables judges to rule in favour of exclusion when confronted with police behaviour which they regard as particularly outrageous.

The most recent House of Lords decision on improperly obtained evidence is that in Fox v Chief Constable of Gwent.[104] The police gained access by trespass to the home of the defendant, whose motor vehicle had been involved in an accident, and asked him to provide a breath specimen for testing for alcohol. On refusing he was arrested for failure to provide a breath specimen and taken to the police station, where a breath specimen was obtained from him. The defendant argued, inter alia, that his

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[104] [1985] 3 All ER 392.

conviction of driving with excess alcohol should be quashed on the basis that this specimen had been obtained as a result of a wrongful arrest.

The five Law Lords were unanimous in holding that the defendant's appeal should be dismissed. The comments of Lords Fraser and Elwyn-Jones are worthy of note. Lord Fraser had, it will be recalled, taken the widest view in Sang in relation to the exclusion of improperly obtained evidence. In the present case he cited approvingly the statement of the Privy Council in Kuruma that a judge is not concerned with how relevant evidence was obtained.[105] "Accordingly, the Divisional Court ... was in my view right in treating the fact that the appellant was in the police station because he had been unlawfully arrested merely as a historical fact, with which the court was not concerned."[106] However,

> if the appellant had been lured to the police station by some trick or deception, or if the police officers had behaved oppressively towards the appellant, the justices' jurisdiction to exclude otherwise admissible evidence recognised in R v Sang might have come into play. But there is nothing of that sort suggested here. The police officers did no more than make a bona fide mistake as to their powers ...[107]

It is therefore to be noted that Lord Fraser was consistent with his approach in Sang in recognising oppression, in addition to a trick or deception, as a ground for discretionary exclusion. The difficulty lies, however, in Lord Fraser's application of this approach. As one commentator puts it: "[O]ne might wish to know why, if the accused was made to go to the police station by being falsely told that he was under lawful arrest, this did not amount to a trick, or a deception? Similarly, why does not false imprisonment amount to oppression?"[108]

Lord Elwyn-Jones commenced with the observation that "such a serious invasion of privacy as unauthorised entry by the police into a suspect's house" would not be

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[105] Id, 396.
[106] Id, 397.
[107] Ibid (emphasis added).
[108] A A S Zuckerman, "Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy" (1987) 40 Current Legal Problems 55, 62.

readily excused.[109] But the task here, he thought,[110] was to reconcile the two important but conflicting public interests analysed in the Scottish case of Lawrie v Muir.[111] In this case Lord Cooper had said:

> From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict - (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground.[112]

Lord Elwyn-Jones' adoption of this line of reasoning marks a refreshing change from judicial statements of the type found in Kuruma and Sang. Rather disappointingly, however, Lord Elwyn-Jones adopted the all too common approach of stating the applicable law, reciting the facts, and then stating the conclusion without any explanation of how it was reached. It would have been interesting to have been able to read why a balancing of the two interests identified by Lord Cooper in Lawrie would have led in the present case to the conclusion that the evidence was admissible.

(e) Police and Criminal Evidence Act 1984

Finally, reference should be made to the Police and Criminal Evidence Act 1984. Part VIII of the Act is headed "Evidence in Criminal Proceedings - General".[113] The relevant provision for our purposes is section 78(1):

> In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

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[109] [1985] 3 All ER 392, 397.
[110] Id, 398.
[111] [1950] SLT 37.
[112] Id, 39-40.
[113] It should be noted that section 82(3) provides: "Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."

In essence, then, the provision would appear to render improperly obtained evidence excludable in the exercise of discretion if its admission would adversely affect the fairness of the proceedings. Which leads to the question: When does the admission of improperly obtained evidence adversely affect the fairness of a trial? The answer to this would depend on whether section 78(1) is interpreted in the light of Sang. If it is, only evidence "tantamount to a confession" obtained after the offence by deception or by a trick will be regarded as excludable. But such an approach would treat section 78(1) as merely restating the common law. I would accordingly suggest that the provision provides an opportunity for English law to develop a coherent approach to the problem of improperly obtained evidence.

Section 78 began life as an amendment to the Police and Criminal Evidence Bill which was moved in the House of Lords by Lord Scarman and agreed to by the House. This amendment read:

> (1) If it appears to the court in any proceedings that any evidence (other than a confession) proposed to be given by the prosecution may have been obtained improperly, the court shall not allow the evidence to be given unless
>
> (a) the prosecution proves to the court beyond reasonable doubt that it was obtained lawfully and in accordance with a code of practice (where applicable) issued, approved, and in force, under Part VI of this Act; or
>
> (b) the court is satisfied that anything improperly done in obtaining it was of no material significance in all the circumstances of the case and ought, therefore, to be disregarded; or
>
> (c) the court is satisfied that the probative value of the evidence, the gravity of the offence charged, and the circumstances in which the evidence was obtained are such that the public interest in the fair administration of the criminal law requires the evidence to be given, notwithstanding that it was obtained improperly.
>
> (2) ...

In moving the amendment, Lord Scarman acknowledged that such a provision would "impose upon our courts a deterrent power"[114] by acting "as a deterrent to abuse of power by the police."[115] Two important features of the amendment were identified.[116] First, it would restore the wider power to exclude improperly obtained evidence which many had thought was part of the law prior to Sang. Second, the amendment placed the onus of proof upon the prosecution: improperly obtained evidence would be excluded unless the prosecution could justify inclusion.

When the Bill returned to the Commons, however, an amendment to replace the Lords amendment was proposed by the Home Secretary. This was agreed to and now appears as section 78. The Home Secretary opined that it was inappropriate for improperly obtained evidence to be excluded to mark society's disapproval of the improper police conduct or for disciplinary reasons.[117] "[D]isciplinary matters should be dealt with by disciplinary procedures."[118] Rather, the sole purpose of exclusion should be to avert an unfair trial.[119] A further objection to the Lords amendment related to the heavy onus of proof which it placed upon the prosecution: "[o]ne of my principal concerns is bound to be to ensure that neither the accused nor the whole criminal justice system bear[s] the burden of unnecessarily lengthy trials."[120] Finally, the criteria laid down in the Lords amendment were considered to be too complex for a court to have to address in the course of ordinary criminal proceedings.[121]

By contrast, what has now become section 78 was described as "simple and clear in form, yet suitably flexible."[122] "The provision of a simple requirement based on

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[114] The Parliamentary Debates (Hansard): House of Lords (Vol 455) (1984) col 657.
[115] Id, col 672.
[116] Ibid.
[117] See generally Parliamentary Debates (Hansard): House of Commons (Vol 65) (1984) col 1012.
[118] Id, col 1029.
[119] Id, col 1012.
[120] Id, col 1013.
[121] Id, col 1014.
[122] Ibid.

the fundamental requirement of fairness gives the court a more flexible approach that better meets the case and goes less far in a direction that we would be wise to avoid."[123]

The interpretation of section 78 has yet to be considered by the House of Lords, but there are several Court of Appeal decisions concerning confessional evidence in which the issue has been addressed. However, the Court has generally shied away from providing any general guidance as to the way in which the section 78 discretion should be exercised. The following comment is typical: "It is undesirable to attempt any general guidance as to the way in which a judge's discretion under section 78 or his inherent powers should be exercised. Circumstances vary infinitely."[124] It has been stressed, however, that the discretion may not be used to discipline the police,[125] and that "the mere fact that there has been a breach of the Codes of Practice does not of itself mean that evidence has to be rejected."[126] However, "significant and substantial" breaches of the Code will weigh heavily in favour of exclusion,[127] even if the police did not act in bad faith.[128] As was summed up by the Court in R v Walsh:[129]

> To our minds it follows that if there are significant and substantial breaches of section 58 or the provisions of the Code, then prima facie at least the standards of fairness set by Parliament have not been met. So far as a defendant is concerned, it seems to us also to follow that to admit evidence against him which has been obtained in circumstances where these standards have not been met, cannot but have an adverse effect on the fairness of the proceedings. This does not mean, of course, that in every case of a significant or substantial breach of section 58 or the Code of Practice the evidence concerned will automatically be excluded. Section 78 does not so

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[123] Id, col 1029.

[124] R v Samuel [1988] 2 WLR 920, 934. See also R v O'Leary (1988) 87 Cr App R 387.

[125] R v Mason [1987] 3 All ER 481, 484; R v Delaney (1988) 88 Cr App R 338, 341; R v Keenan [1989] 3 All ER 598, 609.

[126] R v Delaney (1988) 88 Cr App R 338, 341. See also R v Parris (1988) 89 Cr App R 68, 72; R v Keenan [1989] 3 All ER 598, 609; R v M (A Juvenile) (1989) 153 JP 691; R v Maguire (1989) 90 Cr App R 115, 120; R v Quinn, The Times, 31 March 1990; R v Gillard and Barrett, The Times, 5 September 1990.

[127] R v Keenan [1989] 3 All ER 598, 609. Cf R v Beycan [1990] Crim LR 185 (breach of a "fundamental" right led to exclusion) and R v Canale [1990] 2 All ER 187 (breaches described as "flagrant", "deliberate" and "cynical" also resulted in exclusion).

[128] R v Quinn, The Times, 31 March 1990.

[129] (1989) 91 Cr App R 161.

> provide. The task of the court is not merely to consider whether there would be an adverse effect on the fairness of the proceedings, but such an adverse effect that justice requires the evidence to be excluded. ... [A]lthough bad faith may make substantial or significant that which might not otherwise be so, the contrary does not follow. Breaches which are in themselves significant and substantial are not rendered otherwise by the good faith of the officers concerned.[130]

There are many cases in which section 78 has been considered in the context of confessional evidence. Whilst it is intended to exclude from discussion in this thesis the specific subject of confessional evidence, an examination of a few of the decisions pertaining to confessions may be helpful in demonstrating the attitude of the Court of Appeal to the interpretation of section 78. In R v Mason[131] the Court of Appeal held that a confession, the reliability of which was not in doubt, should have been excluded on the basis that it had been obtained by deceit: the police had falsely told the appellant and his solicitor that the appellant's fingerprints had been discovered near the scene of the crime. And in R v Samuel[132] the Court held that the confession in question should have been excluded because it had been obtained after the appellant was denied access to a solicitor in breach of section 58 of the Police and Criminal Evidence Act. Again, the reliability of the confession was not in doubt. By contrast, the confession in R v Alladice[133] was held to have been correctly admitted despite a similar section 58 breach. In this case, unlike Samuel, the presence of a solicitor would have added nothing to the appellant's knowledge of his rights and he would have confessed in any event. It is clear, therefore, that a breach of section 58 would probably lead to

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[130] Id, 163.
[131] [1987] 3 All ER 481.
[132] [1988] 2 WLR 920.
[133] (1988) 87 Cr App R 380.

exclusion if it can be shown that the defendant is not likely to have confessed if allowed access to a solicitor.[134]

There already have been at least seven reported instances of judicial consideration of section 78(1) in the context of improperly obtained non-confessional evidence. In R v H[135] the defendant was accused of raping his girlfriend. After being arrested and interviewed, he was released pending further enquiries. With the girlfriend's consent, the police installed tape recording equipment on her telephone and she instigated a series of telephone conversations with the defendant. It was held that the tape recordings would have an adverse effect on the proceedings and should be excluded under section 78. The commentary on the case in the Criminal Law Review correctly points out that, on the assumption that the defendant's "end of the conversation was tendered as in some way equivalent to a confession or admission on his part", the same decision could have been reached on the basis of Sang. Thus R v H was clearly not an ideal test case.

The opposite conclusion was reached by the Court of Appeal in R v Jelen and Katz,[136] where it was held that evidence of a tape recorded conversation between one of the defendants and a witness, made by the witness at the instigation of the police

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[134] There are many other reported cases in which confessional evidence has been excluded under section 78: R v Deacon [1987] Crim LR 404; R v Smith [1987] Crim LR 579; R v Vernon [1988] Crim LR 445; R v Trussler [1988] Crim LR 446; R v Cochrane [1988] Crim LR 449; R v Saunders [1988] Crim LR 521; R v Maloney and Doherty [1988] Crim LR 523; R v Absolam (1988) 88 Cr App R 332; R v Delaney (1988) 88 Cr App R 338; R v Waters [1989] Crim LR 62; R v Williams (Violet) [1989] Crim LR 66; R v Quayson [1989] Crim LR 218; R v Parris (1988) 89 Cr App R 68; R v Fogah [1989] Crim LR 141; R v Woodall [1989] Crim LR 288; R v Brown [1989] Crim LR 500; R v Keenan [1989] 3 All ER 598; R v Walsh (1989) 91 Cr App R 161; R v Ismail [1990] Crim LR 109; R v Beycan [1990] Crim LR 185; R v Canale [1990] 2 All ER 187; R v Moss, The Times, 17 March 1990; R v Twaites and Brown, The Times, 16 April 1990.

See also R v Hughes [1988] Crim LR 519; R v Parchment [1989] Crim LR 290; R v Brezeanu and Francis [1989] Crim LR 650; R v Clarke [1989] Crim LR 892; R v M (A Juvenile) (1989) 153 JP 691; R v Maguire (1989) 90 Cr App R 115; R v Matthews (1989) 91 Cr App R 43; R v Younis and Ahmed [1990] Crim LR 425; R v Dunn (1990) 91 Cr App R 237; R v Dunford (1990) 91 Cr App R 150; R v Manji [1990] Crim LR 512.

[135] [1987] Crim LR 47.

[136] (1989) 90 Cr App R 456.

without the defendant's knowledge, should not be excluded under section 78. R v H was distinguished by the Court of Appeal on the basis that in the present case the police were at an early stage of their inquiry into the defendant's alleged involvement and had not yet even interviewed him. In R v H, on the other hand, the defendant had been arrested, had been interviewed under caution, had asserted his innocence, and had been then released pending further inquiries.[137]

Of greater interest is Matto v Wolverhampton Crown Court,[138] the facts of which are similar to those of Fox. The defendant was followed onto private property by police officers in a police vehicle. They informed him that he was required to take a breath test and that if he failed or refused he might be arrested. The defendant replied that the officers could not act because the property was private - thereby terminating the officers' implied licence to enter the property. The officers proceeded, however, to obtain a breath sample from the defendant in the police vehicle. He was arrested and taken to a police station where analysis of a specimen of his breath showed breath-alcohol exceeding the legal limit. The defendant was convicted by the Wolverhampton Justices of driving with excess alcohol, and his appeal was dismissed by the Crown Court. A further appeal to the Divisional Court was, however, upheld on the ground that the Crown Court had not properly considered the exercise of the section 78 jurisdiction: "in this case exceptionally there could be circumstances where if the Crown Court had properly directed themselves, they could or might have exercised a discretion to refuse to admit the breath-alcohol analysis in evidence."[139]

The fact that the Divisional Court in Matto was prepared to assume that section 78 may be applicable to a Fox-type situation demonstrates that the judiciary may be prepared to interpret section 78 as not merely restating the common law. However, a Queen's Bench Divisional Court held more recently in Thomas v DPP[140] that evidence

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[137] Id, 464-5.
[138] [1987] RTR 337, [1987] Crim LR 641.
[139] [1987] RTR 337, 346.
[140] The Times, 17 October 1989.

concerning a motorist's refusal to provide a specimen at a police station should not be excluded merely because he had been unlawfully arrested for failing to provide a roadside specimen of breath for analysis. The Court, distinguishing Matto, pointed out that in the present case the police officer had acted under a misunderstanding and not in bad faith.

Also of interest is R v Fennelley (Edward),[141] a first instance decision. The defendant, a heroin addict, was seen in the street by plain clothes police officers who believed that they had seen him handing something over for money and suspected that he was selling drugs. He was stopped and searched but no drugs were found. The defendant was then taken to a police station where a strip search was authorised. Heroin was found in his underpants and he was charged with possession with intent to supply. The defence argued that evidence of the stop and search in the street and of the strip search at the police station should be excluded under section 78.

It was held by Watts J at the Acton Crown Court that there had been a breach of section 2(3) of the Police and Criminal Evidence Act 1984 and of the Code of Practice: the prosecution had not established that the defendant had been told why he was stopped, searched in the street and arrested. Nor had the search in the street been a "consent search". Watts J considered that it was a difficult and finely balanced point, but that in all the circumstances, including the possibility that the defendant might have provided an explanation which would have reduced the charge he faced to mere possession, the evidence of the stop and search in the street and of the search in the police station should be excluded under section 78. Why the possibility that the defendant might have provided an explanation which would have reduced the charge he faced was regarded as significant was not explained.

Another recent decision on section 78 in the context of improperly obtained evidence is that of the Queen's Bench Divisional Court in DPP v Marshall.[142] The

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[141] [1989] Crim LR 142.
[142] [1988] 3 All ER 683.

respondents were charged with selling lager and wine without having the appropriate justices' licence to do so. The case for the prosecution rested entirely on "test purchases" made by plain clothes police officers. It was argued that the police officers' evidence should be excluded under section 78 because the officers had not at the time of the purchase revealed that they were police officers. This argument was not accepted by the Divisional Court: "it is difficult to see how the fact that the police officers did not reveal their identity could have any effect on the trial", and the mere fact "that the police officers obtained the evidence by taking part themselves in a sale which contravened the law" was insufficient. Mason was distinguished on the basis that, in that case, there had been an express misrepresentation and a clear deception practised, while in the present case the police officers had simply not revealed their identity.[143] More will be said on the issue of pro-active law enforcement techniques in Chapter 6.

Most recently, the Court of Appeal, in considering the issue of illegally obtained identification evidence in R v Quinn,[144] made the interesting observation that section 78 did give courts the power to express disapproval of objectionable police methods by excluding the fruit of such misconduct. Where, however, identification evidence had come into existence abroad as a result of arrangements made by a foreign police force, the critical consideration was the protection of the fairness of the subsequent English proceedings (in the sense of balancing probative value against prejudicial effect).

The decisions in Matto and Fennelley, as well as the attitude of the Court of Appeal to the exclusion of confessional evidence under section 78, suggest that the courts are apparently willing to interpret the provision as not merely restating the common law. Section 78 has been utilised to exclude evidence which has been obtained by means of improprieties other than deception or a trick. It is to be hoped, then, that the section 78 jurisdiction will provide the courts with just the impetus for a more rigorous consideration of the problem of improperly obtained evidence. This does not,

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[143] Id, 685.
[144] The Times, 31 March 1990.

however, abrogate the need for a search for the relevant guiding principles in the area. On the contrary, it increases it. This task will be undertaken in Chapters 3 and 4 of the thesis.

3. Stay of Proceedings

(a) Introduction

It is axiomatic that a jurisdiction to exclude improperly obtained evidence would be inapplicable where no tangible item of prosecution evidence has been obtained as a result of the impropriety in question. In such a situation the defendant may wish to make an application for a stay of the proceedings as a whole.

(b) Stay of Criminal Proceedings: "Abuse of Process"[145]

The ability of a trial judge to stay a criminal prosecution was considered by the House of Lords in Connelly v DPP,[146] in the context of the double jeopardy principle. I shall canvass very briefly the views of the five Law Lords.

Lord Reid acknowledged the ability of a court "to prevent a trial from taking place", in the exercise of its "residual discretion to prevent anything which savours of abuse of process."[147] He also expressed agreement with the speeches of Lords Devlin and Pearce.[148]

Lord Devlin referred in his speech to the judgment of Lord Goddard CJ in R v Chairman, County of London Quarter Sessions, ex p Downes.[149] Lord Goddard CJ had

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[145] See generally R Pattenden, "Abuse of Process in Criminal Litigation" (1989) 53 J Crim L 341; R Pattenden, "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175; R Pattenden, Judicial Discretion and Criminal Litigation (2nd ed 1990) 32-8.

[146] [1964] AC 1254.

[147] Id, 1296.

[148] See, however, Lord Reid's qualification in Atkinson v USA Government [1971] AC 197, 232.

[149] [1954] 1 QB 1.

said that once an indictment was before a court it had to be tried except (1) if it was defective; (2) if a plea in bar (autrefois acquit or autrefois convict) was available; (3) if a nolle prosequi was entered by the Attorney-General; or (4) if the court had no jurisdiction.[150] Lord Devlin considered, however, that a fifth ground should be added: a court could also refuse to allow an indictment to go to trial in the case of "a gross abuse of process".[151] "Are the courts", he asked,

> to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.[152]

Thus, Lord Devlin considered that proceedings which put a defendant in double jeopardy could be stayed as an abuse of process even if the pleas in bar, autrefois acquit and autrefois convict, were unavailable.[153] Lord Pearce was of the same view.[154]

By contrast, Lord Morris expressed agreement with what was said by Lord Goddard CJ in Downes. Thus, "if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld the court cannot direct that the prosecution must not proceed."[155] Mere regret that a prosecution was taking place would not enable the judge to suppress the prosecution.[156]

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[150] Id, 6.
[151] [1964] AC 1254, 1355.
[152] Id, 1354.
[153] Id, 1360.
[154] Id, 1365.
[155] Id, 1300.
[156] Id, 1304.

Like Lord Morris, Lord Hodson adopted the statement of Lord Goddard CJ in Downes[157] and doubted the existence of a discretion to stay a prosecution where the pleas in bar were unavailable.[158]

Dicta on the staying of proceedings occur in the speeches of three of the five members of the House of Lords in DPP v Humphrys.[159] Lord Salmon, in recognising the existence of a judicial power to intervene "if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious",[160] found himself in agreement with Lords Devlin and Pearce in Connelly.[161] Lord Edmund-Davies took a similar view: "While judges should pause long before staying proceedings which on their face are perfectly regular, ... [i]n my judgment, Connelly ... established that they are vested with the power to do what the justice of the case clearly demands".[162] However Viscount Dilhorne thought that proceedings should be stayed only in situations where the trial was improperly split.[163]

In sum, it would appear that a majority of the House of Lords in both Connelly and Humphrys has recognised the ability of a trial judge to stay proceedings outside the four categories identified by Lord Goddard CJ in Downes. The scope of the power, however, is far from clear. But as the House of Lords in Connelly was speaking in the double jeopardy context, it has been generally accepted that proceedings which put a

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[157] Id, 1335-6.

[158] Id, 1337. "If there were such a discretion, I do not understand why so many cases have been decided and so much learning has been expended in considering the doctrine of autrefois convict and autrefois acquit. Has all this been waste of judicial time? It would seem so, if all the judge had to do was to exercise his discretion as to whether or not a second indictment in such a case as this should be allowed to proceed."

[159] [1977] AC 1.

[160] Id, 46.

[161] Id, 45.

[162] Id, 55.

[163] "If at the time of Connelly v Director of Public Prosecutions it had been possible to try the murder and robbery charges together, then it might well have been held unfair, oppressive and an abuse of process for them to be tried separately, each charge being based on the same evidence": id, 24. See also id, 26: it may be right to stay proceedings "[i]n cases where there could be one trial for more than one offence and it is sought without good reason to have two trials on the same facts".

defendant in double jeopardy can be stayed as an abuse of process where the pleas in bar are unavailable.[164] In other words, double jeopardy protection in English law is afforded not only by the pleas of autrefois acquit and autrefois convict, but also by the judicial discretion to stay proceedings as an abuse of process.

In his monograph on Double Jeopardy, Professor M L Friedland regards[165] the rationale for double jeopardy protection as having been summed up in the following passage from the decision of the US Supreme Court in Green v US:[166]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[167]

The essential idea underlying double jeopardy protection, then, is that it is in the public interest that members of the public should not be subjected by the State to embarrassment, expense and anxiety through repeated attempts to convict them for the same offence - even if they are in fact guilty of it. By preventing harassment and inconsistent results[168] and by conserving judicial resources and court facilities, the double

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[164] See generally R v Riebold [1965] 1 All ER 653; Mills v Cooper [1967] 2 QB 459; R v Thomson Holidays Ltd [1974] 1 QB 592; R v Roberts [1979] Crim LR 44; Dewhurst v Foster & Foster [1982] Crim LR 582; R v Payne [1982] Crim LR 684; R (Smith) v Birch and Harrington [1983] Crim LR 193; R v Moxon-Tritsch [1988] Crim LR 46; R v Griffiths [1990] Crim LR 181; R v Forest of Dean JJ, ex p Farley, The Times, 16 April 1990.

[165] M L Friedland, Double Jeopardy (1969) 4.

[166] 355 US 184 (1957).

[167] Id, 187-8.

[168] As to inconsistent results, Lord Devlin had this to say in Connelly ([1964] AC 1254, 1353): "Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence." Illustrative is R v Cwmbran JJ, ex p Pope (1979) 143 JPR 638. After having been acquitted by a jury in a Crown Court of driving with excess alcohol, the applicant was charged in a magistrates' court with driving without due care and attention. The Divisional Court ordered that these proceedings be stayed: "it would not be entirely in the interests of public policy that one tribunal might be in a situation in which it feels itself driven to a decision directly in conflict with what was the finding of a jury, who after all form the basis of our administration of common law justice": id, 640.

jeopardy principle serves to maintain public respect for, and public confidence in, the legal system itself.

There is of course, as acknowledged by the US Supreme Court in the passage quoted above, a secondary consideration rooted in intrinsic rather than extrinsic policy: that the double jeopardy principle assists in preventing the possibility that an innocent person may be convicted. In many cases an innocent person may not have the resources or the stamina to defend a second charge effectively. Even if he has, he may be at a greater disadvantage than he was at his first trial since he will normally have disclosed his complete defence at that trial, thus enabling the prosecution to study the transcript to find apparent defects and inconsistencies for use at the second trial. As Lord Devlin pointed out in Connelly, "[t]he Crown might, for example, begin with a minor accusation so as to have a trial run and test the strength of the defence."[169]

The House of Lords, we have seen, recognises (1) the existence of a judicial power to stay criminal proceedings which are an "abuse of process"; and (2) that proceedings which put a defendant in double jeopardy may be stayed pursuant to this power. Implicit in this - keeping in mind the primary justification for the double jeopardy principle - is the notion that proceedings can be considered an "abuse of process" where their continuation would undermine the public interest in the integrity of the criminal justice system. It is important to keep this in mind when considering the availability in English law of a stay of proceedings as a procedural measure for dealing with pre-trial executive improprieties. However, as will now be demonstrated, no clear indication of such availability is provided by the cases on illegal extradition. These cases concern situations in which proper extradition procedures have not been complied

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See also R v Roberts [1979] Crim LR 44; Dewhurst v Foster & Foster [1982] Crim LR 582; R (Smith) v Birch and Harrington [1983] Crim LR 193.

Note that the need to prevent inconsistent results may extend to the staying of proceedings where a trial of substantially the same question against a different defendant has resulted in acquittal: R v Intervision Ltd and Norris [1984] Crim LR 350; R v Noe [1985] Crim LR 97. Cf R v Smyth [1986] Crim LR 46.

[169] [1964] AC 1254, 1353.

with in securing the presence of the defendant from another jurisdiction. The fundamental issue raised in these cases, then, is similar to that raised in cases on the admissibility of improperly obtained evidence: what should be the proper judicial response to pre-trial executive improprieties which do not actually affect the veracity of the prosecution case against the accused?

(c) The "Illegal Extradition" Cases[170]

As a preliminary to discussion of the English cases on illegal extradition, it is convenient to look at the decision of the New Zealand Court of Appeal in R v Hartley.[171] Proper extradition procedures were not followed in securing the presence in New Zealand of one of the co-defendants, Bennett, who at the request of the New Zealand police was arrested in Australia by the Melbourne police and placed on a flight to New Zealand. The Court of Appeal held, applying R v O/C Depot Battalion, RASC, Colchester, ex p Elliott,[172] that these circumstances did not rob the trial court of jurisdiction to try Bennett: "although Bennett was brought here unlawfully, he was eventually lawfully arrested within the country and then by due process of law he was brought before the Court."[173] However, the Court of Appeal considered that the trial judge would probably have been justified, had the appropriate application been made, to exercise his discretion, either under section 347(3) of the Crimes Act 1961 (NZ) or pursuant to the "abuse of process" power recognised in Connelly, to direct that the accused be discharged:

> [I]n our opinion there can be no possible question here of the Court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say

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[170] For further discussion of the English cases, see generally P O'Higgins, "Unlawful Seizure and Irregular Extradition" (1960) 36 BYIL 279; J K Bentil, "When Extradition Masquerades as Deportation" (1983) 127 SJ 604; A N Khan, "Trial Without Extradition - Abuse of Court's Process" [1986] NZLJ 123; A N Khan, "Extradition in the Guise of Deportation" (1986) 130 SJ 657.

[171] [1978] 2 NZLR 199.

[172] [1949] 1 All ER 373.

[173] [1978] 2 NZLR 199, 215.

> that in the present case a New Zealand citizen attempted to avoid a criminal responsibility by leaving the country: that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. But this must never become an area where it will be sufficient to consider that the end has justified the means. The issues raised by this affair are basic to the whole concept of freedom in society.[174]

In other words, the nature of the illegality meant that the proceedings should be stayed notwithstanding the public interest in bringing the offender to conviction. To allow the prosecution to proceed would involve the court in turning a blind eye to the flagrant illegality. Hartley thus provides a recognition of the utility of the Connelly "abuse of process" power as an instrument for dealing with pre-trial executive improprieties.[175]

A similar issue arose in England in R v Bow Street Magistrates, ex p Mackeson.[176] The applicant, a British citizen, was in Zimbabwe-Rhodesia when allegations of fraud were made against him in the UK. The Metropolitan Police did not request the authorities in Zimbabwe-Rhodesia to extradite him, because at the time the de facto government of Rhodesia was in rebellion against the Crown and considered illegal. Instead, the Metropolitan Police informed the authorities in Zimbabwe-Rhodesia that the applicant was wanted in England in connection with fraud charges. The applicant was arrested in Zimbabwe-Rhodesia and a deportation order made against him. He was accordingly returned to the UK. On his application to a Divisional Court for an order of prohibition to prevent the hearing of committal proceedings against him in the Magistrates' Court, it was held, on the basis of Hartley, that the circumstances of the

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[174] Id, 216-7.

[175] But see Moevao v Department of Labour [1980] 1 NZLR 464, in which Richmond P, who had been one of the members of the Court of Appeal in Hartley, said (id, 470): "... I am now inclined to the view that Bennett's case could not have been properly disposed of on the basis that the prosecution was an abuse of process. That is because I now see difficulty in using the oppressive conduct of the police towards Bennett to support an argument that the process of the Supreme Court was itself being abused." He, however, added that "[t]he question whether illegal or 'unfair' conduct by the police in the course of investigating a crime can so taint a subsequent prosecution as to render it an abuse of process must remain for determination in a suitable case." Note that in the same case Woodhouse J, who also had been a member of the Court of Appeal in Hartley, stood by the opinion of the Court in Hartley (id, 476).

[176] (1981) 75 Cr App R 24.

applicant's return had amounted to an "extradition by the back door",[177] and that his application should accordingly be granted. This was despite the fact that the Metropolitan Police had "no doubt" acted "due to an excess of enthusiasm, certainly not due to any conscious intent to do wrong".[178]

The following year, Mackeson was distinguished in R v Guildford Magistrates' Court, ex p Healy[179] on the basis that there had been no attempt in this case to circumvent the provisions of the relevant extradition treaty. There was, the Divisional Court found, no ground for supposing that the police had tried to persuade the US authorities to deport the applicant so that they could arrest him in this country.[180]

The authority of Mackeson and Healy has been, however, thrown into doubt by the decision of the Divisional Court in R v Plymouth Magistrates' Court, ex p Driver.[181] It was concluded in this case that a court had no power to inquire into the circumstances in which a person was found in the jurisdiction, for the purpose of refusing to try him.[182] This conclusion was reached by a questionable application of the doctrine of stare decisis, and without any consideration of issues of principle. The reasoning of the Court,[183] essentially, was that the New Zealand Court of Appeal in Hartley had been wrong to treat the decision in R v O/C Depot Battalion, RASC, Colchester, ex p Elliott[184] as authority only for the proposition that a court had jurisdiction to try a prisoner found within its territory. In actual fact, the Court pointed out, Lord Goddard CJ in Elliott had dealt with other points including an allegation of unreasonable delay. This meant, the Court in Driver thought, that Lord Goddard must have had in mind both the questions of "jurisdiction" and of "discretion". Thus Elliott stood not only for the proposition that impropriety in bringing a prisoner into the

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[177] Id, 30.
[178] Id, 33.
[179] [1983] 1 WLR 108.
[180] Id, 112.
[181] [1985] 2 All ER 681.
[182] Id, 697.
[183] Id, 695.
[184] [1949] 1 All ER 373.

country did not deprive a court of jurisdiction, but also for the proposition that such impropriety could not lead to a stay of proceedings in the exercise of discretion.

There are two problems with the reasoning of the Court in Driver. First, even if Lord Goddard CJ had indeed had in mind the question of "discretion" as well as of "jurisdiction", it does not follow that the way in which he exercised this "discretion" should not be reconsidered. For example, Lord Goddard CJ said in relation to the allegation of unreasonable delay that "[i]f a man is kept an unreasonable time awaiting trial to such an extent that this court thinks it is oppressive, they can interfere and admit him to bail ... the condition of the bail being that he shall surrender at the court martial when he receives notice that that court is to proceed. That is the utmost extent to which this court could go."[185] In recent times, however, it has become clear that to admit a defendant to bail is not the utmost extent to which a court can go in dealing with oppressive delay; as we shall see later in the thesis, such delay can now lead to a stay of proceedings. By the same token, the fact that illegal extradition may have been incapable of leading to a stay of proceedings in Lord Goddard's day is no reason why it should still be incapable of doing so today.

The other problem with the reasoning of the Court in Driver is that discussion of issues of principle was completely eschewed. No attempt was made to justify, in principle, the holding that a court should not inquire into the circumstances in which an accused person was brought into the jurisdiction. In sum, the decision in Driver leaves the position in England with respect to illegal extraditions very uncertain. The issue cannot be regarded as settled in the absence of a decision by the Court of Appeal or House of Lords. In the recent case of R v Bateman and Cooper,[186] the Court of Appeal declined to resolve the Mackeson/Driver conflict.

It should be noted that even though the reasoning in Driver can be challenged, the result itself may be justifiable. In particular, two points may be said to distinguish

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[185] Id, 379.
[186] [1989] Crim LR 590.

Driver from Mackeson. First, it will be recalled that in Mackeson, there had been a deliberate attempt by the English authorities to circumvent proper extradition procedures because at the time the de facto government of Rhodesia was in rebellion against the Crown and considered illegal. In Driver, however, there was no evidence of improper dealing on the part of the English authorities leading to the illegal extradition of the applicant from Turkey. "All that the Devon and Cornwall police did was, first, to inquire of the whereabouts of the suspected person and, second, to invite the Turkish authorities acting within their powers to make such arrangements as would enable the Devon and Cornwall police to interview the fugitive."[187] Second, what was being investigated in Driver was a murder. Accordingly it is arguable that in view of the seriousness of the offence charged, the public interest required that the proceedings should be allowed to continue.[188] Thus even though the reasoning in Driver is flawed, the result itself may be justifiable.

4. Conclusion

The aim of this part of the chapter has been to examine the prevailing English approach to procedural implications of pre-trial executive improprieties. This examination has shown that a coherent and principled approach to the problem cannot be said to have emerged. The House of Lords in Sang approached the question of the admissibility of improperly obtained evidence without any serious consideration of the rationales for exclusion, and simply by reference to what it regarded as an established

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[187] [1985] 2 All ER 681, 690 (emphasis in original).

[188] It is interesting to note that a number of cases involving illegal extradition have come to public attention not so much because of the circumstances of the illegal extraditions, as because of the gravity of the offences charged. See, eg, the case of Adolf Eichmann: A-G of the Government of Israel v Eichmann (1961) 36 ILR 5 (affirmed by the Supreme Court of Israel in (1962) 36 ILR 277); J E S Fawcett, "The Eichmann Case" (1962) 38 BYIL 181. For further discussion of issues associated with illegal extradition, see C V Cole, "Extradition Treaties Abound But Unlawful Seizures Continue" (1975) 9 Law Soc Gazette 177; D Lanham, "Informal Extradition in Australian Law" (1987) 11 Crim LJ 3; C E Lewis, "Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffe: A Case in Point" (1986) 28 Crim LQ 341; S A Williams, 'Comment' (1975) 53 Can Bar R 404.

historical principle, namely, the right against self-incrimination. We also observed that where the exclusion of evidence is inapplicable because no tangible item of prosecution evidence has been obtained as a result of the impropriety in question, the defence may apply instead for a stay of the proceedings as a whole. The House of Lords has, by a narrow majority, recognised the existence of a judicial power to stay criminal proceedings which are an "abuse of process", and acknowledged the applicability of the abuse of process concept in double jeopardy situations. It was recognised in the earlier English "illegal extradition" cases that the fundamental justification for the double jeopardy principle (protection of the integrity of the criminal justice system) implies that the abuse of process concept should be available also as a procedural measure for dealing with pre-trial executive improprieties. Sadly, however, the authority of these cases has been thrown into doubt by the decision in Driver.

The conclusion is, therefore, that the issue of the procedural implications of pre-trial executive improprieties is in need of closer and more serious consideration in England. This will be the subject of discussion in the remainder of the thesis.

CHAPTER 3

FOUNDATIONS FOR A RECONSIDERATION

A. INTRODUCTION

In Chapter 2 we examined the prevailing English approach to the problem of pre-trial executive improprieties, and concluded that a fresh consideration of the issue should be undertaken. The present chapter is devoted, therefore, to an examination of the theoretical issues associated with the problem of pre-trial executive improprieties, with view to laying down foundations for a new approach to the problem.

B. EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE[1]

In this section it is proposed to address the question of the exclusion of improperly obtained evidence. First, it will be demonstrated that the major Anglo-American legal systems have all abandoned rules of mandatory inclusion and mandatory exclusion of improperly obtained evidence in favour of more flexible positions whereby such evidence is to be admitted in some circumstances but excluded in others. This suggests that rules of mandatory inclusion and mandatory exclusion have been perceived to be undesirable. Why this is so will be explored, and my proposals for a new approach to the problem of improperly obtained evidence put forward.

1. A Retreat from Extreme Positions

(a) Mandatory Inclusion

One possible solution to the problem of the admissibility of improperly obtained evidence is to admit all relevant and reliable evidence regardless of the manner in which

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[1] See A L-T Choo, "Improperly Obtained Evidence: A Reconsideration" (1989) 9 LS 261, which is based on my earlier views on this issue.

it was obtained.[2] As will be discussed below, such a rule of mandatory inclusion represented the original position in English law. The reasoning on which the idea of mandatory inclusion is premised is simple. It is the responsibility of a legal system to ensure that facts are determined fully and accurately in court. Accurate factual determination facilitates the reliable reconstruction of historical facts and, hence, the discovery of the "truth". And in the specific context of criminal trials, accurate factual determination facilitates the bringing of criminal offenders to conviction.

A further consideration is that of the behavioural implications of judicial decisions. As Professor Nesson has argued,[3] one of the primary goals of a legal system is the projection through judicial decisions of a behavioural message which will influence the conduct of members of society. A trial is not merely a truth-seeking process;

> it is also a drama that the public attends and from which it assimilates behavioral messages. The court's message to the public at large is: "If you do what the defendant did, you will be doing wrong and you should feel guilty; if you commit such an action, we will judge you guilty and punish you."[4]

To admit evidence irrespective of the fact that it has been obtained improperly is, therefore, to reinforce this behavioural message. Members of the public are reminded that they must obey the law; if they fail to do so they can never escape conviction and punishment merely because someone else has also behaved improperly. There is, of course, an important countervailing consideration here: the fact that the policeman "gets away with his illegality" may itself breed contempt for the law and encourage lawbreaking. More will be said on this issue later in the chapter.

Accordingly, advocates of a rule of mandatory inclusion argue that any item of reliable evidence which is probative of the accused's guilt should be admitted. Even the

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[2] Dr A J Ashworth has called this the "reliability principle": see A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723, 723-4.

[3] C Nesson, "The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts" 98 Harvard LR 1357 (1985).

[4] Id, 1360.

fact that this evidence may have been obtained by torture would be of no relevance. The impropriety "is by no means condoned" by the admission of the evidence; "it is merely ignored",[5] as "it is irrelevant at this stage. It is properly a matter for separate inquiry or a subsequent action."[6] A criminal trial is an inappropriate forum in which to conduct collateral inquiries into the means by which reliable evidence was obtained. To conduct collateral inquiries into improprieties which occurred during criminal investigation offends the administration of justice "by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it."[7] "[C]riminal courts exist for the protection of society, and they fail this purpose, this duty, if they release a prisoner in the face of evidence of his guilt because another has failed the same duty."[8] The concern of a trial judge is with the guilt or innocence of the particular accused. The judge

> does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law.[9]

Early English cases on improperly obtained evidence simply emphasised that such evidence had to be admitted, and made no mention of the existence of any exclusionary discretion.[10] However, as we have seen in Chapter 2, the Privy Council had acknowledged by the 1950s that improperly obtained evidence could be excluded in

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[5] J H Wigmore, "Using Evidence Obtained by Illegal Search and Seizure" 8 ABAJ 479, 479 (1922).

[6] J A Andrews, "Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases - I" [1963] Crim LR 15, 17.

[7] Note 5 supra.

[8] W T Plumb, Jr, "Illegal Enforcement of the Law" 24 Cornell LQ 337, 378 (1939).

[9] Note 5 supra.

[10] See generally R v Warickshall (1783) 1 Leach 263; R v Griffin (1809) Russ & Ry 151; R v Gould (1840) 9 Car & P 364; R v Berriman (1854) 6 Cox CC 388; R v Leatham (1861) 8 Cox CC 498.

the discretion of the trial judge if its admission would be unfair to the accused. Section 78 of the Police and Criminal Evidence Act 1984 provides evidence of legislative recognition that improperly obtained evidence should not be admitted in all circumstances.

In Australia the old rule of mandatory inclusion has been similarly eroded through recognition of an exclusionary discretion, although, as will be discussed later in the chapter, this discretion differs substantially from that recognised in England. It is, however, in Canada that the retreat from mandatory inclusion has occurred most recently and strikingly. Prior to the enactment of the Canadian Charter of Rights and Freedoms in 1982, the Canadian approach to the problem of improperly obtained evidence had been embodied in the decision of the Supreme Court in R v Wray.[11] The majority in Wray adopted, in effect, a rule of mandatory inclusion: "[t]he task of a Judge in the conduct of a trial is to apply the law and to admit all evidence that is logically probative unless it is ruled out by some exclusionary rule."[12] However, section 24(2) of the Charter now requires that "[w]here ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." In the relatively short time since the enactment of the Charter a very considerable body of case law on the interpretation of this provision has already emerged.[13]

A brief examination of the attitude in West Germany[14] to the problem of

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[11] (1970) 11 DLR (3d) 673.

[12] Id, 695 per Judson J.

[13] S 24(2) will be discussed in greater detail later.

[14] Some of the problems associated with comparative study are noted by M Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" 121 U Pa LR 506, 509 (1973): "Within each of the two general legal systems, that of common and that of civil law, proof processes change as we move from jurisdiction to jurisdiction. It is therefore only on a rather general level that styles of factfinding exhibit certain common characteristics. Nor are evidentiary rules applied with equal rigor in all types of criminal cases, even within a single jurisdiction. An additional difficulty resides in the fact that, at least at first blush, there is so much

improperly obtained evidence shows that even the criminal courts in an inquisitorial system have found it necessary to evolve an exclusionary doctrine in order to underpin the integrity of the criminal justice system.[15] As Professor Arenella has pointed out, the traditional view of a criminal trial in an inquisitorial system is that its main objective is "truth discovery", with the role of the judge being to "discover the truth by examining all sources of relevant information, including the defendant."[16] There is much about the German prosecution system which reflects this philosophy.[17] The principle of Legalitätsprinzip, or compulsory prosecution, requires that the public prosecutor pursue every significant crime.[18] Section 244(II) of the German Code of Criminal Procedure

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highly complex law on the common law side and so little law on the civil law side. Also, there is in the law of evidence a very pronounced disparity between the law on the books and actual practice. Everywhere so many tendencies seem to be at work, often operating in opposite directions, that one is tempted to suspect that a kind of self-canceling Brownian motion may be the end-result. Finally, conceptual tools and systematic arrangements in the civil and common law differ so widely in the evidentiary field, that one finds oneself groping for common denominators in order to make issues comparable."

[15] As my purpose here is not to provide a detailed description of the West German position in relation to improperly obtained evidence, only secondary sources have been relied upon for the material presented here. The following have been consulted: P Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 72 Georgetown LJ 185 (1983); C M Bradley, "The Exclusionary Rule in Germany" 96 Harvard LR 1032 (1983); Y-M Morissette, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do" (1984) 29 McGill LJ 521; W Pakter, "Exclusionary Rules in France, Germany, and Italy" 9 Hastings ICLR 1 (1985); B F Shanks, "Comparative Analysis of the Exclusionary Rule and its Alternatives" 57 Tulane LR 648 (1983); J H Langbein, Comparative Criminal Procedure: Germany (1977); H Niebler (transl), The German Code of Criminal Procedure (1965).

See also M Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" 121 U Pa LR 506 (1973).

[16] P Arenella, id, 206. See also M R Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process (1986) 68: "Continental judges are ideally still expected to anchor their decisions in a network of outcome-determinative rules; they are reluctant to 'politicize' or 'moralize' matters that come before them. ... By contrast, ... [t]he American professional judiciary is notoriously politicized and expected to consider 'the equities' of cases so that the door remains open to the consideration of various extralegal factors. Even in England, where professional judges are much more technically oriented than in America, Continental lawyers register their surprise at the apparent flexibility of the judiciary to respond to contours of individual cases in commonsensical ways."

[17] Cf the prosecution systems of Denmark, Sweden and the Netherlands: see generally L H Leigh and J E Hall Williams, The Management of the Prosecution Process in Denmark, Sweden and the Netherlands (1981).

[18] § 152(II) of the German Code of Criminal Procedure provides: "Except as otherwise provided by law, [the prosecution] is obliged to take action in case of all acts

provides: "In order to explore the truth the court shall on its own motion extend the reception of the evidence to all facts and to all means of proof which are important for the decision."[19] Further evidence that "the basic purpose of a German criminal trial is to investigate thoroughly all the facts to arrive at the objective truth"[20] is provided by the principle of "unfettered evaluation of evidence (freie Bewerswurdigung)".[21]

Not surprisingly, German law has been traditionally hostile to the exclusion of improperly obtained evidence. In recent times, however, there has emerged an exclusionary doctrine based on two constitutional principles, the Rechtsstaatsprinzip and the Verhältnismässigkeit. Under the Rechtsstaatsprinzip (principle of a state governed by the rule of law), police brutality or deceit in the seizure of evidence would lead automatically to the exclusion of the evidence. The purpose of exclusion is "to preserve the purity of the judicial process (Reinheit des Verefahrens)."[22] Considerations such as the probative value of the evidence and the seriousness of the offence charged are irrelevant. Where the evidence is not excluded under the Rechtsstaatsprinzip the court must then consider the Verhältnismässigkeit (principle of proportionality). This requires the court to balance, on a case by case basis, such factors as the defendant's interests in privacy and whether less intrusive measures will have sufficed, against the importance of the evidence and the seriousness of the offence charged.[23] "[O]ne should not shoot sparrows with a cannon."[24] The Federal Constitutional Court has developed a three-tiered analysis (Dreistufentheorie) to determine the admissibility of evidence under the Verhältnismässigkeit. First, evidence which would violate the most basic rights of an

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which are punishable by a court and capable of prosecution, so far as there is a sufficient factual basis." W Pakter, note 15 supra, 39 points out that "[t]he 'rule of compulsory prosecution' was itself a reflection of the 'theory of absolute punishment' embodied in Kant's famous dictum requiring execution of the last murderer in prison as a duty of a society before that society disbands."

[19] Emphasis added.

[20] B F Shanks, note 15 supra, 666.

[21] Id, 667.

[22] C M Bradley, note 15 supra, 1042.

[23] Id, 1034, 1041.

[24] Y-M Morissette, note 15 supra, 530.

individual (Kernbereich) must be excluded irrespective of the seriousness of the offence charged. The second, "private sphere" (Privatbereich) can be intruded upon only in the event of an overriding public interest. Third, evidence which would not violate the defendant's privacy rights - for example, a tape recording of a business meeting - cannot be excluded.[25]

A 1977 decision of the Federal Constitutional Court[26] is instructive. The case concerned the admissibility of medical records seized at a drug rehabilitation centre. It was held that because the evidence had not been seized by means of brutality or deceit, the seizure did not violate the Rechtsstaatsprinzip. On considering the Verhältnismässigkeit, the Court held that the evidence fell into the second category of the Dreistufentheorie, the Privatbereich. Thus, the defendant's privacy could have been intruded upon only in the event of an overriding public interest. It was concluded that there had been no such interest since the public itself had a strong interest in encouraging people to seek treatment for drug addiction and other health problems.

The West German position outlined above is only one example of the evolution of an exclusionary doctrine on the Continent; it should be noted that similar trends have been apparent in other jurisdictions such as France and Italy.[27]

But why has mandatory inclusion been generally abandoned in favour of the exclusion of improperly obtained evidence in certain circumstances? This abandonment clearly stems from a recognition that it is entirely inappropriate to regard a criminal trial as being concerned solely with determination of the "truth". The criminal trial is an integral part of the entire criminal justice system; "the governmental action for which a criminal court incurs responsibility is not merely the trial but the whole course of conduct called the prosecution. The trial is a part of the whole prosecution, just as the court is a part of the whole government that is investigating, charging, judging, and

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[25] See generally C M Bradley, note 15 supra, 1044 ff.
[26] See id, 1046-7.
[27] See generally W Pakter, note 15 supra.

sentencing the individual."[28] Hence the presentation of evidence in court may be viewed as the natural conclusion of a criminal investigation.[29] The mandatory inclusion of all relevant and reliable evidence, regardless of how it was obtained, may be crucial in the pursuit of the "truth", but "[t]ruth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."[30] If the importance of determining the issue of improperly obtained evidence is accepted, then surely it is immaterial that this determination inevitably involves a collateral inquiry.[31] Indeed, recognition of a jurisdiction to conduct pre-trial inquiries into allegations of pre-trial executive impropriety would go some way towards solving the procedural problems caused by the interruption of trials for voir dire hearings, as will be explained later in the thesis.

(b) Mandatory Exclusion

The other "extreme" view is that all improperly obtained evidence must automatically be excluded. Like a rule of mandatory inclusion, a rule of mandatory exclusion has the advantage of being relatively easy to apply. Once it is determined that an item of evidence has been obtained illegally or otherwise improperly, it must be excluded regardless of the circumstances.

It is instructive at this point to look briefly at the background and development of what is generally known as the US exclusionary rule. This rule is applicable in cases of violations of the Federal Constitution, in particular the Fourth Amendment, which

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[28] T S Schrock and R C Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement" 59 Minn LR 251, 258 (1974).

[29] A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723, 725.

[30] Pearse v Pearse (1846) 1 De G & Sm 12, 28-9; quoted in Bunning v Cross (1978) 141 CLR 54, 72 per Stephen and Aickin JJ.

[31] A judge of the Irish Supreme Court has stated: "There are many kinds of evidence which require a collateral inquiry before their admissibility can be decided. I instance but one - the question whether a statement, which would otherwise transgress the hearsay rule, was made by a deceased man in the course of his duty. I do not think that the necessity of a collateral inquiry is an adequate reason for establishing a general rule that all relevant evidence is admissible notwithstanding the illegality of the means used to prove it": The People (AG) v O'Brien [1965] IR 142, 162 per Kingsmill Moore J.

provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In 1914, the US Supreme Court held in Weeks v US[32] that evidence obtained in contravention of the Fourth Amendment would be automatically inadmissible in Federal proceedings. The Court in 1961 extended this rule to cover State courts: Mapp v Ohio.[33] By the 1970s, however, the Court had begun to recognise the undesirability of a rule of mandatory exclusion, and become aware of "the strains imposed by reality, in terms of the costs to society and the bizarre miscarriages of justice that have been experienced because of the exclusion of reliable evidence when the 'constable blunders'".[34] Accordingly, it was decided that tainted evidence should be excluded only where such exclusion would have the effect of deterring future violations. On this basis the impeachment exception to the exclusionary rule was recognised: this exception permits the prosecution to introduce illegally obtained evidence to impeach the defendant's own testimony.[35] It has been held, too, that the exclusionary rule should not be extended to grand jury proceedings.[36] Further,

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment

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[32] 232 US 383 (1914).

[33] 367 US 643 (1961).

[34] Stone v Powell 428 US 465, 496 (1976) per Burger CJ.

[35] See Harris v New York 401 US 222 (1971) and James v Illinois 110 S Ct 648 (1990).

[36] US v Calandra 414 US 338 (1974). It was said (id, 351) that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation."

> is minimal and the substantial societal costs of application of the rule persist with special force.[37]

Most recently, the Court has decided that evidence obtained in "good faith" violation of the Fourth Amendment ought not to be excluded from criminal trials.[38]

Objections to mandatory exclusion which are of a rather practical nature have been put forward by some commentators.[39] In particular, it is argued that frustration with a rule of mandatory exclusion could result in the courts being extremely reluctant to hold that an item of evidence has been obtained improperly, and could also encourage police perjury. Police officers may be encouraged either (1) to lie in court about the way in which improperly obtained evidence was obtained, or (2) to use the improperly obtained evidence as a lead to other evidence and then to lie in court about the connection between them.[40] Indeed it is likely that "a substantial percentage of policemen [would] take the view that two wrongs make a right and that perjury is a permissible method"[41] of avoiding the effect of mandatory exclusion.

The possibility of (increased) perjury seems to be supported by empirical research conducted in the US. One study examined the effect of Mapp v Ohio[42] on police search and seizure practices in narcotics cases in New York City. As has been discussed above, it was decided by the US Supreme Court in Mapp that evidence obtained as a result of an illegal search and seizure would be automatically inadmissible in State criminal proceedings. The New York City study revealed (1) a sharp decrease since Mapp v Ohio in allegations that contraband had been found on the defendant's

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[37] Stone v Powell 428 US 465, 494-5 (1976).

[38] US v Leon 104 S Ct 3405 (1984); Massachusetts v Sheppard 104 S Ct 3424 (1984); Illinois v Krull 107 S Ct 1160 (1987).

[39] See generally J Kaplan, "The Limits of the Exclusionary Rule" 26 Stanford LR 1027, 1036 (1974); Australian Law Reform Commission, Criminal Investigation (1975) par 295.

[40] See generally J D Heydon, "Illegally Obtained Evidence (2)" [1973] Crim LR 690, 694; J Kaplan, id, 1032; Australian Law Reform Commission, id, par 295, par 297; Australian Law Reform Commission, Evidence (Vol 1) (Report No 26: Interim) (1985) par 961.

[41] J Kaplan, note 39 supra, 1038.

[42] 367 US 643 (1961).

body or hidden in the premises, and (2) a marked increase since Mapp in allegations by uniform and plainclothes officers that the defendant had dropped the contraband to the ground or had had it in general view either "in hand" or "openly exposed in the premises". There had been, in other words, a marked increase in allegations by uniform and plainclothes officers that evidence had been obtained in a manner which satisfied the requirements for a proper search and seizure. On the other hand, there was some indication that police practices in New York City narcotics enforcement had not changed substantially as a result of Mapp. This suggests, the study points out, that police officers were prepared to fabricate testimony as to how evidence had been obtained, in an attempt to prevent the mandatory exclusion of evidence which they had obtained illegally.[43]

Whilst it may indeed be the case that a rule of mandatory exclusion could encourage police perjury, it is clearly inappropriate to treat this as a valid objection to mandatory exclusion. Such a line of argument is reminiscent of the specious pre-19th century justification for forbidding accused persons from testifying in court - that is, that they would perjure themselves if given the opportunity to testify. If the police commit such a serious criminal offence as perjury as a result of frustration with a rule of mandatory exclusion, then surely there is a public interest in dealing with that perversion of justice (through dismissal of the offender from the police force and, possibly, a prosecution for perjury). Similar objections apply to the argument that a rule of mandatory exclusion could encourage judges to hold that items of evidence which they regard as improperly obtained have not been, in fact, obtained improperly. Surely it is the duty of judges to decide such issues dispassionately and in accordance with the law.

These difficulties with the "practical" objections to mandatory exclusion do not, however, invalidate an independent point: that a rule of mandatory exclusion is

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[43] For a more detailed account of the research and results, see "Effect of Mapp v Ohio on Police Search-and-Seizure Practices in Narcotics Cases" 4 Columbia J of Law and Social Problems 87, 94-5 (1968). See also People v McMurty 314 NYS 2d 194, 196 (1970).

undesirable in principle because it flies in the face of the duty of the law to bring criminal offenders to conviction. Mandatory exclusion fails to take account of the circumstances of the individual case. It could result in a dangerous offender going free even where the executive impropriety in question was a trivial one.[44] Thus, a rule of mandatory exclusion may give the law an appearance of regarding "the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer."[45] Such an appearance can hardly enhance public respect for the administration of justice. The public, after all, expects the criminal law to fulfil the role of bringing to conviction those who commit serious crimes. As Kaplan points out:

> The disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal is an affront to popular ideas of justice. ... Proportionality is a major element of our sense of justice. The lack of proportionality between the crime and the punishment was shocking when Jean Valjean received what amounted to a life sentence for stealing a loaf of bread, and a similar sense of injustice arises from the disparity between the police officer's error and the failure because of it to punish one who has committed a serious crime.[46]

Thus, to adopt a rule of mandatory exclusion would be to fly in the face of the duty of the law to apprehend and bring to conviction those who commit criminal offences. The US experience clearly suggests that a rule of mandatory exclusion is difficult to maintain. Recognition of the right of society "to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition"[47] has led to the abandonment of mandatory exclusion of all evidence obtained in contravention of the Fourth Amendment.

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[44] See People v Defore 150 NE 585, 587 (1926) per Cardozo J: "The criminal is to go free because the constable has blundered."

[45] J H Wigmore, "Using Evidencc Obtained by Illegal Search and Seizure" 8 ABAJ 479, 482 (1922).

[46] J Kaplan, "The Limits of the Exclusionary Rule" 26 Stanford LR 1027, 1036 (1974).

[47] Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 US 388, 419 (1971).

2. Packer's Models of the Criminal Process

In the light of the above discussion of mandatory inclusion and mandatory exclusion, it may be interesting to examine Professor H L Packer's diametrically opposed models of the criminal process. These are known as the "crime control" and "due process" models. The models represent, as Packer himself indicates, an attempt to abstract two separate value systems which compete for priority in the operation of the criminal process. Neither model is presented as corresponding to reality or as representing the ideal; the models "merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two value systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims." They are "distortions of reality."[48] Additionally, "[t]he models are polarities, and so are the schemes of value that underlie them. A person who subscribed to all of the values underlying one model to the exclusion of all of the values underlying the other would be rightly viewed as a fanatic."[49]

(a) Crime Control[50]

The Crime Control Model sees the repression of criminal conduct as the most important function of the criminal process. To achieve this, primary attention must be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt and secure the appropriate disposition of those convicted of crime. By "efficiency" is meant the system's capacity to apprehend, try, convict and dispose of a high proportion of offenders whose crimes become known. The Model thus places a premium on speed and finality. Accordingly, extra-judicial processes are to be preferred to judicial ones, and informal operations to formal ones. Those probably innocent

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[48] H L Packer, The Limits of the Criminal Sanction (1969) 153.
[49] Id, 154.
[50] See generally id, 158-63.

should be screened out at an early stage and those probably guilty passed quickly through the remainder of the process.

What enables the system to deal efficiently with large numbers, as the Crime Control Model requires, is what Packer terms the presumption of guilt. "The supposition is that the screening processes operated by police and prosecutors are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty."[51] However, there must also be devices for dealing with the suspect once the preliminary screening process has resulted in a determination of probable guilt. The focal device is the plea of guilty. Thus, when operating at its optimum, the Crime Control Model presents two possibilities: an administrative fact-finding process leading either to the exoneration of the suspect, or to a plea of guilty.

The Crime Control Model considers that all reliable evidence should be admitted regardless of how it was obtained.[52] Impropriety in the obtaining of evidence should never lead to exclusion; it should result instead in an action for damages, and in discipline and education. In this way, those whose privacy has been improperly invaded are afforded a remedy, while the future conduct of the wrongdoing police officers will be corrected.

(b) Due Process[53]

The Due Process Model emphasises the concept of the primacy of the individual and the complementary concept of limitation on official power. First, the stigma and loss of liberty which come with the end of the criminal process are seen as the heaviest

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[51] Id, 160.
[52] Id, 199.
[53] See generally id, 163-73.

deprivation which can be inflicted upon an individual by the State. Second, the very processes which culminate in the infliction of this stigma and loss of liberty are seen as coercive, restricting and demeaning. Because of its potency in subjecting the individual to the coercive power of the State, the criminal process must be subjected to controls which prevent it from operating with maximal efficiency. Maximal efficiency means maximal tyranny.

The Due Process Model subscribes, for example, to the doctrine of legal guilt: a person cannot be held guilty of a crime merely because it can be shown on the basis of reliable evidence that he did factually what he is alleged to have done. Instead, he can be held guilty only if these factual determinations are made in a procedurally regular fashion by authorities acting within the scope of their power. Further, the rules designed to protect him and to safeguard the integrity of the process (such as the rules relating to jurisdiction, venue, statutes of limitations, double jeopardy and criminal responsibility) must be satisfied. Associated with the doctrine of legal guilt is the presumption of innocence. Finally, the Due Process Model subscribes to the idea of equality: as there can be no equal justice if the kind of trial a defendant gets depends on the amount of money he has, it must be ensured that financial inability does not destroy the capacity of an accused to meet the charges against him.

The Due Process Model would require the automatic exclusion of improperly obtained evidence from a criminal trial:[54] "[t]he only practical way to control illegal searches is to take the profit out of them." It may even be appropriate to enact a prophylactic rule that impropriety in the obtaining of evidence should lead to a dismissal of the prosecution and not merely to exclusion of the evidence. The ordinary tort remedies are totally ineffective as a means of deterring police misconduct: victims are not usually in a position to sue; juries are unlikely to provide a remedy; and police

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[54] Id, 200.

officers are often judgment-proof. Departmental discipline, too, is unlikely to represent an effective deterrent.

(c) Comment

It is undeniable that Packer's diametrically opposed models of the criminal process provide a useful starting point for a consideration of issues relating to the criminal process. However, as Packer himself acknowledges, the models are designed merely as an aid to analysis, rather than as a program for action.[55] Neither model identifies the specific functions of criminal justice or fully explains how these functions would be served (or otherwise) by a "crime control" or "due process" value perspective. Moreover, the models give the false impression that criminal justice is concerned solely with the issue of which party, the State or the defendant, should gain the advantage in the adversarial contest.[56] In order to explore the problem of improperly obtained evidence in a meaningful manner, it is necessary to examine a number of aspects of criminal justice in greater detail.

3. Aspects of Criminal Justice[57]

The first aspect of criminal justice which deserves attention in this context may be termed the behavioural aspect. The aim of making certain behaviour criminal is, in the words of H L A Hart, "[t]o announce to society that these actions are not to be done and to secure that fewer of them are done."[58] It is only by subscribing to the notion that the criminal law sets up standards of behaviour to encourage certain forms of

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[55] Id, 154.

[56] See generally P Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 72 Georgetown LJ 185, 211-2 (1983).

[57] See generally P Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 72 Georgetown LJ 185 (1983); I H Dennis, "Reconstructing the Law of Criminal Evidence" (1989) 42 Current Legal Problems 21.

[58] H L A Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968) 6.

conduct and discourage others that one can distinguish a punishment in the form of a fine from a tax on a course of conduct.[59] Thus a crime may be viewed generally as a public, rather than a private, wrong. In the words of Blackstone, writing as far back as 1765: "[P]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity."[60]

A second noteworthy point relates to the consequences of a criminal conviction. Conviction carries "a formal and solemn pronouncement of the moral condemnation of the community" as well as the threat of unpleasant physical consequences in the form of punishment.[61] The crucial difference between the situation of a prison inmate and that of a patient committed to a mental hospital, it has been pointed out, is that the former has incurred the moral condemnation of his community, while the latter has not.[62] Walker has classified the stigmatic effects of conviction and punishment under seven different headings:[63]

Suspicion

The offender may become more likely to be suspected of subsequent offences, particularly offences resembling his original one.

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[59] Id, 6-7.

[60] W Blackstone, Commentaries on the Laws of England (Vol 4) (A Facsimile of the First Edition of 1765-1769) (1979) 5. (I have updated the spelling.)

[61] H M Hart, Jr, "The Aims of the Criminal Law" 23 Law and Contemporary Problems 401, 405 (1958).

[62] Id, 405-6.

[63] N Walker, Punishment, Danger and Stigma: The Morality of Criminal Justice (1980) 142-3.

Employment

It may become more difficult for the offender to obtain or to retain employment. This may be because of the policies of employers or because of the attitudes towards him which he observes (or thinks he observes) in employers and workmates.

Ostracism

The offender may lose the support of family and friends, and as a result may seek the company of those who are more tolerant of his offence and who may encourage him in further lawbreaking.

Damaged self-image

He may feel "labelled" as a criminal offender and may therefore regard himself as a person who is "by nature" likely to offend. This could result in further lawbreaking.

Anti-label reaction

On the other hand, he may reject the label as unfair, resolve to prove that it is, and therefore behave more rather than less correctly.

Anti-labeller reaction

He may react against the "labellers" (real or imagined) and therefore reject the values of a society which appear to him to be unfair.

Martyrdom

There may be situations in which his conviction and sentence may appear to certain sections of society to be a great moral wrong, and therefore enlist support for him or for a cause.

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Walker also refers to some relevant empirical research. In two experiments, one conducted in the Netherlands and the other in New Zealand, fictitious job applications which "admitted" convictions for theft prompted significantly fewer favourable responses than those which did not.[64]

The punishment meted out to an offender following his conviction has a certain symbolic significance, or what Feinberg has termed an expressive function. "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[65] Elements of this expressive function include:[66]

Authoritative disavowal

By punishing a criminal offender, the State is effectively condemning and disavowing his act. It is telling the community that the offender had no right to do as he did, and that it does not condone his actions.

Symbolic nonacquiescence: "speaking in the name of the people"

A State has a kind of "power of attorney" for its citizens. Thus, by punishing a criminal offender it is expressing effective public denunciation and, through it, symbolic nonacquiescence in the crime.

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[64] Id, 146.

[65] J Feinberg, Doing and Deserving: Essays in the Theory of Responsibility (1970) 98.

[66] Id, 102-5.

Vindication of the law

A law is vindicated (emphatically reaffirmed) by the punishment of those who violate it.

Absolution of others

By punishing an offender, the State effectively relieves of suspicion, and informally absolves of blame, any other individual who may also have been suspected of the crime.

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Another important aspect of criminal justice is the notion that human dignity must be respected when the power of the State is ranged against an individual, as in a criminal prosecution.[67] The social stigma which may attach to conviction and punishment (discussed above) has prompted recognition by the law of the concepts of freedom of action and the ability of an individual to exercise self-determination in his choice of actions. As Lord Simon put it in DPP v Lynch:[68] "[T]he law ... accepts generally as an axiom the concept of the free human will - that is, a potentiality in the conscious mind to direct conscious action - specifically, the power of choice in regard to action. ... The general basis of criminal responsibility is the power of choice involved in the axiomatic freedom of the human will."[69] And in the words of Packer:

> Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provided a locus poenitentiae, a point of no return beyond

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[67] See generally H Gross, A Theory of Criminal Justice (1979) 32-3; P Stein and J Shand, Legal Values in Western Society (1974) 130 ff.
[68] [1975] AC 653.
[69] Id, 689.

> which external constraints may be imposed but before which the individual is free - not free of whatever compulsions determinists tell us he labors under but free of the very specific social compulsions of the law.[70]

Thus the doctrine of mens rea is founded on the principle that freedom of action is not to be interfered with unless it has been knowingly abused; the criminal law usually does not predicate criminal liability on acts alone. If it did, the State's power to interfere in the lives of its citizens would be greatly increased. In a discussion of mens rea, H L A Hart imagines the consequence of a hypothetical abandonment of the mens rea requirement in the crime of assault. Every blow, even if it was clearly a purely accidental or careless one, would become a matter to be investigated. Official interferences with the life of the individual would consequently become more frequent, and their incidence less predictable.[71]

The final aspect of criminal justice of relevance here is that not only does criminal procedure recognise the concept of criminal responsibility, but it also articulates what Arenella has termed "fair process norms".[72] Fair process norms place substantive and procedural limits on the State's exercise of power. An example is the prohibition of arbitrary search and seizure by the police in the course of their criminal investigations. Some fair process norms are valued because of their result-efficacy but others have value independent of their result-efficacy. Summers has put forward a theory of "process values",[73] or values which should be embodied in the legal process

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[70] H L Packer, The Limits of the Criminal Sanction (1969) 74-5. See also P Stein and J Shand, Legal Values in Western Society (1974) 137: "The requirement of personal responsibility for the application of the sanctions of the criminal law gives the individual the power to determine by his choice what is to happen to him ... Even if things go wrong and his acts cause harm to others, he will not suffer the penalties which the law would impose on those whose acts are voluntary. If he has done his best and made the right choices, and it is through accident or mistake that harm has been done, the law will excuse him."

[71] H L A Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968) 206.

[72] P Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 72 Georgetown LJ 185, 200 (1983).

[73] See generally R S Summers, "Evaluating and Improving Legal Processes - A Plea for 'Process Values'" 60 Cornell LR 1 (1974). See also M Bayles, "Principles for Legal Procedure" 5 Law and Philosophy 33, 50 ff (1986).

irrespective of their effect on the accuracy of outcomes. In other words, process values are procedural arrangements to which members of society are deontologically entitled.[74] The process values which Summers identifies are participatory governance; process legitimacy; process peacefulness; humaneness and respect for individual dignity; personal privacy; consensualism; procedural fairness; the procedural rule of law ("procedural legality"); procedural rationality; and timeliness and finality. Other possible candidates for process value status, according to Summers, include truth telling, tolerance for dissent, official integrity and public openness. Summers acknowledges that it is in the criminal sphere that process values and desired outcomes regularly conflict most dramatically. In the past, for example, the process values of humaneness and respect for individual dignity and of personal privacy were regularly infringed in the name of convicting the guilty, through warrantless intrusions and "third degree" methods. However it is unsurprising, given the accordance of high priority to the desired outcome of conviction of the guilty, that officials have on occasion subordinated process values to this outcome, as Summers points out. Summers concedes that there may be circumstances in which process values can be justifiably sacrificed to overriding considerations, though he also believes that officials are often too ready to sacrifice process values in return for desired outcomes, whether or not the sacrifice is justified.

4. The Search for a Rationale

The above discussion has brought out clearly the public dimension as well as the moral dimension of criminal justice. We have seen that the criminal process may be viewed as a medium of communication with the public at large. The conviction of an offender for his criminal actions has the effect of warning the public against engaging in such actions. Conviction imposes upon the offender a special moral stigma of community condemnation, and punishment, similarly, expresses attitudes of resentment

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[74] See generally L H Tribe, American Constitutional Law (2nd ed 1988) 663 ff.

and indignation as well as judgments of disapproval and reprobation. It is precisely because of the public dimension of criminal justice that criminal justice has also acquired a moral dimension.[75] Thus, an offender should not be exposed to the stigmatic effects of conviction and punishment unless the values attached to dignity and freedom have been respected in the course of bringing the offender to conviction. It is for this reason, we have seen, that the doctrine of mens rea plays a central role in the criminal law.

Yet the moral dimension of criminal justice requires more than just recognition of the doctrine of mens rea and the articulation of fair process norms. It also requires the development of a coherent judicial approach to the issue of how a court should deal with evidence which has been obtained in violation of a fair process norm. Suppose that a suspect is subjected to an illegal search, that relevant evidence is discovered as a result of the search, that the suspect is subsequently brought to trial, and that at the trial it is sought to adduce the illegally obtained evidence. What should the trial judge do about the evidence?

It was seen earlier in the chapter that the problem of improperly obtained evidence cannot be dealt with either by mandatory inclusion or by mandatory exclusion. Accordingly, it is necessary to identify a rationale for exclusion which properly explains the need to exclude improperly obtained evidence in some circumstances but not in others. I shall first embark upon an analysis of two rationales for exclusion which are commonly advanced: the compensatory and deterrent rationales. This will be followed by a description of what I believe to be the most appropriate rationale for the exclusion of improperly obtained evidence. I shall call this the principle of legitimacy.

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[75] To say that criminal justice has a moral dimension is certainly not to suggest that the criminal process functions for the sake of morality. In fact, I would wish to disassociate myself strongly from such a view. As has been put by H Gross, A Theory of Criminal Justice (1979) 33: "Moral matters ... are of the greatest importance in carrying on the business of criminal justice, though it is not for the sake of moral matters that it is carried on. And one may include among the many ironies of criminal justice that it is least likely to be morally sound when it is carried on most moralistically."

(a) Compensation

The compensatory rationale for the exclusion of improperly obtained evidence[76] takes the following form. A suspect's rights are infringed if he is subjected to improper treatment by the police in the course of their investigations. And where it is established that the rights of a defendant have been infringed in this manner, it is the responsibility of the court to protect him from any disadvantage flowing from the infringement. Thus, any evidence obtained as a result of the infringement should be excluded from the trial.[77] It is said that exclusion is especially appropriate since it puts the individual in the position in which he would have been had the infringement not occurred.[78] "Only an exclusionary sanction places the person in no greater risk of criminal conviction than he would have been in had the violation of protected interests not occurred."[79]

In Chapter 2 we examined briefly some of the possible tort actions which may be available to those seeking compensation for the infringement of their rights by the police. It was pointed out that there may be practical difficulties associated with bringing such an action: the victim may not want to risk the loss of privacy or subsequent police victimisation, and, if convicted and imprisoned, would probably be unable to obtain a remedy until his release, by which time the cause of action may have become stale. Not all of these difficulties are insurmountable, however, and it is to be hoped that the law will take steps to ensure that, as far as possible, victims of police misconduct are not disadvantaged when seeking to obtain compensation. It is not germane to the present thesis to explore in detail how this might be achieved. One possibility would be for the law to provide expressly for the award of compensation in

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[76] Dr Ashworth has called this the "protective principle": A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723.

[77] See generally ibid.

[78] See Australian Law Reform Commission, Evidence (Vol 1) (Report No 26: Interim) (1985) par 959; E W Cleary (ed), McCormick on Evidence (3rd ed 1984) 462-3.

[79] E W Cleary (ed), id, 463.

respect of police misconduct, with the establishment of a cheap and simple procedure which would encourage victims of misconduct to sue.

Nonetheless, advocates of the compensatory rationale for exclusion would argue that whilst monetary compensation would be appropriate for an aggrieved person who is not charged and brought to trial, exclusion is the only means by which a criminal defendant (against whom the improperly obtained evidence would otherwise be used) can be placed in the position in which he would have been had the impropriety not occurred. Where the police have behaved improperly during criminal investigation and it is sought to adduce the fruits of the impropriety as evidence in court, the vindication of the rights of the defendant effectively becomes the responsibility of the court. It is for the trial judge to put matters right, as far as possible, by restoring the defendant to the position in which he would have been had the impropriety not occurred.

There are, however, difficulties with the view that compensation for the infringement of rights of accused persons is the justification for exclusion. Consider the issue of evidence which has been obtained as a result of the infringement of the rights not of the accused, but of a third party. Under the compensatory rationale such evidence can never be excluded.[80] Even the fact that the evidence had been obtained by means of torturing the third party would be irrelevant. It is evident from this illustration that the compensatory rationale for exclusion is unduly narrow. This rationale assumes that, where the executive has obtained evidence by violating individual rights and seeks on the basis of this evidence to bring a person to conviction, the only relevant harm has been that done to the person whose rights were violated, and thus the duty of the law is merely to restore him to the position in which he had been prior to the violation. Where the evidence is sought to be used against the person whose rights were violated, this "restoration" is achieved by the exclusion of the evidence; where,

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[80] Note, however, that the US Supreme Court has decided that the deterrent rationale, too, does not require the exclusion of evidence obtained as a result of the infringement of the rights of a third party: Alderman v US 394 US 165 (1969).

however, the evidence is sought to be used against another person, this "restoration" is achieved by monetary compensation. Yet this line of thought completely ignores the fact that in a case involving improperly obtained evidence, the infringement of rights in the obtaining of the evidence does not represent the only relevant harm. There is also the harm which could be done to the administration of justice as a whole if the evidence were admitted. Thus, not only must the law seek to compensate for the infringement of individual rights which has already occurred, but it must also avert any possible injury to the criminal justice system as a whole. The compensatory rationale is directed to the former but not to the latter.

A further problem with the compensatory rationale is that it fails to explain adequately the need for improperly obtained evidence to be admitted in some circumstances but excluded in others. Under the compensatory rationale, it would have to be said that the law is sometimes justified in not compensating for the infringement of individual rights, in the interest of a greater public interest in the conviction of the guilty. The difficulties with such a formulation are obvious. A judge in deciding whether to admit or exclude an item of improperly obtained evidence would be attempting to weigh incommensurables: he would be seeking to weigh a private interest against a public interest to determine which should prevail in the particular case - individual rights on the one hand, or the public interest in the conviction of the guilty on the other.[81] Further, the very notion that it is possible for a right to be meaningfully sacrificed to a social goal is a problematic one, as I pointed out in Chapter 2 in the context of my criticism of the US courts' refusal to allow a guilty plaintiff to recover in an action for false imprisonment or malicious prosecution under 42 USC section 1983.

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[81] I H Dennis, "Reconstructing the Law of Criminal Evidence" (1989) 42 Current Legal Problems 21, 30-1.

(b) **Deterrence**

A second justification for the exclusion of improperly obtained evidence is the deterrent rationale. It is said that, being an integral part of the criminal justice system, the courts have a responsibility, inasmuch as it lies within their power to do so, to deter the police from the commission of future improprieties. The disciplining of police officers is not a matter which is solely the concern of the executive. By the 1970s the US Supreme Court had begun to adopt the view that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[82]

The Canadian experience is worthy of note in this context. In an article published in 1970,[83] a US commentator set out, inter alia, to consider the question of "how the Canadians manage to discourage illegal behavior by law enforcement officials without resort to the exclusionary rule that is apparently considered so essential on this side of the border."[84] He identified a number of possible explanations, two of which are of particular relevance.[85] First, police discipline in Canada was said to be good and to be seriously pursued, with police officers being prosecuted occasionally for criminal misconduct occurring in the course of their duties. Second, and of paramount importance, was the fact that there existed in Canada a reasonably effective tort remedy. Some have cited Professor Oaks' discussion of the pre-1982 Canadian position in support of the argument that since it is possible to control police misconduct by taking the traditional civil and criminal remedies seriously, there is no need for the judiciary to attempt to do so via the exclusion of evidence. Implicit in this argument is, of course,

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[82] US v Calandra 414 US 338, 348 (1974). See also, eg, Stone v Powell 428 US 465, 486 (1976): "The primary justification for the exclusionary rule ... is the deterrence of police conduct that violates Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right."

[83] D H Oaks, "Studying the Exclusionary Rule in Search and Seizure" 37 U Chi LR 665 (1970).

[84] Id, 702.

[85] Id, 702-5.

an acceptance of Professor Oaks' assumption that police improprieties in Canada were being controlled effectively. Yet the post-1982 Canadian experience throws doubts upon the correctness of this assumption. The large number of instances of police misconduct which have come to light since 1982 as a result of applications to have evidence excluded under section 24(2) of the Charter suggests that it was not that improprieties were being well controlled prior to 1982, but rather that these improprieties were simply not being brought to the attention of the public or of the courts. As one commentator, writing in 1984, puts it:

> The large number of reported cases which in recent months have involved illegalities, some rather serious, in routine police investigations, offers an indication of what reality actually held in store. Since it does not appear likely that Canadian law enforcement personnel intentionally began to perform illegal searches after April 1982 for the purpose of testing the effect of the Charter, the irregular methods must have existed on a similar and perhaps even greater scale before that date.[86]

There are two bases on which it might be suggested that the exclusion of improperly obtained evidence could deter future improprieties.[87] The first concerns the police officer responsible for the impropriety. It is said that such an officer would be likely to feel aggrieved if his efforts are thwarted by exclusion and that exclusion would accordingly induce him to take greater care in the future. Second, it is said that exclusion would also deter police misconduct in a broader sense: the dissemination of the significance of individual rulings on the admissibility of improperly obtained evidence would be relatively manageable in a bureaucratic framework such as that in which the police and prosecution function, and thus a judicial policy of excluding

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[86] Y-M Morissette, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do" (1984) 29 McGill LJ 521, 535. See also D V Macdougall, "The Exclusionary Rule and Its Alternatives - Remedies for Constitutional Violations in Canada and the United States" 76 J Crim L & Criminol 608, 639 (1985): "[T]he Canadian circumstances provide a unique opportunity for comparison of pre- and post-1982 practices, or even to note changes in police behavior as the [S]upreme [C]ourt provides definitions of the rights."

[87] See generally D H Oaks, "Studying the Exclusionary Rule in Search and Seizure" 37 U Chi LR 665 (1970).

improperly obtained evidence from criminal trials would be likely to result, inter alia, in the formulation of education programmes and administrative directives for the police, leading, in the long term, to some improvement in police practices.

In practice, however, there are likely to be limitations on the effectiveness of exclusion as a deterrent. Some of these may be set out briefly here.[88] First, exclusion probably will not deter improprieties which the offending police officer does not regard as likely to result in the obtaining of evidence for presentation in court. Second, it must be remembered that the incentives which encourage police improprieties include the expectations of superiors, and public pressure to apprehend criminals. An evidentiary deterrent may not swing the balance away from these incentives, even though it will at least be a countervailing consideration. Third, it is doubtful whether the sanction and the reasons for the sanction would be adequately communicated to police officers.[89] US experience suggests that "the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the [exclusionary rule]."[90] This situation is exacerbated by the long time lapse between the misconduct and the exclusion of the tainted evidence. "Given a policeman's pressing responsibilities, it would be surprising if he ever became aware of the final result after such a delay."[91]

In spite of the obvious methodological difficulties associated with any empirical research conducted for the purpose of evaluating the deterrent effect of exclusion, several

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[88] For a more detailed treatment, see id, 720-34, which is the source of much of the information presented in this paragraph.

[89] As was put by Burger CJ in Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 US 388, 417 (1971): "Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow. The issues that these decisions resolve often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not 'reasonable' amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity."

[90] Note 87 supra, 730. Kaplan states (J Kaplan, "The Limits of the Exclusionary Rule" 26 Stanford LR 1027, 1033 (1974)): "The crucial assumption of feedback to the police is simply belied by experience in most, if not all, police departments."

[91] Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 US 388, 417 (1971) per Burger CJ.

such research projects have been undertaken in the US. In a well known article,[92] Professor Oaks analyses the results of several empirical studies and concludes that "[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure."[93] He points out, for example, that in 1969, charges against about 45 per cent of all persons charged with gambling offences in Chicago were being dismissed after the granting of a motion to suppress evidence obtained as a result of an illegal search and seizure. The comparable figures for narcotics offences and carrying a concealed weapon were 33 per cent and 24 per cent respectively. These figures were interpreted by Oaks as providing evidence that the exclusionary rule did not deter the Chicago police from making illegal searches and seizures in a large proportion of the cases that came to court in the area of gambling, narcotics and weapons offences.[94] In a similar vein, another commentator, Spiotto, points out that the period 1950-70 (in the course of which the exclusionary rule was introduced into Illinois) saw a proportional increase in Chicago in the number of motions to suppress for narcotics and guns. "Yet", in Spiotto's view, "it would seem that if the exclusionary rule had a strongly deterrent effect on the police, the proportional number of motions to suppress would have decreased over that period of time."[95]

The inferences drawn by Oaks and Spiotto have been criticised by Canon, who argues that counting successful motions is an imperfect indicator for several reasons. First, the police or prosecution may, in anticipation of a successful motion, drop charges against the defendant early in the proceedings. Second, worthy motions may never be made because of defendants' ignorance or strategy considerations. Finally, it may be that motions which should be granted will be denied by judges because of their

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[92] D H Oaks, "Studying the Exclusionary Rule in Search and Seizure" 37 U Chi LR 665 (1970).

[93] Id, 755.

[94] Id, 706-7.

[95] J E Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives" 2 J Leg Studies 243, 276 (1973).

ignorance of the law or lack of sympathy for the exclusionary rule.[96] Canon further points out that Chicago could well be regarded as atypical in any event: "[j]udges in Chicago have long been noted for their willingness to grant motions to suppress evidence" and "[i]ndeed, it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful."[97] Canon's own study of 65 cities indicated that in 60 per cent of them motions to suppress were granted 10 per cent of the time or less, and in only 10 per cent of the cities were motions granted as often as 25 per cent of the time, with only one city even approaching Chicago's record.[98]

The other main argument relied upon by Oaks, in his attempt to demonstrate the ineffectiveness of the exclusionary rule as a deterrent, was that an examination of 12 years' law enforcement statistics in Cincinnati showed that the adoption of the exclusionary rule had had no apparent effect upon the number of arrests or convictions in narcotics, weapons or gambling offences. This provided some evidence, in Oaks' view, that the adoption of the exclusionary rule did not produce a significant change in Cincinnati search and seizure practices in relation to these offences.[99] But Canon, on gathering similar data for 14 cities, including Cincinnati, discovered that the Cincinnati experience relied upon by Oaks was not necessarily typical; only four other cities displayed the "rather minimal response pattern" which Cincinnati did.[100]

The studies undertaken by Oaks, Spiotto and Canon were all published in the early 1970s. More recently, Orfield[101] has endeavoured to learn directly from Chicago narcotics officers how the exclusionary rule has influenced their behaviour while conducting searches and seizures. This was achieved by interviewing 26 Chicago

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[96] B C Canon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion" 62 Kentucky LJ 681, 718 (1974).

[97] Id, 720.

[98] Id, 721.

[99] Note 92 supra, 707.

[100] Note 96 supra, 704-6.

[101] M W Orfield, Jr, "The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers" 54 U Chi LR 1016 (1987).

narcotics officers, the interviews being based on a questionnaire which included both narrowly focused and open-ended questions. Orfield's more important findings are the following:

1. Virtually all of the officers knew when their evidence had been suppressed, and understood why.

2. The officers believed that they learned most about changes in the law of search and seizure from in-court experience.

3. When asked what specific lessons they had learned from having evidence suppressed, the officers' responses indicated, first, that they had learned lessons in the law of search and seizure. Orfield observes that these lessons

> represent some of the best evidence produced by this study of the educational aspect of the exclusionary rule's deterrent effect on unlawful police behavior. When evidence is suppressed, the officers learn about the law of search and seizure and apply these lessons to bring their search activity into line with the requirements of the fourth amendment. In particular, the responses show that the exclusionary rule has caused the officers (1) to be especially careful in the context of warrantless searches and (2) to use warrants when at all possible - lessons the exclusionary rule clearly was intended to impart.[102]

Second, suppression had taught officers to be more thorough in their case reports. The case report is a document which an officer must file within eight hours of an arrest, search or seizure, describing the circumstances surrounding the officer's action. The officers reported that, to ensure accurate police testimony, it had become a rule in the Chicago narcotics court that an officer could not testify with respect to anything not listed in his case report. Thus thoroughness in these reports became extremely important, especially in terms of events and observations tending to establish probable

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[102] Id, 1039-40.

cause.

4. At least some of the time, the reason for the seizure of evidence which was later suppressed was not that the officers failed to understand the substantive law, but rather that the officers preferred to risk the evidence being suppressed in order to get it "off the street".

5. All of the officers considered that the exclusionary rule should be preserved with a good faith exception. Many thought that the rule was necessary as a limit on police behaviour. Several also remarked that they appreciated the rule because it gave them a reason, within their peer group, to act properly.

6. All of the officers did not consider that a system in which victims of improper searches could sue police officers directly would be preferable to the exclusionary rule.

It is to be noted that while adopting the view that the sole aim of exclusion is to deter, the US Supreme Court has not overlooked the absence of conclusive empirical evidence supporting the deterrent effect of exclusion. In US v Janis[103] the Court observed that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied."[104] And in Stone v Powell[105] it was said that "[d]espite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it."[106]

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[103] 428 US 433 (1976).
[104] Id, 450 n 22.
[105] 428 US 465 (1976).
[106] Id, 492.

Perhaps the most notable consequence of the US Supreme Court's adoption of the deterrent rationale is the emergence of what is generally known, somewhat misleadingly, as the "good faith exception" to the exclusionary rule. This "exception" was firmly entrenched in the law in 1984, by the decision in US v Leon.[107] Leon suggests that only deliberate, or at least negligent,[108] improprieties should lead to exclusion. The facts in Leon were that police officers initiated a drug-trafficking investigation which involved surveillance of the respondents' activities. On the basis of an affidavit summarising the officers' observations, an application for a warrant to search three residences and the respondents' automobiles was prepared by Officer Rombach. This application was reviewed by several Deputy District Attorneys, and a facially valid search warrant was issued by a state superior court judge. The ensuing searches produced large quantities of drugs and other evidence. It was found by the District Court and the Court of Appeals that the affidavit had been insufficient to establish probable cause, with the result that the warrant had been invalid and the searches illegal. The question before the US Supreme Court was whether an exception to the exclusionary rule should be recognised in the case of "evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[109]

The Court doubted that exclusion would have a deterrent effect if the officers concerned have acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment - such as "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope."[110] However, the officer's reliance on the warrant must also be "objectively

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[107] 104 S Ct 3405 (1984). See also Massachusetts v Sheppard 104 S Ct 3424 (1984) and Illinois v Krull 107 S Ct 1160 (1987).

[108] It is to be noted that the Supreme Court cited approvingly (104 S Ct 3405, 3419 (1984)) an earlier statement of the Court that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." (Emphasis added.)

[109] Id, 3409.

[110] Id, 3420.

reasonable"; "it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued."[111] Exclusion would thus be appropriate where, for example, "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth",[112] or where the warrant is "so facially deficient - ie, in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid."[113] The Court pointed out that, in the present case, Officer Rombach's application for a warrant had been clearly "supported by much more than a 'bare bones' affidavit". This affidavit "related the results of an extensive investigation" and "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." Under these circumstances, the Court concluded, the officers' reliance on the warrant was objectively reasonable and exclusion would be inappropriate.[114]

More recently, it has been held by the US Supreme Court that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorising warrantless administrative searches, but which is subsequently found to violate the Fourth Amendment.[115]

The deterrent rationale for the exclusion of improperly obtained evidence raises two important issues. First, it is to be noted that the rationale reflects an instrumentalist approach to criminal justice: the criminal process may legitimately be used as a tool for achieving good results in the future. Thus the goal of deterrence of future police misconduct justifies the impairment of the public interest in bringing offenders to conviction. In an article written in defence of the deterrent rationale for punishment, Rawls has emphasised the importance of distinguishing between the justification of a

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[111] Id, 3421.
[112] Ibid.
[113] Id, 3422.
[114] Id, 3423.
[115] Illinois v Krull 107 S Ct 1160 (1987).

rule, practice or institution and the justification of a particular action falling under it. "[W]here a form of action is specified by a practice there is no justification possible of the particular action of a particular person save by reference to the practice. In such cases the action is what it is in virtue of the practice and to explain it is to refer to the practice."[116] Thus, where an item of improperly obtained evidence is excluded for deterrent reasons, it is inappropriate to attempt to justify this particular action except by reference to the deterrent rationale for the exclusion of improperly obtained evidence.

The second issue relates to the extent to which exclusion actually deters. The above discussions have shown that whilst the exclusion of improperly obtained evidence would be likely to have some deterrent effect, the extent of this effect is inherently incapable of proper measurement. The results of empirical studies are susceptible of a wide variety of interpretations. However, it is possible to attach too much significance to the absence of conclusive empirical evidence supporting the deterrent effect of exclusion: there is, for example, a similar lack of conclusive empirical evidence to support the deterrent theory of punishment. What is more important - accepting that exclusion will deter to some extent - is the courts' assumption as to when it would do so. The US Supreme Court has made the assumption that exclusion would be likely to deter future improprieties unless the evidence was not obtained as a result of a deliberate or negligent impropriety.

That there is very little consensus as to the extent to which exclusion actually deters is well illustrated by a debate between Posner and Morris published in the Washington Law Review in 1982. Posner's contention is that exclusion in fact overdeters, since the private (and social) cost which exclusion imposes on the State may greatly exceed the social cost of the misconduct. To illustrate this point, Posner provides the following hypothetical example. Suppose that evidence which is crucial to conviction is obtained illegally, and suppose further that the illegal search imposes a cost

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[116] J Rawls, "Two Concepts of Rules" 64 Phil Rev 3, 32 (1955).

of $100 on the person searched in terms of lost time spent cleaning up after the searching officers, but that the loss to society from not being able to convict him can be valued at $10 000. Assuming that the probability of apprehending and convicting the offending policeman is one, optimal deterrence of such illegal searches would be provided by a fine of $100. The much larger "fine" actually imposed would overdeter, "causing the government to steer too far clear of the amorphous boundaries of the fourth amendment compared to what it would do at the optimal fine level." The legal searches forgone and convictions which these would have produced are social opportunity costs which the lower fine would have avoided.[117]

Posner's analysis has been subjected to scrutiny and analysis by Morris. Morris points out, first, that Posner's example is arbitrary: if the arbitrarily assigned dollar values were reversed, then exclusion would economically underdeter. Second, Posner equates the cost of an illegal search simply with the victim's lost time in cleaning up; this does not take account of the actual social costs created by illegal searches and seizures. Finally, Morris points out that the assumption on which Posner's example is premised - that the illegally obtained evidence is crucial to conviction - may be unrealistic; such a situation is not nearly as common as opponents of exclusion claim.[118]

In sum, the deterrent rationale for the exclusion of improperly obtained evidence is not without considerable difficulties. It is arguable that the public interest in the conviction of the guilty should not be compromised on such a speculative basis. The deterrent rationale requires assumptions to be made as to when exclusion would deter and when it would not. To determine admissibility on the basis of such assumptions is, in my view, unsatisfactory. The preferable approach to the problem of police discipline would be to overhaul completely the present police disciplinary procedures. The new procedures introduced by the Police and Criminal Evidence Act are a step in the right

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[117] R A Posner, "Excessive Sanctions for Governmental Misconduct in Criminal Cases" 57 Washington LR 635, 638 (1982).

[118] A A Morris, "The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law" 57 Washington LR 647, 661-2 (1982).

direction, but they are insufficient. The discussion earlier of the Canadian experience showed that even in a jurisdiction where police discipline was considered good and to be seriously pursued, police misconduct apparently remained widespread. What is required now in England is the establishment of a completely independent police disciplinary court which is under judicial supervision.

(c) Towards a Principle of Legitimacy

We saw earlier that it has been recognised not only in England, the US, Canada and Australia but also in jurisdictions such as West Germany that to deal with the problem of improperly obtained evidence either by mandatory inclusion or by mandatory exclusion is inappropriate. To be able to be taken seriously, any possible rationale for exclusion must therefore be capable of accommodating properly the need for improperly obtained evidence to be excluded in some circumstances but not in others. In other words, the public interest in the conviction of the guilty must be able to be weighed meaningfully against the rationale in question: if it is concluded that in the circumstances the public interest in the conviction of the guilty is weightier and should prevail, then the evidence should be admitted regardless of the impropriety. Both the compensatory and deterrent rationales discussed above do not satisfy this requirement of "weighability" comfortably. The compensatory rationale would require that the public interest in the conviction of the guilty be weighed against individual rights; while the deterrent rationale would require the same public interest to be weighed against the speculative future benefits of exclusion. The difficulties involved in these weighing exercises have been already demonstrated.

A preferable approach to the problem of improperly obtained evidence would be to attempt to deal with it in the context of the functions of criminal justice and the duties and responsibilities of the judge in a criminal trial. It is accepted that one function of criminal justice is to secure the conviction of the guilty and the acquittal of the innocent. Thus a trial judge should attempt to secure the admission of relevant and

reliable evidence, and the exclusion of any evidence which may be irrelevant or unreliable. But this is subject to an important qualification: the public interest does not simply require the conviction of the guilty at all costs.[119] Rather, what the public interest demands is that offenders are brought to conviction in a civilised and publicly acceptable manner. It has been emphasised in this chapter that the criminal process has a number of aspects which extend beyond its concern with the conviction of the guilty and acquittal of the innocent. A conviction is an expression of moral condemnation of the defendant; it emphasises the criminal law's behavioural message and points to the defendant as an example to reinforce this message. In the light of this public dimension of criminal justice, it is not too much to expect criminal proceedings to have moral authority and a verdict of guilty moral force. The public has an interest not only in the conviction of the guilty, but also an interest in the moral integrity, or to put it more simply, the quality, of criminal proceedings.[120]

The concept of the public interest in the moral integrity of the criminal process has not received much attention in England but has done so in the US, where it is

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[119] Cf D J Galligan, "More Scepticism about Scepticism" (1988) 8 Oxf J Leg Studies 249, 255: "[T]here are two distinct issues: (i) one concerns rules about the probative value of evidence; (ii) the other concerns rules about the exclusion of evidence for reasons other than reasons of evidentiary value. The question in (i) is how to deal with evidence the probative value of which is in doubt, or which, although of probative value, contains a degree of risk that it will be used improperly. ... The guiding objective in these cases is rectitude of outcome; the question is, given some such uncertainty or defect, how best is rectitude achieved; what is the most rational procedure for obtaining an accurate outcome. These are issues internal [emphasis in original] to proof. In (ii) the issue is whether certain kinds of evidence, which are likely to be of probative value and therefore relevant in achieving rectitude, should be excluded, in order to advance other values or policies ... These are issues external [emphasis in original] to proof; they are based on values which compete with rectitude. The exclusion of evidence in order to uphold those values may mean the loss of probative evidence and thus a lower level of accuracy. The distinction between (i) and (ii) is fundamental, since (i) is concerned with the rationality of proof, while (ii) is concerned with the conflict of values."

[120] See generally I H Dennis, "Reconstructing the Law of Criminal Evidence" (1989) 42 Current Legal Problems 21, 36-8.

referred to as the imperative of judicial integrity.[121] Several US cases contain statements on why the public interest in the moral integrity of the criminal process requires the exclusion of improperly obtained evidence. "[B]y admitting unlawfully seized evidence," it has been observed, "the judiciary becomes a part of what is in fact a single governmental action".[122] The judiciary becomes, in a sense, an accomplice to the improper governmental action. This is not appropriate, since "[a] court sworn to uphold and promote observance of the law cannot adequately perform its function if it ignores illegality in the enforcement of the law."[123] "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[124] The admission of illegally obtained evidence "has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[125]

Thus, by refusing to turn a blind eye to pre-trial executive misconduct a trial court is safeguarding the moral integrity of the trial process. And as the trial process is a part of the entire criminal justice process the moral integrity of the administration of justice as a whole is also protected. The moral integrity of the administration of justice will, it is true, have been compromised already (at the investigatory stage) by the executive impropriety in question. The impropriety is a historical fact; it has already occurred and the court cannot prevent it from compromising the moral integrity of the

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[121] The use of this phrase has been criticised by P Arenella, "Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies" 72 Georgetown LJ 185, 203 (1983): "Indeed, the 'judicial integrity' label is misleading because the issue is not whether the courts are 'condoning' improper executive action or whether they are 'vicariously responsible' for the executive's misconduct. The issue is not the court's integrity but the criminal process' integrity as a self-regulating legal order."

[122] US v Leon 104 S Ct 3430, 3432 (1984).

[123] H Schwartz, "Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin" 33 U Chi LR 719, 752 (1966).

[124] Terry v Ohio 392 US 1, 13 (1968). See also Elkins v US 364 US 206, 223 (1960).

[125] Terry v Ohio 392 US 1, 13 (1968).

administration of justice. However, the important consideration is that by safeguarding the moral integrity of the trial process, the court would be preventing the moral integrity of the administration of justice as a whole from being further compromised.

A lucid summation of the notion that the public interest in the moral integrity of the criminal justice system requires exclusion of improperly obtained evidence is to be found in a judgment of the Supreme Court of California:

> When ... the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as judge. ... Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business". ... It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law.[126]

It is to be noted that the Court was speaking specifically of an illegal search and seizure the sole purpose of which was to obtain prosecution evidence for introduction in proceedings. In such a situation the illegality would, as the Court acknowledged, be totally "unsuccessful" in the absence of admission of the evidence by the trial judge. In many cases, however, prosecution evidence may have been obtained as a result of an impropriety which had not been motivated solely by a desire to gain evidence for introduction in proceedings. The main purpose of the impropriety may have been - for instance - harassment of the defendant. In such a situation it cannot be said that the executive impropriety would be totally unsuccessful in the absence of admission of the evidence. However, the trial judge would still be bringing the impropriety to fruition by admitting the evidence; he would be rendering the impropriety more successful than it otherwise would have been. The dilemma facing the trial judge, then, is precisely the same in this situation as in that which the Californian Supreme Court was discussing:

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[126] People v Cahan 282 P 2d 905, 912 (1955) per Traynor J.

would the moral integrity of the criminal justice system be compromised if the executive were permitted to profit in the courtroom from its pre-trial impropriety?

It is appropriate to draw attention also to the following passage from the judgment of Brandeis J in Olmstead v US:[127]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. ... Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[128]

The idea to which Brandeis J was subscribing in this passage is, it is to be noted, slightly different from, though based upon, the concept of the public interest in the moral integrity of the criminal justice system. The usual concern of the "moral integrity" concept, we have seen, is with the moral integrity of the trial process and hence the criminal justice process as a whole. Brandeis J's argument takes this line of reasoning one step further: by excluding improperly obtained evidence, courts would be safeguarding the moral integrity of the administration of justice and, in doing so, safeguarding the administration of justice from being brought into disrepute in the eyes of the public.[129] This argument clearly reflects an instrumentalist approach to criminal justice and in this respect is reminiscent of our earlier discussion of the idea of exclusion as a deterrent tool. What I am advocating here is the pure version of the

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[127] 277 US 438 (1928).

[128] Id, 485.

[129] There is interesting evidence in the US "that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained": M A Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure" (1980) 9 Anglo-Am LR 238, 243.

"moral integrity" concept - in other words, the moral idea without Brandeis J's practical and instrumentalist extension.

In short, then, the public interest in the moral integrity of the criminal process requires that a court disassociate itself from pre-trial executive impropriety and refrain from bringing such impropriety to fruition; this may be achieved by the exclusion of any evidence obtained as a result of the impropriety.

We come, then, to what I regard as the most appropriate test for the admissibility of improperly obtained evidence. I shall refer to this, for convenience, as the principle of legitimacy.[130] Essentially, this principle is premised on the notion that it is in the public interest that the legitimacy of the criminal process and of the verdict should be safeguarded. Such legitimacy is dependent upon two essential factors: first, conviction of the guilty (and acquittal of the innocent) and, second, the moral integrity of the criminal process. In terms of improperly obtained evidence, the former favours admission while the latter favours exclusion. Thus, the issue of whether an item of improperly obtained evidence should be included or excluded effectively involves a determination of whether the public interest would be better served by inclusion or exclusion.[131] If in the circumstances it is concluded that the public interest in the conviction of the guilty outweighs the public interest in the moral integrity of the criminal process, then the evidence should be admitted regardless of the impropriety.

It might be objected here that, like the compensatory and deterrent rationales, the legitimacy principle requires that considerations of a different nature (the public interest in the conviction of the guilty on the one hand, and the public interest in the moral integrity of the criminal process on the other) be weighed against each other. My answer to this objection would be to point out that these considerations can hardly be

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[130] See A A S Zuckerman, "Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy" (1987) 40 Current Legal Problems 55, 59.

[131] It was recognised in the US Supreme Court as far back as 1928 that in appropriate cases it will be "a less evil that some criminals should escape than that the government should play an ignoble part": Olmstead v US 277 US 438, 470 (1928).

regarded as considerations of a different nature or as incommensurables. The conviction of the guilty and (as I have demonstrated earlier) the protection of the morality of the process are both accepted functions of criminal justice; it is immaterial that each of these considerations pulls in opposite directions where the admissibility of an item of improperly obtained evidence is at issue. By contrast, the deterrent rationale for exclusion, for example, is more problematic because it is not universally accepted that criminal courts should be concerned with the deterrence of future police misconduct. Of course, it is arguable that such deterrence should be a legitimate concern of a criminal court, and this, indeed, is the attitude taken by the US Supreme Court. However, I do not wish to pursue this argument here. All I wish to suggest is that because the English criminal law is (as I have demonstrated earlier) concerned with moral matters as well as with the conviction of the guilty, the principle of legitimacy should be entrenched in English law. In other words, even on concepts of criminal justice as presently accepted in England, the principle should be recognised. If the doctrine of mens rea is entrenched in the English criminal law as a moral principle, so too should the principle of legitimacy.

The principle of legitimacy, or something approaching it, has been expressly adopted in a number of jurisdictions. In both Ireland and Australia the admissibility of improperly obtained evidence is determined by weighing the public interest in the conviction of the guilty against the public interest in the moral integrity of the criminal process. The Irish Supreme Court, for instance, has acknowledged that

> a choice has to be made between desirable ends which may be incompatible. It is desirable in the public interest that crime should be detected and punished. It is desirable that individuals should not be subjected to illegal or inquisitorial methods of investigation and that the State should not attempt to advance its ends by utilising the fruits of such methods. It appears ... 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.[132]

This approach to the problem of improperly obtained evidence is also taken in Australia. Reservations about the Kuruma decision had been expressed in the High Court of Australia as early as 1963,[133] but it was not until its 1970 decision in R v Ireland[134] that the Court expressly declined to follow Kuruma. Barwick CJ said in Ireland:

> Whenever ... 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.[135]

This approach was explained and refined by the High Court in the later case of Bunning v Cross,[136] but it is in the decision of the New South Wales Court of Criminal Appeal in R v Dugan[137] that the best summation of the approach is to be found: "The court is required to make a relative, balanced assessment of the interests of the community in facilitating the apprehension of offenders and bringing them to conviction, on the one hand, and, on the other hand, repudiating conduct and subterfuge in the processes of criminal investigation that are unfair or unlawful in the sense of bearing so gross a character as to offend relevant concepts of democratic decency."[138]

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[132] The People (AG) v O'Brien [1965] IR 142, 160 per Kingsmill Moore J.

[133] See Wendo v R (1963) 109 CLR 559, 562 per Dixon CJ: "It is ... unnecessary to deal with the controversial question whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly. I do not think that in this or any other jurisdiction the question has been put at rest by [Kuruma]".

[134] (1970) 126 CLR 321.

[135] Id, 335.

[136] (1978) 141 CLR 54.

[137] [1984] 2 NSWLR 554.

[138] Id, 558.

It is to be noted that the High Court of Australia has not followed the English approach of determining the admissibility of improperly obtained evidence by reference to the concept of a "fair trial". In the view of the High Court, the admission of improperly obtained evidence can render a trial "unfair" only if the evidence is unreliable.[139] The considerations by reference to which the admissibility of improperly obtained evidence is to be determined are, therefore, outside the "fair trial" concept rather than being encompassed by it.

Also relevant is the Canadian position subsequent to the enactment in 1982 of the Canadian Charter of Rights and Freedoms. Section 24(2) of the Charter provides:

> Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[140]

The interpretation of this provision was the subject of comment by the Canadian Supreme Court in R v Collins.[141] It was pointed out that[142] police misconduct in the investigatory process would often have some effect on the repute of the administration of justice and that, accordingly, the purpose of section 24(2) is really to prevent the administration of justice from being brought into further disrepute by the admission of

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[139] See Bunning v Cross (1978) 141 CLR 54, 77 per Stephen and Aickin JJ: "If a 'breathalyzer' test, properly performed and with all attendant safeguards observed, discloses an excessive level of alcohol in a motorist's blood it is in no sense 'unfair' to use it in the conviction of the motorist, just as it is surely not 'unfair' to use, against a person accused of having in his possession weapons or explosives, evidence obtained by means of an unlawful body search so long, once again, as that search is so conducted as to provide all proper safeguards against weapons or explosives being 'planted' on the accused in the course of the search."

See the explanation of this passage in Cleland v R (1982) 151 CLR 1, 32 per Dawson J: "By this, it seems, they must mean that there can be no unfairness to the accused in the sense that the evidence, although obtained improperly or illegally and hence in some, if not most, cases unfairly, will not, once obtained, be unreliable or untrustworthy in the same way as confessional statements obtained unfairly are unreliable or untrustworthy."

See also Linkletter v Walker 381 US 618, 639 (1965) (fairness of trial not under attack where relevance and reliability of impugned evidence not questioned).

[140] Emphasis added.

[141] (1987) 56 CR (3d) 193.

[142] Id, 208.

the evidence. This further disrepute could result "from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies." The Supreme Court pointed out that it would be necessary, on the other hand, to consider any disrepute which might result from the exclusion of the evidence. What the Court clearly had in mind was the disrepute which could result from the failure of the criminal justice system to bring a guilty person to conviction. "It would be inconsistent with the purpose of s 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission."

The Canadian Supreme Court has also had to face the question of whether the results of public opinion polls can usefully be taken into account in determining admissibility. This idea was rejected by the Court.[143] It emphasised that the issue of disrepute should be determined by applying a "reasonable person" test. Thus the relevant question is whether the admission of the impugned evidence would bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances of the case. "The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable."[144] A decision should not be rendered "that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events."[145] It is therefore to be noted that the Canadian Supreme Court has refused to interpret section 24(2) of the Charter in a literal manner. A literal interpretation of the provision would require courts to pander to public mood - for instance, public clamour for the conviction of a person who has committed a serious offence may mean that all illegality should be excused in order to secure his conviction. Rather, the concern of the Supreme Court is with what may be termed "objective

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[143] R v Collins (1987) 56 CR (3d) 193, 209. See also R v Therens (1985) 18 DLR (4th) 655, 687-8 per Le Dain J.
[144] R v Collins (1987) 56 CR (3d) 193, 209.
[145] Id, 210.

disrepute", and it is for this reason that the results of public opinion polls are regarded as irrelevant.

In a similar vein, the Canadian Supreme Court has also emphasised that

> it is the long-term consequences of regular admission or exclusion of the evidence on the [objective] repute of the administration of justice that must be considered. In other words, while I, and surely most people, would like to see the appellant convicted and punished severely for the offences with which he is charged, the long-term effect of admitting evidence obtained in a manner that infringed the Charter on the basis that the offence is a very serious one, would lead to the result that s 24(2) will only be used to exclude evidence when less serious crimes are involved.[146]

That the Canadian Supreme Court has not interpreted section 24(2) literally has been noted recently by one commentator:

> As a matter of construction, s 24(2) decidedly focuses on ... the maintenance of popular trust in the judicial branch of government. The phrase states that the concern is with whether the admission of the evidence would bring the administration of justice into disrepute. Disrepute has to do with reputation and reputation has to do with what others think of you, not with what standards you would like to emulate. If one was to boil all of this down into simple terms and to appreciate it in its historical context, one would be driven to conclude that the framers of the Charter were attempting to fashion a cautious exclusionary rule where evidence would be refused only in relatively extreme cases; after all, there were no signs at the time that s 24(2) was drafted that the administration of justice was suffering disrepute as a result of the long-standing position that the method of obtainment was irrelevant to the admissibility of probative evidence. ... Despite this, the Supreme Court of Canada has fashioned what has proved, in at least a wide spectrum of cases, to be an extremely aggressive exclusionary remedy. It set the stage for doing so by leaving the partially implicit but unmistakable message that s 24(2) should be understood as though it was intended to preserve judicial integrity, regardless of the impact of exclusion on the reputation of the judicial branch.[147]

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[146] R v Greffe (1990) 107 NR 1, 19 (emphasis in original).

[147] D M Paciocco, "The Judicial Repeal of s 24(2) and the Development of the Canadian Exclusionary Rule" (1990) 32 Crim LQ 326, 341-2 (emphasis in original).

Clearly, then, despite the wording of section 24(2), the approach required by this provision may in effect be identical to that required by the principle of legitimacy which I am advocating. The Canadian Supreme Court has made it clear that what is required is a moral calculation rather than a factual one. It can be expected that the circumstances in which legitimacy would be compromised would equate with those in which the administration of justice would be brought into disrepute in the eyes of a "reasonable person".

It remains, therefore, to consider how the principle of legitimacy can be accommodated within the English framework. We have seen that the admissibility of improperly obtained evidence in particular cases is to be determined in English law by reference to the judicial duty to ensure a fair trial. This is the case both under the common law and under section 78 of the Police and Criminal Evidence Act. It does not matter whether this nebulous concept of a "fair trial" is utilised to accommodate the principle of legitimacy which I have developed. If the concept is to be utilised, my argument could proceed on this basis. A trial is "unfair" in the traditionally accepted sense if the conviction of an innocent person may result. However, a trial may also be rendered unfair if the executive were permitted to profit in court from its pre-trial misconduct. The trial is part of the entire criminal justice process and impropriety at the pre-trial stage is brought to fruition at the trial by the action of the trial judge in admitting improperly obtained evidence. Given that the pre-trial stage is inextricably linked to the trial itself, pre-trial executive impropriety may render "unfair" not only the pre-trial stage but also, in the absence of judicial intervention, the trial itself.[148]

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[148] Cf B Downey, "Judicial Discretion and the Fruit of the Poisoned Tree" (1978) 8 HKLJ 43, 54: "[W]henever an accused person challenges the admissibility of a confession or other evidence because it has been obtained illegally or improperly, he is, in effect, also asking whether it is fair or just to find him guilty of some alleged infringement of the law when his accusers are also guilty of breaking the law, or of conduct which no fair-minded tribunal would tolerate. Surely the court must respond to this question in a way which demonstrates that a trial is not just a game to be played according to certain rules but a serious search for justice."

On the other hand, the judicial duty to ensure a fair trial may be regarded as relevant only in those situations where judicial intervention is required to protect an innocent person from conviction. On this basis it may be said that the principle of legitimacy, while important, is not, however, subsumed within the "fair trial" doctrine. This is the approach taken, as we have seen, in Australia.

It is immaterial whether the fair trial doctrine is utilised to accommodate the reforms which I have suggested. What is required is that English courts <u>do</u> consider the principle of legitimacy when they are confronted with an item of improperly obtained evidence. To put it simply, it does not matter under what guise they do it, so long as they do do it. What seems likely is that the courts will find it convenient to accommodate any reforms of the English law in this area within section 78.[149] In fact it is arguable that in its decisions on section 78 the English Court of Appeal has already moved towards an implicit adoption of the legitimacy principle. We saw in Chapter 2 that there has been acknowledgement by the Court that improperly obtained evidence may be excluded under section 78 if it was obtained in bad faith, or, alternatively, if it was obtained as a result of a "fundamental" (or "significant and substantial") breach. Now if the Court is adopting the compensatory rationale, then the issue of whether the impropriety was committed in good faith is irrelevant; the question is whether the defendant should be compensated via the exclusion of evidence for the infringement of his rights. If, however, it is the deterrent rationale which is being adopted, then the issue of whether the breach was deliberate (or at least negligent) is crucial, while it is immaterial whether the breach violated fundamental rights of the defendant. In any event the Court of Appeal has expressly disassociated itself from the idea of exclusion for deterrent purposes. It may therefore be the case that the Court is in fact coming

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[149] Pattenden, too, feels that in the light of s 78, little will be heard in future of the common law on the subject: R Pattenden, <u>Judicial Discretion and Criminal Litigation</u> (2nd ed 1990) 281.

close to the adoption of a principle of legitimacy. If this is so, then it would be preferable if such adoption could be explicit rather than implicit.[150]

C. STAY OF PROCEEDINGS

It was shown in Chapter 2 that the English position in relation to the procedural implications of illegal extradition is uncertain. Cases of illegal extradition provide an illustration of situations in which the entire prosecution has been commenced on the basis of a pre-trial executive impropriety. The impropriety does not therefore relate merely to evidence, but to the proceedings as a whole, and the question arises as to whether the proceedings should be stayed as an abuse of the process of the court.

A jurisdiction to stay proceedings commenced on the basis of a pre-trial executive impropriety is an obvious corollary of a jurisdiction to exclude improperly obtained evidence. It would be anomalous if the law were to recognise the latter but not the former. The principle of legitimacy requires that proceedings commenced on the basis of a pre-trial executive impropriety be stayed in appropriate circumstances; the continuation of "tainted" proceedings compromises the moral integrity of the criminal justice system in the same way as does the admission of improperly obtained evidence.

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[150] A number of other interpretations of s 78 have been advanced by commentators. See, eg, C J W Allen, "Discretion and Security: Excluding Evidence under Section 78(1) of the Police and Criminal Evidence Act 1984" [1990] Crim LR 80, who argues that the admissibility of improperly obtained evidence should be determined by considering the two relevant threats to security: that posed by the government agents, and that posed by criminals. "The expectation which, for example, I have of continuing to enjoy my property without interruption is diminished, and so correspondingly is my security, if my house may be invaded with impunity by the police in an unauthorised search for stolen goods. But both may also be diminished if a burglar can go free because evidence highly probative of his guilt is kept from the jury by reason of the way in which it was obtained. A judge who, with these considerations in mind, exercises his discretion under section 78(1) will base his decision on whether he believes inclusion or exclusion to present the greater threat to security": id, 89-90.

See also D Feldman, "Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984" [1990] Crim LR 452; M A Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?" (1990) 106 LQR 327; B Robertson, "The Looking-Glass World of Section 78" (1989) 139 NLJ 1223. Gelowitz and Robertson favour restrictive interpretations of the concept of "fairness" under s 78, though Gelowitz does so with regret.

Where, however, neither exclusion nor a stay would be appropriate in the circumstances, the principle of legitimacy may be satisfied merely by adverse judicial comment on the conduct of the police.[151]

In Australia, the High Court recognises the ability of a court to stay proceedings which are an abuse of the process of the court[152] but has not yet had the opportunity to acknowledge that this power extends, as an obvious corollary of the jurisdiction to exclude improperly obtained evidence recognised in Ireland and Bunning v Cross, to the staying of proceedings on the ground of pre-trial executive impropriety. However the New South Wales Court of Appeal, the highest court in the State of New South Wales, has recently stated unequivocally that a stay of proceedings should be available in "illegal extradition" cases in appropriate circumstances.[153] The Irish Supreme Court, too, has acknowledged that it would be anomalous to recognise, as a procedural measure for dealing with pre-trial executive improprieties, a jurisdiction to exclude evidence but not a jurisdiction to stay proceedings. The relevant case is The State (Trimbole) v The Governor of Mountjoy Prison.[154] At approximately 2 pm on 25 October 1984 Trimbole, an Australian citizen, was arrested in purported pursuance of section 30 of the Offences Against the State Act 1939, and detained in Dublin. He made an application to the Irish High Court the following day to have the legality of his detention ascertained. An inquiry held at 7 pm found that his arrest and hence his detention were illegal, and he was accordingly released. In the meantime, extradition arrangements between Ireland and Australia (previously non-existent) had been brought into existence at approximately 1.15 pm. Immediately after his release Trimbole was arrested again, pursuant to a

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[151] Note the following comments by the Court of Appeal in R v Mackintosh (1982) 76 Cr App R 177, 182: "It is most important that the police should bear in mind that it is stupid as well as unlawful to keep someone in custody for a minute longer than they should. It is to be hoped that such behaviour by the police will not occur in future. ... Nothing is more likely to muddy the waters of the administration of justice than this kind of behaviour by police officers."

[152] Barton v R (1980) 147 CLR 75.

[153] Levinge v Director of Custodial Services (1987) 9 NSWLR 546.

[154] [1985] IR 550.

provisional warrant authorising his arrest and detention on a number of charges relating to offences alleged to have been committed in Australia. An application was made by Trimbole to the Irish High Court for an inquiry into the legality of his detention. It was held by Egan J that "the only rational explanation" for the section 30 arrest on 25 October 1984 was to ensure that Trimbole would be available for arrest and detention when extradition arrangements between Ireland and Australia came into effect. Trimbole's present detention in extradition proceedings was "the ultimate result of a conscious and deliberate violation of constitutional rights" and he should, accordingly, be released.[155]

This decision was affirmed by the Irish Supreme Court. McCarthy J, in particular, made strong statements about the need to refrain from turning a blind eye to executive improprieties:

> If ... the Executive itself abuses the process of law as in this case by the wrongful use of s 30 ... and, for what it is worth, persists in that abuse by giving false evidence in the course of the constitutional enquiry, are the courts to turn aside and, apart from administering severe strictures to those concerned, appear to sanction the procedure that has been adopted to secure the extradition of an individual to the requesting State?[156]

It was emphasised that this refusal to turn a blind eye to the executive misconduct should not be affected by the fact that Trimbole was an Australian citizen on a temporary visit to Ireland.[157] McCarthy J then proceeded to acknowledge that whilst there was a strong public interest in the continuation of the extradition proceedings, a far greater principle was at stake:

> The release upon what may appear to have been a technical ground of an individual 'wanted' on serious charges may seem, at first sight, undesirable and, indeed, contrary to public policy; it may seem highly contrary to public policy that elaborate arrangements for extradition should be set at nought by what may be termed an excess of zeal. In my judgment, however, a far greater principle is at stake: that part of the Executive

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[155] Id, 566-7.
[156] Id, 581.
[157] Id, 581-2.

> represented by the Garda authorities and those others responsible for what I have termed the plan to extradite the prosecutor must not be permitted to think that conduct of this kind will at worst result in a judicial rebuke, however severe.[158]

[158] Id, 585.

CHAPTER 4

APPLICATION OF THE PRINCIPLE OF LEGITIMACY

A. INTRODUCTION

It has been demonstrated in the preceding chapter that the most appropriate judicial response to the problem of improperly obtained evidence or the problem of proceedings commenced on the basis of a pre-trial executive impropriety is to apply what I have called the principle of legitimacy. This principle is premised on the notion that criminal justice should be concerned not only with the conviction of the guilty and acquittal of the innocent, but also with the protection of the moral integrity of the criminal process. In this chapter it is proposed to consider in greater detail the practical application of the approach. How should a judge, faced with a defendant's application to have evidence excluded or the proceedings stayed on account of pre-trial executive impropriety, apply the legitimacy principle to determine whether the application should succeed?

B. "CAUSATION" ISSUES

1. Is a Causal Connection Necessary?

In this section it is proposed to consider the extent to which proof of a causal connection between the impropriety and the obtaining of the impugned evidence is necessary. Whilst the discussions are directed specifically to evidence, it should be noted that similar considerations apply in relation to an application for a stay of the proceedings: to what extent should there have been a causal connection between the impropriety and the commencement of the prosecution which it is argued should be stayed on account of the impropriety?

Two decisions of the Supreme Court of Canada, R v Therens[1] and R v Strachan,[2] provide a useful starting point for discussion. In Therens, the accused was operating a motor vehicle when he lost control of the vehicle which collided with a tree at the side of the street. A police constable arrived at the scene and, having reasonable and probable grounds for doing so, required the accused to accompany him for the purpose of obtaining samples of the accused's breath for analysis. At no time was the accused informed of any rights to retain and instruct counsel. The accused was charged with driving with excess alcohol, and argued that the evidence obtained by the breathalyser test should be excluded pursuant to section 24 of the Charter on the ground that he had been denied the right to counsel guaranteed by section 10 of the Charter. Section 10 provides: "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right ...".

The Supreme Court unanimously agreed that the evidence had been "obtained in a manner that infringed or denied" the accused's rights under section 10(b)[3] (although only the majority of the Court thought that the admission of this evidence would bring the administration of justice into disrepute). Estey J, with whom Beetz,[4] Chouinard[5] and Wilson[6] JJ concurred, simply said: "We are here dealing only with direct evidence or evidence thereby obtained directly and I leave to another day any consideration of

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[1] (1985) 18 DLR (4th) 655.

[2] (1988) 90 NR 273.

[3] See also the decision of the New Zealand Court of Appeal in Police v Hall [1976] 2 NZLR 678; G F Orchard, "A Rejection of Unfairly Obtained Evidence: A Commentary on Hall v Police" [1976] NZLJ 434. Contrast the earlier decision of the Canadian Supreme Court in Hogan v R (1974) 48 DLR (3d) 427. The accused, taken to the police station for a breathalyser test, was not permitted to speak to his lawyer before taking the test. The majority of the Supreme Court held that the breathalyser evidence had been correctly admitted, on the basis, inter alia, that "[t]here is no causal connection between the denial of the right to counsel and the obtaining of the certificate of the breathalyzer test which led to his conviction": id, 432.

[4] (1985) 18 DLR (4th) 655, 661.

[5] Id, 663.

[6] Id, 666.

evidence thereby indirectly obtained."[7] Le Dain J, with whom McIntyre J agreed,[8] stated:

> In my opinion, the words "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter", particularly when they are read with the French version, "obtenus dans des conditions qui portent atteinte aux droits et libertés garantis par la présente charte", do not connote or require a relationship of causation. It is sufficient if the infringement or denial of the right or freedom has preceded, or occurred in the course of, the obtaining of the evidence. It is not necessary to establish that the evidence would not have been obtained but for the violation of the Charter.[9]

However, Lamer J, with whom Dickson CJC agreed on this issue,[10] expressed disagreement with Le Dain J's view that the mere fact that the infringement or denial of the right had preceded the obtaining of the evidence would suffice. In Lamer J's view, more than a mere temporal relationship had to be shown. He thought that, in order to determine what consequences should flow under section 24 as a result of the violation in this case, one had "to go back and give some content to s 10(b)".[11] Thus,

> s 10(b) requires at least that the authorities inform the detainee of his rights, not prevent him in any way from exercising them and, where a detainee is required to provide evidence which may be incriminating and refusal to comply is punishable as a criminal offence, ... s 10(b) also imposes a duty not to call upon the detainee to provide that evidence without first informing him of his s 10(b) rights and providing him with a reasonable opportunity and time to retain and instruct counsel. Failure to abide by that duty will lead to the obtainment of evidence in a manner which infringes or denies the detainee's s 10(b) rights.[12]

The issue of causation was considered again by the Canadian Supreme Court in the recent case of R v Strachan.[13] Dickson CJC, with whom the rest of the Court agreed on this point, appeared to recant from his agreement with Lamer J in Therens,

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[7] Id, 662-3 (emphasis added).
[8] Id, 663.
[9] Id, 684 (emphasis added).
[10] Id, 661.
[11] Id, 664.
[12] Id, 665.
[13] (1988) 90 NR 273.

adopting instead the view that in general, the fact that the illegality had preceded the obtaining of the evidence would suffice. Indeed, Lamer J himself recanted in Strachan from the view he had taken in Therens, stating that "I am now satisfied that the approach proposed by Le Dain, J, in Therens is, from a practical point of view, the better one. The requirement for some 'nexus', as I suggested, would be too difficult a test to apply."[14]

Fairly detailed reasoning was provided by Dickson CJC in Strachan for his view that a causal connection was unnecessary. He pointed out that the imposition of a causal requirement would give the courts the "highly artificial task" of speculating whether the evidence would have been discovered had the Charter violation not occurred:

> Isolating the events that caused the evidence to be discovered from those that did not is an exercise in sophistry. Events are complex and dynamic. It will never be possible to state with certainty what would have taken place had a Charter violation not occurred. Speculation of this sort is not, in my view, an appropriate inquiry for the courts.[15]

Additionally, to require a causal connection

> will tend to distort the analysis of the conduct that led to the discovery of evidence. The inquiry will tend to focus narrowly on the actions most directly responsible for the discovery of evidence rather than on the entire course of events leading to its discovery. This will almost inevitably lead to an intellectual endeavour essentially amounting to "splitting hairs" between conduct that violated the Charter and that which did not.[16]

Dickson CJC thought that while in general the mere fact that the illegality had preceded the obtaining of the evidence would suffice, there may be situations where evidence obtained following a Charter breach would be too remote from the violation to be considered to have been "obtained in a manner" which infringed the Charter. These situations should, however, be dealt with on a case by case basis; "[t]here can be no

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[14] Id, 305.
[15] Id, 296.
[16] Id, 297.

hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote."[17]

Finally, Dickson CJC observed that[18] the presence of a causal connection was a factor to be considered in determining whether the admission of the evidence would bring the administration of justice into disrepute - it would weigh in favour of exclusion of the evidence.[19]

In sum, it would appear that after a somewhat shaky start, the Canadian Supreme Court is now firmly of the view that, generally, the mere fact that evidence has been obtained following an illegality would suffice. A causal connection, if it can be established, is a factor to be considered in determining whether the evidence should be admitted or excluded. There is much merit in this approach. It is futile to attempt to isolate completely the issue of causation from the actual determination of admissibility. Indeed it can be demonstrated that this would be the case even if one of the other two rationales for exclusion - compensation or deterrence - were adopted. Now because from the standpoint of compensation the purpose of exclusion is to place the defendant in the position in which he would have been had the impropriety not occurred, proof of a causal connection is clearly necessary. The same is not true, however, of deterrence: the deterrent rationale is premised on the need to protect future suspects from impropriety rather than on the need to protect the defendant from any

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[17] Id, 301.

[18] Id, 302.

[19] See also R v Debot (1989) 102 NR 161, 166-7: "[D]etermining the exclusion or admission of evidence obtained as a result of an unreasonable search is quite different from determining the exclusion or admission of evidence obtained as a result of a search which was perfectly valid but which was carried out contemporaneously with a s 10(b) violation. While the violation of s 8 is directly linked to the obtaining of the evidence, the violation of s 10 could be very remote: indeed it could be totally unrelated to the finding of the evidence. For example, in this case the appellant was subjected to a warrantless 'frisk' search authorized by s 37 of the Food and Drugs Act. The search was carried out contemporaneous to a violation of the appellant's s 10(b) rights under the Charter. But as Wilson, J, notes in her discussion of s 24(2) in this case, the evidence obtained was real evidence the existence of which, and I hasten to add its seizure, was totally unrelated to the Charter violation. This link, or in this case the lack of it, of course makes a great difference when assessing whether the repute of our system of justice will be harmed by the admission of the evidence."

disadvantage flowing from the impropriety. Indeed, it is arguable that the impropriety need not even have preceded the obtaining of the evidence.[20] These two illustrations should suffice to show that the issue of causation is inextricably linked to the actual rationale for exclusion. The approach to be adopted should, therefore, be as follows. A court should not attempt to resolve causation as a preliminary issue, but should proceed directly to the consideration of the principle of legitimacy. It is in the context of considering this principle that issues pertaining to causation may assume importance.

2. The US "Fruit of the Poisonous Tree" Doctrine

It is now timely to consider whether there are situations in which, regardless of a causal connection, the evidence should not be treated as "tainted" and hence liable to be excluded. Guidance on this issue may be obtained from an examination of the US "fruit of the poisonous tree" doctrine (or, more appropriately, the exceptions to the doctrine), to which I now turn.

(a) The Doctrine

In Nardone v US,[21] Frankfurter J, delivering the opinion of the Supreme Court, spoke of the ability of an accused to obtain suppression of evidence by proving that it was "a fruit of the poisonous tree".[22] To put it another way, the US position is that all evidence which can be considered to be a "fruit" of a constitutional violation is regarded as tainted by the illegality.

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[20] P Mirfield, Confessions (1985) 71.
[21] 308 US 338 (1939).
[22] Id, 341.

(b) The Exceptions

(i) Attenuation of Taint

Frankfurter J observed in Nardone:

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.[23]

This observation was applied in Wong Sun v US,[24] in which one of the issues arising for consideration was the admissibility of an unsigned confession made by Wong Sun. The Supreme Court stated:

> We have no occasion to disagree with the finding of the Court of Appeals that his arrest ... was without probable cause or reasonable grounds. At all events no evidentiary consequences turn upon that question. For Wong Sun's unsigned confession was not the fruit of that arrest, and was therefore properly admitted at trial. On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint."[25]

More recently, the attenuation exception was applied in US v Ceccolini.[26] A police officer entered a shop during his break to speak to a friend, who was an employee of the shop. He noticed an envelope containing money behind the counter, and on examining it found that it contained not only money but policy slips as well. Four months later an FBI agent, acting on information supplied by the officer, questioned the employee about the defendant's activities. The defendant subsequently denied involvement in gambling activity before a grand jury. The employee, however, testified to the contrary, with the result that the defendant was indicted for perjury and

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[23] Ibid.
[24] 371 US 471 (1963).
[25] Id, 491 (emphasis added).
[26] 435 US 268 (1978).

found guilty by the District Court. But immediately after the finding of guilt the District Court granted the defendant's motion to "suppress" the employee's testimony on the ground that it was a "fruit of the poisonous tree". The verdict of guilty was set aside. The suppression ruling was affirmed by the Court of Appeals.

The majority of the Supreme Court, however, thought that the Court of Appeals had been wrong in holding that there was insufficient attenuation between the officer's search and the employee's testimony at the trial. The fact that the impugned evidence was live-witness testimony rather than an item of physical evidence was considered significant:

> Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.[27]

In holding that the degree of attenuation was sufficient to dissipate the connection between the illegality and the testimony, the Court took three main considerations into account:[28]

1. The giving of the testimony of the witness was an act of her own free will and was in no way coerced or induced as a result of the discovery of the policy slips. The policy slips themselves were not used in questioning the witness. This consideration was therefore an application of the Court's view (expressed in the passage

[27] Id, 276-7.
[28] Id, 279-80.

quoted above) that live-witness testimony is less likely than physical evidence to be "tainted" by an impropriety.

2. A substantial period of time elapsed between the illegal search and the initial contact with the witness, and again between the initial contact with the witness and the testimony at trial. This consideration would appear to provide a sensible general rule of thumb: clearly, the longer the time lapse between the impropriety and the actual obtaining of the evidence, and the longer the time lapse between the obtaining of the evidence and the adduction of the evidence in court, the lower the tendency of the evidence to "reflect" the impropriety.

3. Exclusion of the evidence would have no deterrent effect on police behaviour. While the particular knowledge to which the witness testified could be logically traced back to the officer's discovery of the policy slips, both the identity of the witness and her relationship with the defendant were well known to those investigating the case. There was in addition no evidence that the officer had entered the shop or picked up the envelope with the intent of obtaining evidence of an illicit gambling operation, or that he had entered the shop with the intent of finding a willing and knowledgeable witness to testify against the defendant.

In short, the fact that exclusion would have no deterrent effect was regarded by the US Supreme Court as a consideration supporting the conclusion that the evidence was not "tainted". As we have seen in Chapter 3, the view adopted in the US is that deterrence is the justification for the exclusion of improperly obtained evidence. Thus the Supreme Court in Ceccolini would appear to have considered that the issue of whether an item of evidence is "tainted" by an impropriety (and hence liable to be excluded) is inextricably linked to the actual rationale for exclusion. This is sensible.

If the exclusion of a particular item of evidence would not serve any purpose,[29] then there is obviously little reason for treating that evidence as "tainted" and hence liable to exclusion.

(ii) Independent Source

A further exception to the "fruit" doctrine is that "[i]f knowledge of [the facts in question] is gained from an independent source they may be proved like any others ...".[30] The latest major Supreme Court pronouncement on the exception[31] is to be found in the recent case of Segura v US.[32] Task Force agents entered an apartment without requesting or receiving permission, and observed, in plain view, various drug paraphernalia. Two agents remained in the apartment awaiting a search warrant. Owing to "administrative delay" the warrant was not issued until some 19 hours after the initial entry into the apartment. In the course of the search conducted pursuant to the warrant, the agents discovered, inter alia, cocaine and records of narcotics transactions, and seized these items. The question before the Supreme Court was "whether, because of an earlier illegal entry, the Fourth Amendment requires suppression of evidence seized later from a private residence pursuant to a valid search warrant which was issued on information obtained by the police before the entry into the residence."[33]

Applying the "independent source" exception, the majority of the Court held that the legality of the initial entry was irrelevant to the admissibility of the impugned evidence since there was an independent source for the warrant under which that evidence was seized:

> None of the information on which the warrant was secured was derived from or related in any way to the

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[29] On the approach being advocated in this thesis, this purpose would be the protection of the legitimacy of the criminal process.

[30] Silverthorne Lumber Co v US 251 US 385, 392 (1920).

[31] A more recent case is Murray v US 108 S Ct 2529 (1988), which was remanded by the Supreme Court for determination whether the exception was established on the facts.

[32] 104 S Ct 3380 (1984).

[33] Id, 3382.

> initial entry into petitioners' apartment; the information came from sources wholly unconnected with the entry and was known to the agents well before the illegal entry. No information obtained during the initial entry or occupation of the apartment was needed or used by the agents to secure the warrant. It is therefore beyond dispute that the information possessed by the agents before they entered the apartment constituted an independent source for the discovery and seizure of the evidence now challenged.[34]

Stevens J, with whom Brennan, Marshall and Blackmun JJ joined, dissented on the basis that exclusion of the evidence would have a deterrent effect: the precise reason for the agents' impoundment of the apartment was the wish to avoid risking loss of access to the evidence within it.[35]

If a problem like that in Segura were to arise in the English context, it should, I suggest, be resolved in the following manner. It is inappropriate to adopt the view of the majority of the US Supreme Court that the impugned evidence cannot be liable to exclusion merely because of the existence of an independent source for the warrant under which the evidence was seized. The fact that the illegality was motivated by a desire to avoid risking loss of access to the evidence means that the evidence does "reflect" the illegality, and to admit it may have the effect of compromising the legitimacy of the criminal process. It cannot be automatically assumed that exclusion would be irrelevant in situations where it is possible to identify an "independent source" for the evidence in question. Adoption of an "independent source" principle would therefore be inappropriate.

(iii) Inevitable Discovery

This exception has been recently applied by the Supreme Court in the case of Nix v Williams.[36] Following the disappearance of a girl, Williams was arrested and arraigned. He was interrogated by police officers in violation of his Sixth Amendment

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[34] Id, 3391.
[35] Id, 3403.
[36] 104 S Ct 2501 (1984).

right to counsel, and made incriminating statements directing the officers to the site of the child's body. A systematic search of the area was being conducted at the same time with the aid of 200 volunteers; this search was terminated when Williams guided the police to the body. It was argued that evidence of the location and condition of the body was admissible on the basis that the body would have been discovered even if the incriminating statements had not been elicited from Williams.

The majority of the Supreme Court accepted this argument. It was said that "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means - here the volunteers' search - then the deterrence rationale has so little basis that the evidence should be received."[37] The case was remanded for further proceedings consistent with this opinion.

By contrast, the view of the minority was that clear and convincing evidence is needed before the government has met its burden of proof on the issue of inevitable discovery. Because this principle "necessarily implicates a hypothetical finding" rather than a factual one, the government should satisfy a heightened burden of proof before being allowed to use such evidence.[38] The minority would have remanded the case for application of the heightened burden of proof by the lower courts.[39]

It should be noted that the recognition by both the majority and minority of the US Supreme Court in Nix v Williams of the "inevitable discovery" principle stems primarily from the Court's acceptance of the deterrent rationale for the exclusion of evidence improperly obtained. The reasoning of the Court was that evidence which would inevitably have been discovered by proper means should not be subject to exclusion because the deterrent effect of the exclusion of such evidence would be negligible. The only point of disagreement between the majority and minority of the

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[37] Id, 2509 (emphasis added).
[38] Id, 2517.
[39] Id, 2518.

Court was as to the standard to which the prosecution was required to prove inevitable discovery. In the context of the approach being advocated in this thesis there is, in my view, no justification for the adoption of an "inevitable discovery" principle, even if inevitable discovery can be proved beyond reasonable doubt. Whilst exclusion may serve no deterrent purpose where inevitable discovery can be proved, the "legitimacy" rationale remains applicable. The impropriety in question would be brought to fruition by the admission of the evidence regardless of whether it would inevitably have been discovered by proper means. Of course, it is arguable that the fact that the police were adopting proper investigatory techniques at the same time should make the court more willing to excuse the impropriety than it otherwise might be. This, however, does not alter the fact that improperly obtained evidence is still liable to be excluded under the principle of legitimacy notwithstanding proof of inevitable discovery.

3. Police and Criminal Evidence Act 1984, Section 76(4): The Problem of Consequentially Discovered Evidence

The problem of evidence discovered in consequence of an inadmissible confession is a specific issue in relation to which the considerations discussed in the preceding section may assume importance. This problem of "consequentially discovered evidence", as it is known, arises where the following preconditions are satisfied:[40]

1. The confession through which the evidence was obtained is not admissible.

2. "[A]s a result of the confession, a fact must be brought to light, which fact is, independently of the truth of the confession, relevant to an issue in the case."[41] That

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[40] See generally P Bates, "Confirmation by Subsequent Facts" (1982) 40 UT Fac L Rev 67, 79-81; A Gotlieb, "Confirmation by Subsequent Facts" (1956) 72 LQR 209, 210-1.

[41] A Gotlieb, id, 210.

is to say, the evidence must have been discovered in consequence of, or by virtue of, the confession.

3. The evidence discovered must tend to verify or confirm either the whole or part of the confession, or what is logically deduced from the confession.

The issue of consequentially discovered evidence is addressed in the Police and Criminal Evidence Act 1984.[42] We have seen in Chapter 2 that section 76(2) of the Act renders a confession inadmissible if it was obtained by oppression or by means likely to render it unreliable. Section 76(4) provides: "The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence - (a) of any facts discovered as a result of the confession ...". Thus, the fact that a confession is inadmissible under section 76(2) does not render any evidence discovered in consequence of the confession automatically inadmissible, and the issue arises as to whether the evidence should be excluded on an application of the principle of legitimacy.

Also worthy of note in relation to consequentially discovered evidence is section 76(5) of the Police and Criminal Evidence Act, which provides: "Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf." Subsection (6) provides:

> Subsection (5) above applies -
> (a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and
> (b) to any fact discovered as a result of a confession which is partly so excluded, if the fact is discovered as a result of the excluded part of the confession.

[42] For discussions of cases decided on the issue prior to the enactment of the Act, see generally P Bates, "Confirmation by Subsequent Facts" (1982) 40 UT Fac L Rev 67; A Gotlieb, "Confirmation by Subsequent Facts" (1956) 72 LQR 209; Z Cowen and P B Carter, Essays on the Laws of Evidence (1956) Ch 2.

Thus, the effect of subsections (5) and (6) is that the prosecution may not adduce evidence of how consequentially discovered evidence was discovered. Only the defence may do so. In adopting this strategy, the legislature appears to have endorsed the view of Erle J in R v Berriman.[43] The accused was charged with concealing the birth of a child. She was asked by a magistrate where she had put the child's body, but her answer was not admitted in evidence. The prosecution then sought to ask a witness whether, in consequence of the answer improperly elicited by the magistrate from the accused, a search had been made at a particular spot and relevant facts discovered. Erle J said: "No! Not in consequence of what she said. You may ask him what search was made, and what things were found, but under the circumstances, I cannot allow that proceeding to be connected with the prisoner."[44]

Of course, consequentially discovered evidence may in some circumstances be of little relevance or value in the absence of evidence of how it was discovered.[45] This is

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[43] (1854) 6 Cox CC 388.

[44] Id, 389 (emphasis in original). See also the Scottish case of Chalmers v HM Advocate [1954] SLT 177, in which the accused, who was suspected of murder, was interrogated at a police station. He was then taken to a cornfield where he pointed out the place where a purse belonging to the deceased was found. The High Court of Justiciary held that evidence adduced by the prosecution of the visit to the cornfield had been incorrectly admitted by the trial judge. Lord Justice-General Cooper said in relation to the episode of the cornfield (id, 183): "This is related to the interrogation in two ways. In point of time the visit to the cornfield followed immediately after the further interrogation which followed the taking of the 'statement'. Moreover, it is admitted that during the further interrogation the appellant was asked what happened to the purse, and that it was 'in consequence of' his answer to that question that he was taken to the cornfield 'to facilitate any search'. I therefore regard the visit to the cornfield under the surveillance of the police as part and parcel of the same transaction as the interrogation, and if the interrogation and the 'statement' which emerged from it are inadmissible as 'unfair', the same criticism must attach to the conducted visit to the cornfield."

Contra R v Gould (1840) 9 Car & P 364, in which a lantern was found as a result of an inadmissible confession made by a prisoner charged with burglary. A witness was permitted to give evidence that he had made a search for the lantern as a result of something that the prisoner had said.

[45] In Chalmers v HM Advocate [1954] SLT 177, 183 Lord Justice-General Cooper said: "If the police had simply produced, and proved the finding of, the purse, that evidence would have carried them little or no distance in this case towards implicating the appellant. It was essential that the appellant should be linked up with the purse, either by oral confession or by its equivalent - tacit admission of knowledge of its whereabouts obtained as a sequel to the interrogation."

a consideration which, one would assume, would be taken into account by the prosecution in determining whether it should adduce the consequentially discovered evidence at all.

C. RELEVANT CRITERIA, CONCEPTS, ISSUES AND FACTORS

In O'Brien, the Irish Supreme Court set out a number of factors which it thought might be taken into account in determining whether or not an item of improperly obtained evidence should be excluded.[46] The High Court of Australia did the same thing in Bunning v Cross,[47] as did the Supreme Court of Canada in the recent case of R v Collins.[48]

It is proposed to embark now upon a detailed discussion and analysis of the criteria, concepts, issues and factors which may be relevant in applying the legitimacy principle. The majority of the considerations discussed are applicable regardless of whether it is the exclusion of evidence or a stay of the proceedings which is being sought by the defendant. As emphasised above, the jurisdiction to stay "tainted" proceedings is simply the complement of the jurisdiction to exclude improperly obtained evidence.

A major factor to be considered is the importance of the rights infringed. The willingness of a court to turn a blind eye to executive impropriety should, it is clear, be inversely proportional to the extent to which the defendant's rights have been infringed. Obviously, the more serious the infringement, the greater the likelihood that the legitimacy of the criminal justice system would be compromised by the admission of the evidence or the continuation of the proceedings. The Supreme Court of Canada has

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[46] [1965] IR 142, 160-1. It was emphasised, however, that "[i]t would not be in accordance with our system of jurisprudence for this Court to attempt to lay down rules to govern future hypothetical cases": id, 161.

[47] (1978) 141 CLR 54.

[48] (1987) 56 CR (3d) 193.

acknowledged that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home."[49]

Clearly, the infringement of what the law regards as a fundamental right of the accused would easily tip the scales in favour of exclusion or a stay. In the English context it is possible to conceive of situations where rights of the accused which are of such fundamental importance are violated that the presumption will be that the exclusion of evidence or a stay of the proceedings is called for. Suppose, for example, that evidence is obtained by means of torture of the accused - a clear infringement of the basic right to freedom from physical abuse. In such a situation it is difficult to imagine a trial judge declaring that legitimacy would not be compromised by admission of the evidence.[50]

It is clear that if the legitimacy principle being advocated in this thesis is to be allowed to realise its full potential, the courts (and particularly the appellate courts) must not shy away from recognising new "rights" and, perhaps more importantly, the applicability to new situations of established rights. For instance, the concept of a right to privacy must now take account of the use of electronic surveillance. The development of modern technology has meant that the use of surreptitious listening devices to obtain evidence of criminal offences is becoming increasingly common. It is to be noted that, in England, the Interception of Communications Act 1985 prohibits the intentional interception of "a communication in the course of its transmission by post or by means of a public telecommunication system" (section 1(1)), except in certain

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[49] R v Pohoretsky (1987) 58 CR (3d) 113, 116.

[50] Cf the dissenting judgment of Le Dain J in R v Therens (1985) 18 DLR (4th) 655. This case concerned a violation of s 10(b) of the Charter, which provides that "[e]veryone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right". Le Dain J (id, 687) thought that "the right to counsel is of such fundamental importance that its denial in a criminal law context must prima facie discredit the administration of justice." He went on to say that because the police officer had acted in good faith, "I am unable to conclude, having regard to all the circumstances, as required by s 24(2) of the Charter, that the admission of the evidence of the breathalyzer test in this particular case would bring the administration of justice into disrepute".

specified circumstances (section 1(3)). Provision is also made in the Act for the issue by the Secretary of State of warrants for interception (section 2).

The US Supreme Court has devoted considerable attention to the issue of electronic surveillance.[51] Its decisions are instructive in demonstrating the way in which a court might determine whether rights of privacy have been infringed by the use of surreptitious listening devices. In Katz v US,[52] evidence of the defendant's end of telephone conversations was obtained by FBI agents who had attached an electronic listening and recording device to the outside of a public telephone booth. The Supreme Court held that the Government's activities "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[53] As was put by Harlan J: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" A public telephone booth "is a temporarily private place whose occupants' expectations of freedom from intrusion are recognized as reasonable."[54]

In the recent case of US v Karo,[55] a Drug Enforcement Administration (DEA) agent learned that the defendants had ordered 50 gallons of ether from a Government informer. With the informer's consent, DEA agents substituted their own can containing an electronic tracking device ("beeper") for one of the cans in the shipment. Karo collected the ether from the informer, and the beeper was then monitored. The Court held that the Fourth Amendment rights of none of the defendants had been violated by the actual placement of the beeper into the can. The can into which the beeper was

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[51] For Canadian discussion, see N MacDonald, "Electronic Surveillance in Crime Detection: An Analysis of Canadian Wiretapping Law" (1987) 10(3) Dalhousie LJ 141.

[52] 389 US 347 (1967).

[53] Id, 353.

[54] Id, 361.

[55] 104 S Ct 3296 (1984); noted by C S Sullivan, 'Comment' 31 NY Law School LR 345 (1986).

placed belonged at the time to the DEA, and thus the defendants could not be said to have had any legitimate expectation of privacy in it. Further, the mere transfer to Karo of the can containing the beeper infringed no privacy interest as it conveyed no information that Karo wished to keep private, and did not interfere with anyone's possessory interest in a meaningful way.[56] However "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." The Court pointed out that, had a DEA agent entered the house in question, surreptitiously and without a warrant, to verify that the ether was in the house, he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. "For purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house."[57]

The unsatisfactory consequence of failure by the courts to recognise new "rights" is well illustrated by the judgment of Pidgeon J of the Western Australian Court of Criminal Appeal in R v Coward.[58] The appellant was convicted of having broken and entered a dwelling-house with intent to commit an offence therein. He argued on appeal that evidence of the offence given by certain police officers should have been excluded on the ground that, but for their encouragement and facilitation, the offence would not have occurred. The Court unanimously dismissed the appeal, Pidgeon J doing so on the basis that no right of the appellant had been infringed. After examining the facts of the three cases in which the High Court of Australia had considered the issue of improperly obtained evidence,[59] Pidgeon J remarked: "There is a right against self-incrimination and a right against search which I consider these cases are protecting. I would not consider

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[56] 104 S Ct 3296, 3301-2 (1984).
[57] Id, 3303.
[58] (1985) 16 A Crim R 257.
[59] R v Ireland (1970) 126 CLR 321; Bunning v Cross (1978) 141 CLR 54; Cleland v R (1982) 151 CLR 1.

that a citizen could claim a right not to be led into temptation and this is an area not contemplated by the cases referred to."[60] This reasoning is spurious. As will be discussed in Chapter 6, the impropriety of executive inducement of a crime which the defendant would not have committed but for the inducement is arguably far greater than that of other forms of executive impropriety in criminal investigation. What Pidgeon J's judgment confirms is that in practice, application of the legitimacy principle would be likely to lead to anomalous results unless a serious attempt were made to categorise (either specifically or generally) the kinds of rights which the criminal justice system is prepared to protect. Such development demands no more than the system of common law has already achieved in so many diverse areas. Of course at present there appears to be a marked judicial reluctance to classify as infringements of "rights" those improprieties which, however serious, have received limited judicial or legislative attention.

Situations may arise where the infringement was of the rights not of the accused, but of a third party. Legitimacy is obviously less likely to be compromised where a court excuses a violation of the rights of a third party than where it excuses a violation of the rights of the defendant. A third party is not exposed to the possibility of conviction and punishment (and the attendant social stigma). However it must be remembered that there would, for example, be a strong case for the exclusion of evidence obtained by torture of a third party.

Before leaving the issue of individual rights, the following note of warning should be sounded. It is important to avoid the temptation to regard non-compliance with statutory procedures for criminal investigation as necessarily constituting more serious infringements of individual rights than violations of non-statutory standards. As Ashworth, writing prior to the enactment of the Police and Criminal Evidence Act 1984, noted very succinctly:

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[60] (1985) 16 A Crim R 257, 267.

> [T]he suggestion that procedures for criminal investigation which have been laid down by statute should be enforced more rigorously than non-statutory standards and procedures ... could never be an argument of general validity in England. It would be as fallacious to maintain that breath test procedures are more important than the confessions rule because the former are statute-based, as it would be to argue that speeding is a more serious offence than murder for the same reason. In a legal system where no attempt has been made to codify rules and standards for criminal investigation, the intervention of the legislature may be little more than an historical accident and it holds no significance for judgments of the importance of rights and liberties. If there had been no common law rule on confessions, Parliament would certainly have created one.[61]

Indeed, certain rights which are considered so fundamental that they are in some jurisdictions protected by a written Bill of Rights are simply common law rights in the United Kingdom. One example, as we shall see in greater detail in Chapter 5, is the right of a person charged to be tried within a reasonable time. In Bell v DPP[62] the Privy Council, in considering the provision of the written Jamaican Constitution which guarantees this right, pointed out that the same right is recognised in England at common law. The crucial point to be noted, therefore, is that in a jurisdiction where there does not exist a written Bill of Rights, and where statutory procedures for criminal investigation are still relatively uncommon, the common law remains the primary guarantor of rights rights which may be important or even fundamental.

Whether the impropriety in question was deliberate or at least culpably negligent is another factor which ought to be taken into account in applying the legitimacy principle. Turning a blind eye to an executive impropriety would have a higher

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[61] A J Ashworth, "Excluding Evidence as Protecting Rights" [1977] Crim LR 723, 732.

[62] [1985] AC 937.

tendency to compromise legitimacy if the impropriety was deliberate or culpably negligent rather than merely inadvertent.[63]

The Irish Supreme Court,[64] High Court of Australia,[65] and Supreme Court of Canada[66] have all acknowledged that the gravity of the offence charged is an important factor to be considered in applying the legitimacy principle. Obviously the more serious the offence charged, the greater the public interest in bringing the perpetrator to conviction, and hence the lower the likelihood of legitimacy being compromised should the impropriety be excused by the court. Thus in Bunning v Cross[67] the Australian High Court stated that "[s]ome examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority"[68] is called for. In O'Brien, Kingsmill Moore J of the Irish Supreme Court referred to two US decisions[69] involving gambling offences, in which evidence of conversations overheard by means of microphones illegally concealed on private property was excluded. He added: "I can, however, conceive that if a discretionary rule were applicable a judge

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[63] See R v Sanelli (1990) 103 NR 86, 115-6: "[W]hat strikes one here is that the breach was in no way deliberate, wilful or flagrant. The police officers acted entirely in good faith. They were acting in accordance with what they had good reason to believe was the law - as it had been for many years before the advent of the Charter. The reasonableness of their action is underscored by the seriousness of the offence. They had reasonable and probable cause to believe the offence had been committed, and had they properly understood the law, they could have obtained an authorization under the Code to intercept the communication. Indeed, they could have proceeded without resorting to electronic surveillance and relied solely on the evidence of the undercover officer or the informer. In short, the Charter breach stemmed from an entirely reasonable misunderstanding of the law by the police officers who would otherwise have obtained the necessary evidence to convict the accused in any event. Under these circumstances, I hold that the appellant has not established that the admission of the evidence would bring the administration of justice into disrepute." See also R v Debot (1989) 102 NR 161, 201 per Wilson J.

[64] The People (AG) v O'Brien [1965] IR 142, 160-1.

[65] Bunning v Cross (1978) 141 CLR 54, 80. The Australian Law Reform Commission takes the same view (Australian Law Reform Commission, Evidence (Vol 1) (Report No 26: Interim) (1985) par 964): "There is, for example, a greater public interest that a murderer be convicted and dealt with under the law than someone guilty of a victimless crime."

[66] R v Collins (1987) 56 CR (3d) 193, 212.

[67] (1978) 141 CLR 54.

[68] Id, 80.

[69] People v Cahan 282 P 2d 905 (1955); Silverman v US 365 US 505 (1961).

might take a different view if the conversation revealed a conspiracy to murder or the activities of a narcotic organisation."[70]

In determining whether an item of improperly obtained evidence should be excluded, the cogency (probative value) of the evidence should be considered. The High Court of Australia has acknowledged that cogency "bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction."[71] Thus, the more cogent the evidence, the stronger the case for its admission. However, the same Court also recognises that[72] "cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless." The reason for this is that

> [t]o treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.

The presence of circumstances of urgency, emergency or necessity would tend in favour of excusing a pre-trial executive impropriety. For example, it may be that an item of evidence will almost certainly be destroyed if it is not seized immediately. Again, "[m]uch may be forgiven a police officer in pursuit of a homicidal maniac, or of

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[70] [1965] IR 142, 161. It is to be noted that a suggested modification to the US exclusionary rule, proposed by Professor Kaplan in 1974, was that the rule should be inapplicable "in the most serious cases - treason, espionage, murder, armed robbery, and kidnaping by organized groups." See generally J Kaplan, "The Limits of the Exclusionary Rule" 26 Stanford LR 1027, 1046-9 (1974). For criticism of this proposal, see W R LaFave, Search and Seizure: A Treatise on the Fourth Amendment (Vol 1) (2nd ed 1987) 43-4 and associated pages in 1990 Pocket Part. See also Y Kamisar, "'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule" 86 Mich LR 1 (1987).

[71] Bunning v Cross (1978) 141 CLR 54, 79 per Stephen and Aickin JJ.

[72] Ibid.

a robber about to flee the jurisdiction, or of a sexual offender against children who is likely to repeat his crime."[73]

The availability of a direct sanction against the person(s) responsible for the pre-trial executive impropriety may also be a relevant factor. In French v Scarman[74] the Supreme Court of South Australia said in relation to section 47f of the Road Traffic Act 1961-76 (SA):

> The section imposes no penalty upon a police officer who fails to comply with sub-s (2). ... The absence of any sanction other than the exclusion of the evidence of the breath analysis must be an important factor in considering whether to exercise the discretion.[75]

The Australian Law Reform Commission, too, has acknowledged that a relevant factor in applying the legitimacy principle is "whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the conduct concerned".[76]

By contrast, the Supreme Court of Canada has said in relation to illegally obtained evidence that "[o]nce it has been decided that the administration of justice would be brought into disrepute by the admission of the evidence, the disrepute will not be lessened by the existence of some ancillary remedy".[77] This is clearly inaccurate as a generality. Turning a blind eye to executive misconduct could have a lower tendency to compromise the legitimacy of the criminal justice system where some other proceeding has been or is likely to be taken in relation to the misconduct, than would otherwise be the case. Obviously, the nature of the ancillary proceeding in question is an important consideration. If the defendant has already received or is entitled to substantial

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[73] New South Wales Law Reform Commission, Working Paper on Illegally and Improperly Obtained Evidence (1979) par 3.12. In a similar vein the Canadian Supreme Court has acknowledged (R v Genest (1989) 91 NR 161, 196) that "whether the circumstances of the case show a real threat of violent behaviour, whether directed at the police or third parties", is a relevant consideration. "Obviously, the police will use a different approach when the suspect is known to be armed and dangerous than they will in arresting someone for outstanding traffic tickets."

[74] (1979) 20 SASR 333.

[75] Id, 340-1.

[76] Australian Law Reform Commission, Evidence (Vol 2) (Report No 26: Interim) (1985), Draft Evidence Bill 19[ ], cl 116(3)(g).

[77] R v Collins (1987) 56 CR (3d) 193, 213.

monetary compensation in respect of the impropriety, it may quite legitimately be decided that turning a blind eye to the impropriety would not compromise legitimacy to the extent that turning a blind eye to a totally "unremedied" or "unremediable" impropriety would do. On the other hand, the fact that internal disciplinary measures are likely to be taken against the errant policeman would probably be of little relevance.[78]

Cases may arise in which the person responsible for the impropriety in the obtaining of the evidence was not a police officer or other agent of the executive, but a private individual. The US position is instructive, with the case of Burdeau v McDowell[79] being regarded as the leading authority on the issue. The facts were that items which the petitioner alleged would be submitted to the grand jury for use against him in charging him with fraudulent use of the mails had been taken from his room by private detectives. It was held by the majority of the Supreme Court that the "origin and history" of the Fourth Amendment "clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies".[80] In the present case, "[t]he papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character."[81]

Given that our concern in this thesis is with the problem of pre-trial executive improprieties, it is necessary to determine whether, and to what extent, an impropriety can be regarded as an executive impropriety even though it was committed by a private

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[78] See also P Mirfield, "The Early Jurisprudence of Judicial Disrepute" (1988) 30 Crim LQ 434, 463-4.
[79] 256 US 465 (1921).
[80] Id, 475.
[81] Id, 476 (emphasis added).

individual. In other words, even if an impropriety was committed by a private individual, the executive may have been sufficiently "connected" with the impropriety to render it an executive impropriety. Obviously, the more "connected" the executive with the impropriety, the greater the case for the exclusion of the evidence or a stay of the proceedings, as the case may be.

A number of US cases decided subsequent to Burdeau have been concerned with the problem of whether particular searches by private individuals could be regarded as actions of "sovereign authority".[82] These decisions are relevant for our purposes inasmuch as they may throw light upon the issue of how the executive can become "involved" in an otherwise private action. For the purposes of exegesis, it is convenient to conduct the discussion under a number of headings:[83]

(a) Government participation or instigation

Obviously, a search would be rendered governmental by official participation or instigation.[84]

(b) Other pre-search government encouragement

This would be a question of degree. In US v Davis[85] a search of carry-on luggage at an airport was held to be governmental because it was "part of a nationwide anti-hijacking program conceived, directed, and implemented by federal officials in

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[82] The relevant authorities are conveniently collected in P G Reiter, "Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual" 36 ALR 3d 553.

[83] Cf W R LaFave, Search and Seizure: A Treatise on the Fourth Amendment (Vol 1) (2nd ed 1987) 178-219 and associated pages in 1990 Pocket Part.

[84] See, eg, Corngold v US 367 F 2d 1, 5-6 (9th Cir 1966): "The customs agents joined actively in the search. They held open the flaps of the large package; removed, opened, and inspected the contents of the small boxes which it contained; and marked the small boxes for future identification. Thus, at the very least, the search of appellant's package was a joint operation of the customs agents and the TWA employee. When a federal agent participates in such a joint endeavor, 'the effect is the same as though he had engaged in the undertaking as one exclusively his own.'"

[85] 482 F 2d 893 (9th Cir 1973).

cooperation with air carriers."[86] By contrast, encouragement of a more general nature would not suffice. It would be insufficient, for example, "that it is established government policy to pay an informer's fee for information concerning certain forms of criminal conduct."[87]

(c) "Public function"

The courts have generally held that a search is a governmental action only where it is conducted by an individual exercising a "public function". Thus searches conducted by store detectives, insurance investigators, etc are not generally governmental in nature irrespective of the fact that these individuals have as their responsibility the prevention and detection of criminal conduct. In People v Smith,[88] however, the actions of a store detective were held to be governmental on the basis that he was also a special patrolman who had been appointed by the police commissioner, was subject to the orders of the commissioner, and could be removed by the commissioner.[89]

It has been observed by the US Supreme Court that

> this Court has never limited the [Fourth] Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. ... [W]e have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, ... Occupational Safety and Health Act inspectors, ... and even firemen entering privately owned premises to battle a fire, ... are all subject to the restraints imposed by the Fourth Amendment.[90]

The Supreme Court has recently acknowledged the applicability of the Fourth Amendment to searches conducted by public (that is, State) school officials,[91] and to "[s]earches and seizures by government employers or supervisors of the private property

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[86] Id, 897.
[87] Note 83 supra, 194.
[88] 368 NYS 2d 954 (1975).
[89] Id, 957.
[90] New Jersey v TLO 469 US 325, 335 (1985).
[91] New Jersey v TLO 469 US 325 (1985).

of their employees"[92] (for example, the search of the office of an employee of a State hospital by hospital officials and consequent seizure of personal items from his desk and file cabinets[93]).

(d) "Transnational" aspects[94]

In the recent case of US v Verdugo-Urquidez,[95] the US Supreme Court was confronted with the following problem. The respondent was a Mexican citizen and resident who was suspected of being a leader of an organisation which smuggled narcotics into the US. A warrant for his arrest having been obtained, he was apprehended by Mexican police and transported to the US, where he was arrested. Following his arrest, DEA agents, working with Mexican officials, searched his Mexican residences and seized certain documents. The issue before the Supreme Court was "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[96]

Rehnquist CJ, delivering the opinion of the Court, answered this question in the negative. It was held that "the people" protected by the Fourth Amendment referred to a class of persons who were part of a national community, or who had otherwise developed sufficient connection with the US to be considered part of that community. This conclusion was supported both by case law and by the available historical

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[92] O'Connor v Ortega 107 S Ct 1492, 1497 (1987).

[93] O'Connor v Ortega 107 S Ct 1492 (1987).

[94] See generally Y G Grassie, "Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?" 64 Wash ULQ 1205 (1986); R L King, "The International Silver Platter and the 'Shocks the Conscience' Test: US Law Enforcement Overseas" 67 Wash ULQ 489 (1989); Note, "The Extraterritorial Applicability of the Fourth Amendment" 102 Harvard LR 1672 (1989); S A Saltzburg, "The Reach of the Bill of Rights Beyond the Terra Firma of the United States" in R B Lillich (ed), International Aspects of Criminal Law: Enforcing United States Law in the World Community (Fourth Sokol Colloquium) (1981); S H Theisen, "Evidence Seized in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?" 25 William and Mary LR 161 (1983).

[95] 110 S Ct 1056 (1990).

[96] Id, 1059.

information, which showed that the Fourth Amendment was aimed at protecting the people of the US against arbitrary action by their own Government, rather than being intended to restrain the actions of the Federal Government against aliens outside US territory.[97] It was held that policy considerations, too, supported the opinion of the Court:

> The United States frequently employs armed forces outside this country - over 200 times in our history - for the protection of American citizens or national security. ... Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.[98]

Concurring judgments were delivered by Kennedy and Stevens JJ. Kennedy J was in agreement with the opinion of the Court, but pointed out that this did not imply that persons in the position of the respondent would have no constitutional protection. The defendant would, for example, be protected by the dictates of the Due Process Clause of the Fifth Amendment.[99] In this case, however, nothing approaching a violation of due process had occurred.[100]

While concurring in the Court's judgment that no violation of the Fourth Amendment had occurred, Stevens J reached this conclusion in a different way. In contrast to Rehnquist CJ, he felt that aliens lawfully present in the US were among the "people" entitled to the protection of the Fourth Amendment, and that the respondent was certainly such a person even though he had been brought and held in the US against his will. However, Stevens J thought that the search in question could not be

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[97] Id, 1061-4.

[98] Id, 1065.

[99] Due process clauses are to be found in both the Fifth Amendment ("No person ... shall ... be deprived of life, liberty, or property, without due process of law ...") and the Fourteenth Amendment ("No State shall ... deprive any person of life, liberty, or property, without due process of law ...").

[100] 110 S Ct 1056, 1068 (1990).

regarded as "unreasonable" under the Fourth Amendment: "I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches."[101]

Two dissenting judgments were delivered: one by Brennan and Marshall JJ, and the other by Blackmun J. The essence of these judgments is that the term "the people" in the Fourth Amendment should be taken as meaning "the governed", or, in other words, those subject to "the government".[102] It was held that the focus of the Fourth Amendment was on what the Government could and could not do, and on how it could act, rather than on against whom these actions could be taken.[103] Thus Verdugo-Urquidez was protected by the Fourth Amendment because the Government had, by investigating and prosecuting him, made him one of "the governed". But to accept this did not, however, require acceptance of enemy aliens in wartime as among "the governed" entitled to the protection of the Fourth Amendment.[104]

In sum, it is to be noted that the majority of the US Supreme Court has adopted a narrow approach to the applicability of the Fourth Amendment to searches and seizures conducted abroad. The judgment of Kennedy J, however, is interesting inasmuch as it acknowledges that due process principles may be applicable in appropriate circumstances. It is possible, for example, that if those conducting the search and seizure had acted in a particularly egregious manner, conviction of the defendant would be barred. Indeed, it has been acknowledged in some US cases that due process principles may bar conviction even where - unlike the situation in Verdugo-Urquidez - local agents cannot be said to have been in privity with the foreign impropriety. To take an example, suppose that foreign police, without any instigation by local officials and acting solely for the purpose of enforcing their own law, conduct

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[101] Ibid.
[102] Id, 1072.
[103] Id, 1073.
[104] Id, 1075.

a search which would be deemed illegal if conducted in this jurisdiction.[105] Evidence obtained as a result of the search is found to constitute evidence of criminal conduct in this jurisdiction and is accordingly handed over to the local authorities. There are dicta in the US to the effect that such evidence can be excluded "if the circumstances of the foreign search and seizure are so extreme that they 'shock the judicial conscience'".[106]

Of interest in this context is the US position on illegal extraditions. In Ker v Illinois[107] the Supreme Court accepted the proposition that "forcible seizure in another country, and transfer by violence, force, or fraud, to this country ... is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court."[108] This was reaffirmed by the Court in 1952, in the case of Frisbie v Collins.[109] However, the Court of Appeals qualified this principle in US v Toscanino.[110] In doing so the Court relied largely upon due process principles. A classic illustration of the application of due process principles in a case involving pre-trial police illegality is to be found in the decision of the Supreme Court in Rochin v California.[111] After police officers, having information that the defendant was selling narcotics, illegally entered his dwelling, he swallowed two capsules containing morphine. He was taken to a hospital where, at the direction of one of the officers, and against his will, a doctor forced an emetic solution through a tube into his stomach. The defendant was convicted of illegal possession of morphine. The Supreme Court held that this conviction should be reversed because the methods by which it had been obtained

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[105] This example has been adopted from note 83 supra, 213.

[106] US v Morrow 537 F 2d 120, 139 (5th Cir 1976) (emphasis added). See also US v Hensel 699 F 2d 18 (1st Cir 1983) and Commonwealth v Gagnon 449 NE 2d 686 (Mass App 1983).

[107] 119 US 436 (1886). For criticism of the decision see E D Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law" 28 AJIL 231 (1934).

[108] 119 US 436, 444 (1886).

[109] 342 US 519 (1952). See also Gerstein v Pugh 420 US 103, 119 (1975).

[110] 500 F 2d 267 (2nd Cir 1974).

[111] 342 US 165 (1952).

offended due process. In a remarkable passage, the Court stated: "[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."[112]

The facts in Toscanino were as follows. The defendant had been allegedly kidnapped from his home in Montevideo, Uruguay by American agents, detained for three weeks of interrogation accompanied by physical torture in Brazil, and then brought to the US. It was acknowledged by the Court of Appeals that, if proved, these actions would have violated two international treaties obliging the US Government to respect the territorial sovereignty of Uruguay. The Court considered that due process required a court to divest itself of jurisdiction over a defendant whose presence had been secured as the result of the government's deliberate, unnecessary and unreasonable invasion of his constitutional rights. Accordingly, Toscanino should be entitled to some relief if his allegations were true.[113] The case was remanded to the district court for further proceedings not inconsistent with this opinion.[114]

In subsequent cases, however, courts have striven to confine the Toscanino decision within strict boundaries. US ex rel Lujan v Gengler[115] is illustrative. Lujan contended that his abduction in Bolivia by Bolivian police acting as paid agents of the US, and subsequent placement on a flight bound for the US violated due process. At no time had a request for extradition been made by the US, nor had he been formally charged by the Bolivian police. The Court distinguished Toscanino on the ground that "[t]he cruel, inhuman and outrageous treatment allegedly suffered by Toscanino [at the hands of US agents] brought his case within the Rochin principle".[116] In the present case, however, there was no allegation of governmental conduct sufficient to convert a

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[112] Id, 172.
[113] 500 F 2d 267, 275-6 (2nd Cir 1974).
[114] Id, 281.
[115] 510 F 2d 62 (2nd Cir 1975).
[116] Id, 65-6.

simply illegal abduction into one which violated due process. Indeed, Lujan suffered no greater deprivation than he would have endured through lawful extradition.[117] Thus the position would appear to be that where illegal extradition is accompanied by torture, brutality or similar physical abuse by US agents, due process is violated; otherwise, the holdings of the Supreme Court in Ker and Frisbie apply.[118] This position has been reiterated by courts in a number of subsequent cases.[119] For example, it was held in US v Lira[120] that due process had not been violated where on the request of the US Government for the arrest and expulsion of the defendant from Chile, he was arrested and tortured by the Chilean police before being expelled:

> Unlike Toscanino, where the defendant was kidnapped from Uruguay in defiance of the laws of the country, here the Government merely asked the Chilean Government to arrest and expel Mellafe [Lira's true name] in accord with its own procedures. This action can hardly be faulted. Agencies such as the DEA presumably must cooperate with many foreign governments in seeking transfer to the United States of violators of United States law. The DEA can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards.[121]

Thus, in spite of dicta in the US to the effect that improprieties committed abroad would be relevant in extreme cases (that is, where the conduct was so egregious as to shock the judicial conscience), an examination of the US illegal extradition cases throws doubts on the likelihood that this principle would often be given practical application. Even torture and other physical abuse by foreign police would appear not to require that the defendant should not stand trial.

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[117] Id, 66.

[118] Id, 69.

[119] See US v Lira 515 F 2d 68 (2nd Cir 1975); US v Valot 625 F 2d 308 (9th Cir 1980); Weddell v Meierhenry 636 F 2d 211 (8th Cir 1980); US v Reed 639 F 2d 896 (2nd Cir 1981); US v Cordero 668 F 2d 32, 36 (1st Cir 1981).

[120] 515 F 2d 68 (2nd Cir 1975).

[121] Id, 71.

(e) **Summary**

The above review has demonstrated that the concept of "executive" conduct should encompass not only the conduct of the police but also all other conduct which is of a governmental character. Furthermore, an impropriety which would otherwise be a non-governmental action may nonetheless acquire a governmental character if the executive is sufficiently "connected" with it to render it so. Obviously, the more "connected" the executive with the impropriety, the stronger the case for not turning a blind eye to the impropriety. In extreme cases, however, even purely private misconduct, or executive misconduct which occurred in a foreign jurisdiction, may be capable of leading to the exclusion of evidence or a stay of the proceedings. Thus the purely private or foreign misconduct would need to be of such an egregious nature that the mere act of allowing the executive to benefit from it would compromise the legitimacy of the criminal process. The US cases suggest that even torture in a foreign jurisdiction would not suffice, unless US agents can be shown to have participated in the torture.

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In Bunning v Cross,[122] the High Court of Australia considered that a factor to be taken into account in applying the legitimacy principle was "that an examination of the legislation suggests that there was a quite deliberate intent on the part of the legislature narrowly to restrict the police in their power to require a motorist to attend a police station and there undergo a 'breathalyzer' test. This ... factor is, of course, one favouring rejection of the evidence."[123] At issue in Bunning v Cross was breathalyser evidence which had been obtained in contravention of certain provisions of the Western Australian road traffic legislation. The relevant provisions of this legislation are well summed up in the following passage from the judgment of the High Court:

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[122] (1978) 141 CLR 54.
[123] Id, 80.

> The Western Australian legislation empowers police to require a motorist to go to a police station and there submit to such a test in only three cases: if he is first required to undergo an 'on the spot' preliminary test, involving the use of a portable 'Alcotest' appliance, and he fails or refuses to do so or is incapable of doing so; if, having submitted to an 'Alcotest', it indicates an excessive percentage of alcohol in his blood and, thirdly, if the police have reasonable grounds to believe that the motorist has been driving while under the influence of alcohol to an extent rendering him incapable of having proper control of his vehicle.[124]

None of these conditions was satisfied in the present case: the defendant was not asked to, nor did he submit, to a preliminary "alcotest", and the police had no reasonable grounds for believing that the defendant had been driving under the influence of alcohol to the relevant extent.

As we have seen, the fact that the legislature had deliberately restricted the police in their power to obtain the relevant evidence was considered by the High Court as a factor favouring exclusion of the evidence. However this factor was, in the eyes of the Court, outweighed by the factors favouring admission. These were: the fact that the illegality had not been intentional or reckless;[125] the cogency of the evidence;[126] and the nature of the offence charged: "[w]hile it is not one of the most serious crimes it is one with which Australian legislatures have been much concerned in recent years and the commission of which may place in jeopardy the lives of other users of the highway who quite innocently use it for their lawful purposes."[127] In the result, therefore, it was held by the High Court that the balance of the relevant factors came down in favour of admission of the evidence.

Against the background of the decision in Bunning v Cross it is interesting to note that in England, an offence under section 6(1) of the Road Traffic Act 1972 [now section 5(1) of the Road Traffic Act 1988] (driving with excess alcohol) cannot be

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[124] Id, 66.
[125] Id, 78.
[126] Id, 79.
[127] Id, 80.

proved unless the specific procedure for obtaining specimens for analysis, laid down in section 8 [section 7], is complied with. For instance, section 8 [section 7] empowers a police officer to obtain two specimens of breath for analysis, of which the one with the lower proportion of alcohol is to be used and the other disregarded. In Howard v Hallett,[128] where an officer acting in good faith had obtained three specimens and disregarded the ones with the lowest and highest proportions in favour of the "middle" one, it was held that a section 6(1) offence could not be proved. Robert Goff LJ observed: "It would, it seems to me, be a most extraordinary consequence if, where the Act of 1972 lays down a careful and statutory procedure for requiring a suspected motorist to provide specimens of breath and for analysing them and presenting them before a court, it is possible to disregard that procedure altogether. I cannot believe that that was the intention of the legislature."[129] A number of subsequent cases have affirmed that a section 6(1) offence cannot be proved in the absence of strict compliance with section 8,[130] and in Fox v Chief Constable of Gwent[131] Lord Bridge remarked that "I find the reasoning of Robert Goff LJ in [Howard v Hallett] wholly convincing."[132]

What is recognised in England, in other words, is an implied statutory prohibition of the admission, in proof of an offence under section 6(1) of the Road Traffic Act 1972 [section 5(1) of the Road Traffic Act 1988], of all evidence obtained in contravention of section 8 [section 7] of the Act. Never have the courts articulated clearly the principle of statutory interpretation which led them to this conclusion. Robert Goff LJ's statement in Howard v Hallett, quoted above, that the prohibition was to be implied from the careful and detailed nature of the procedure laid down in the

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[128] [1984] RTR 353.

[129] Id, 360.

[130] Anderton v Lythgoe [1985] RTR 395; Johnson v West Yorkshire Metropolitan Police [1986] RTR 167; Wakeley v Hyams [1987] RTR 49; Hobbs v Clark [1988] RTR 36; DPP v Magill [1988] RTR 337; DPP v Gordon and Griggs [1990] RTR 71; Regan v DPP [1990] RTR 102; R v Clwyd JJ, ex p Charles (1990) 154 JPR 486; DPP v Byrne, The Times, 10 October 1990.

[131] [1985] 3 All ER 392.

[132] Id, 401.

statute, is flimsy and unconvincing. If Parliament really had intended that all evidence obtained in contravention of section 8 would automatically be inadmissible to prove a section 6(1) offence, one would have expected that it would have said so clearly. The intent of Parliament must surely have been simply that while the procedure laid down in section 8 ought to be followed, the question of admissibility should be determined in particular cases by reference to common law principles. If Howard v Hallett is correct, then why are not other statutes which lay down equally careful and detailed procedures in relation to the obtaining of evidence also interpreted as impliedly prohibiting the admission of evidence obtained in contravention of these procedures? Why is not the Police and Criminal Evidence Act 1984 interpreted as impliedly prohibiting the admission in proceedings of all evidence obtained in contravention of the careful and detailed procedures which it lays down in relation to search and seizure or the suspect's right to legal advice?[133]

We have seen that the illegality in Bunning v Cross, like that in Howard v Hallett, involved the contravention of careful and detailed procedures laid down in road traffic legislation. However, the Australian High Court did not find that the admission of the illegally obtained evidence had been impliedly prohibited by the statute. Instead, the fact that Parliament had prescribed a careful and detailed procedure in relation to the obtaining of breathalyser evidence was regarded by the Court as a factor to be taken into account, among others, in determining the admissibility of the evidence at common law. This is clearly a preferable approach to that taken in Howard v Hallett. It is to be noted that the High Court of Australia has, in fact, acknowledged that a statute "may on its proper construction itself impliedly forbid the use of facts or things obtained or

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[133] See also M Hirst, "Incorrect Procedures in Drink-Driving Cases" [1990] Crim LR 143, 152.

procured in breach of its terms."[134] However, the fact that the Court did not find an implied statutory prohibition of admission in Bunning v Cross indicates that such a prohibition will not be found in the absence of clear and unambiguous words (or, to put it another way, a necessary implication) in the statute. The fact that a careful and detailed statutory procedure has been laid down by Parliament will not suffice.

In sum, it is to be hoped that the principle in English law that the Road Traffic Act 1972 [Road Traffic Act 1988] impliedly prohibits the admission, in proof of an offence under section 6(1) [section 5(1)], of all evidence obtained in contravention of section 8 [section 7], will be abandoned. This principle gives the law a strange air of inconsistency: similar principles are not recognised in the context of other statutory enactments or more serious crimes. A statute should not be interpreted as impliedly prohibiting the admission of evidence obtained in contravention of its provisions in the absence of clear words to that effect. The intent of Parliament in carefully laying down detailed procedures in relation to the obtaining of evidence is not to prohibit the admission of evidence obtained in contravention of these procedures, but is simply to place narrow restrictions on the power of the police to obtain evidence - a factor which should be considered in applying the legitimacy principle at common law.

However, I would argue that whilst the reasoning employed in Howard v Hallett and its progeny is open to challenge, the conclusions reached in these cases were undeniably correct. The offence of driving with excess alcohol, unlike the offence of driving when under the influence of drink or drugs,[135] is a wholly objective one, and is perceived generally as providing the surer route to a conviction. The objective nature of

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[134] R v Ireland (1970) 126 CLR 321, 334. It should be noted that one commentator was in error in interpreting this statement as meaning "that a suitable criterion for the exercise of the discretion in this area could be based on an implied statutory prohibition": M S Weinberg, "The Judicial Discretion to Exclude Relevant Evidence" (1975) 21 McGill LJ 1, 32 (emphasis added). A similar error in interpretation was apparently made by M H Yeo, "The Discretion to Exclude Illegally and Improperly Obtained Evidence: A Choice of Approaches" (1981) 13 MULR 31, 50-1.

[135] Road Traffic Act 1988, s 4.

the offence made the offence a highly controversial one when it was first introduced, and it was seen (and has continued to be seen by some) as a threat to civil liberties.[136] Such considerations, plus the fact that the very statute creating the offence lays down detailed procedures in relation to the obtaining of evidence, would weigh very heavily in favour of exclusion of evidence obtained in contravention of these procedures. However such exclusion would be exclusion at common law on the basis of the legitimacy principle, rather than exclusion because admission is impliedly prohibited by the statute.

D. THE CONCEPT OF JUDICIAL DISCRETION

An issue worthy of consideration at this point is the extent to which application of the legitimacy principle requires the exercise of "judicial discretion". Unfortunately, however, the concept of judicial discretion is susceptible of a wide variety of interpretations.[137]

1. Power or Duty?

One interpretation treats judicial discretion as signifying a mere power as opposed to a duty. Thus, where a judge is required to reach a conclusion pursuant to judicial discretion rather than as a matter of law, he is at liberty to reach conclusion B even though an application of the relevant guidelines requires that conclusion A be

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[136] See generally M Hirst, "Incorrect Procedures in Drink-Driving Cases" [1990] Crim LR 143.

[137] See R Dworkin, Taking Rights Seriously (1977) 31 ff, where it is pointed out that the word "discretion" may be used in both a weak and a strong sense. Cf D J Galligan, Discretionary Powers: A Legal Study of Official Discretion (1990) 37-46, where three aspects of judicial discretion (discretion implied in deciding cases, discretion to change the law and delegated discretion) are distinguished, and R Pattenden, Judicial Discretion and Criminal Litigation (2nd ed 1990) 1-4, where five usages of the word "discretion" are broadly distinguished, and the relationship between the usages explained.

reached.[138] In the context of our problem, this means that a judge is at liberty to admit improperly obtained evidence or allow "tainted" proceedings to continue (as the case may be) even though he determines that an application of the legitimacy principle requires otherwise. This can hardly be correct. It is difficult to imagine that a judge can, in all conscience as a judge, say: "Taking into account all the relevant factors the evidence should certainly be excluded, but I am going to exercise my discretion in favour of admitting it."

2. Appellate Review

A preferable and more sophisticated interpretation of the concept of judicial discretion relates not to the trial stage but to appellate review. Thus where a decision is reached pursuant to judicial discretion and this decision is the subject of an appeal, the appellate court will interfere with the decision only in limited circumstances. In considering the issue of the circumstances in which the Court of Appeal should interfere with a decision reached pursuant to judicial discretion, Lord Denning MR said in Ward v James:[139]

> The true proposition was stated by Lord Wright in Charles Osenton & Co v Johnston.[140] This court can and will, interfere if it is satisfied that the judge was wrong. Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him. ...

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[138] Le Dain J in R v Therens (1985) 18 DLR (4th) 655 obviously took the view that judicial discretion signifies a mere power as opposed to a duty (id, 687-8):

> The exclusion of evidence under s 24(2) does not, as has been suggested by some, involve the exercise of a discretion. Section 24(2) involves the application of a broad test or standard, which necessarily gives a court some latitude, but that is not, strictly speaking, a discretion. A discretion exists where there is a choice to do one thing or another, not merely because what is involved is the application of a flexible standard. Under the terms of s 24(2), where a judge concludes that the admission of evidence would bring the administration of justice into disrepute, he or she has a duty, not a discretion, to exclude the evidence.

[139] [1966] 1 QB 273.

[140] [1942] AC 130.

> Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him ...[141]

And in R v Scarrott,[142] Scarman LJ observed that so long as a trial judge "does not err in law, takes into account all relevant matters and excludes consideration of irrelevant matters, his discretion will stand."[143]

An illustration may be provided by the case of R v Mackie.[144] In response to an argument that the trial judge should in the exercise of his discretion have excluded certain evidence on the ground that its prejudicial effect outweighed its probative value, the Court of Appeal expressed the view that "the prejudicial effect of the evidence admitted was enormous and far outweighed its value in proving that the child was frightened of the appellant before April 4."[145] The Court went on, however, to hold that the judge was entitled to exercise his discretion as he did and to admit the evidence.[146]

But where what is at issue is a conclusion reached as a matter of law, the appellate court will not hesitate to substitute its own conclusion if it disagrees with that reached by the trial court. It is immaterial that the trial court may have, in reaching its

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[141] [1966] 1 QB 273, 293.

[142] [1978] QB 1016.

[143] Id, 1028. "In my opinion a judge reaches a decision in the exercise of his 'discretion' ... where, on the facts found by or agreed before him and on the law correctly stated by him, he is required in the exercise of his judicial function to decide between two or more courses of action without any further rules governing the decision which he should make, other than that he should act judicially. It is just because this is the nature of such a task facing a judge that this court is restricted by the authorities to the extent to which it can interfere. Unless his decision is perverse in the Wednesbury sense (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223), it must be one to which a judge, acting judicially, could come": Viscount De L'Isle v Times Newspapers [1987] 3 All ER 499, 504 per May LJ. See also Hindes v Edwards, The Times, 9 October 1987.

[144] (1973) 57 Cr App R 453.

[145] Id, 464.

[146] Id, 465. Of course, it is arguable that the Court of Appeal should have held that because the trial judge was so wrong in his conclusion, he must have erred in law. See also R v O'Leary (1988) 87 Cr App R 387, 391: "Subject to the question of Wednesbury unreasonableness, this is a matter for the discretion of the court below, with which this Court would be loth to interfere."

conclusion, taken all relevant factors into account and left irrelevant factors out of consideration.[147]

It is clearly preferable for the application of the legitimacy principle to be required as a matter of law rather than pursuant merely to judicial discretion. An appellate court faced with the issue of exclusion or stay on account of pre-trial executive impropriety should be entitled to substitute its own conclusion if it disagrees with that reached by the trial court. The reason for this was articulated by the Irish Supreme Court in O'Brien. The Court stated that if a trial judge decides to admit improperly obtained evidence,

> an appeal against his decision should lie to a superior Court which will decide the question according to its own views and will not be bound to affirm the decision of the trial judge if it disagrees with the manner in which the discretion has been exercised, even if it does not appear that such discretion was exercised on wrong principles. The result of such decisions, based on the facts of individual cases, may in time give rise to more precise rules.[148]

Care must be taken, of course, to ensure that these "more precise rules" do not grow eventually into a rigid body of "law" which trial judges will in future feel compelled to "apply" and "follow" in individual cases. What is required is that appellate courts formulate principles which provide sufficient guidance to trial judges as to how the principle of legitimacy should be applied in individual cases, while leaving the jurisdiction sufficiently unfettered by rules to enable it to be adapted to new factual circumstances. The very essence of the principle requires that it be capable of taking into account changing public attitudes and public perceptions of the criminal justice system. In other words, a careful line has to be treaded between flexibility and predictability.

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[147] See also R v Viola (1982) 75 Cr App R 125, 130-1.
[148] [1965] IR 142, 161 (emphasis added).

3. Open-Texturedness

Finally, "discretion" may simply be taken to refer to the existence of a latitude of individual choice according to the particular circumstances. "A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained."[149] Thus even if application of the principle of legitimacy is required as a matter of law, as I have suggested should be the case, such application still involves judicial "discretion" in the sense that it

> requires a personal assessment of the circumstances. As reasonable men will legitimately differ, except in extreme cases, about [the conclusion reached], it follows that the judge in fact exercises a choice, even if it is an unconscious one.[150]

It is in this sense that the term "discretion" will be employed in the remainder of this section. The term "rule", by contrast, will be used to mean "a legal precept attaching a definite detailed legal consequence to a definite detailed state of fact."[151]

The principle concerning the admissibility of similar fact evidence provides an analogy to the legitimacy principle. The similar facts principle requires that evidence of an accused's prior acts of misconduct be excluded unless such evidence has sufficient probative value to outweigh whatever prejudicial effect might accompany it.[152] Although this balancing exercise is required as a matter of law, a trial judge possesses a degree of latitude in determining admissibility. Thus, "where similar fact evidence is tendered the

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[149] Evans v Bartlam [1937] AC 473, 489 per Lord Wright.

[150] R Pattenden, The Judge, Discretion, and the Criminal Trial (1st ed 1982) 4. Cf Y-M Morissette, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do" (1984) 29 McGill LJ 521, 553: "The range of factors and circumstances which the court can consider under section 24(2) necessarily denotes a discretion. So does the generality of wording of section 24(2) and the lack of any guidance in the Charter itself as to the respective weight or significance of these factors and circumstances. The provision manifestly calls for individualized solutions in response to the specific factual features of each case ('having regard to all the circumstances'), something more easily achieved by preserving a good measure of discretion at trial level."

[151] R Pound, Jurisprudence (Vol 2) (1959) 124.

[152] See generally DPP v Boardman [1975] AC 421.

judge enjoys considerable leeways of choice."[153] As was acknowledged by Lord Wilberforce in DPP v Boardman:[154] "If this test is to be applied fairly, much depends in the first place upon the experience and common sense of the judge. ... [I]n judging whether one fact is probative of another, experience plays as large a place as logic. And in matters of experience it is for the judge to keep close to current mores."[155] Thus, when considering the facts of the case, his Lordship remarked that "[t]hese matters lie largely within the field of the judge's discretion".[156] In the same case, Lord Morris said that "[i]n the course which he took the learned judge acted, in my view, within legal principle and in so far as the matter depended upon his exercise of discretion I do not consider that his exercise of it was unjustified."[157]

The pros and cons of discretion have been actively debated by the judiciary and in the academic literature. On the one hand it is clear that a measure of discretion is necessary to enable all relevant considerations to be taken into account in the individual case. A rule may have the benefit of predictability and certainty, but "certainty can be bought at too high a price".[158] As K C Davis has observed: "Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process."[159] "Individualization", Lord Justice James noted extra-judicially, "cannot be

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[153] R Pattenden, The Judge, Discretion, and the Criminal Trial (1st ed 1982) 10.
[154] [1975] AC 421.
[155] Id, 444.
[156] Id, 445 (emphasis added).
[157] Id, 442 (emphasis added). See also R v Hally [1962] Qd R 214, 227 (emphasis added): "If the judge considered that the probable effect of the evidence would be out of proportion to its true evidential value he had the right and, indeed, the duty to exclude it. ... This matter lay entirely within the discretion of the trial judge ...". See generally P Mirfield, "Similar Facts - Makin Out?" [1987] CLJ 83, 94-5 and C Tapper, "Proof and Prejudice" in E Campbell and L Waller (eds), Well and Truly Tried (1982) 207-10.
[158] Firman v Ellis [1978] QB 886, 911 per Ormrod LJ.
[159] K C Davis, Discretionary Justice: A Preliminary Inquiry (1971) 17.

achieved without a discretion being exercised."[160] And, as Roscoe Pound has put it, very succinctly:

> Rules in many matters are needed to guide the weak judge and to save us from his lack of will and lack of judgment. But these same rules may only serve to hamper the strong judge and to prevent application of the full measure of his sound sense and good judgment to the case in hand. Such a magistrate may know how to take account of some things, which could not be included in a rule, which nevertheless may be more or less controlling in the individual cause.[161]

The judiciary, too, has recognised, particularly in recent years, the importance of giving trial judges an appropriate measure of discretion in relation to evidential and procedural matters. Speaking of the issue of directions on corroboration, Roch J said in R v Chance:[162]

> The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to spot such anomalies, and will understandably view the anomaly, and often (as a result) the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger ...[163]

On the other hand, however, there is in some quarters considerable hostility to the idea of judicial discretion. Isaacs wrote of this

> aesthetic desire for a complete, rounded system that will take care of every situation almost mechanically. But even if we succeed in getting away from the academic considerations in favor of a law that acts automatically, there is on the human side of the question a desire for a government of laws and not of men, especially in a democratic state, a desire that urges us to minimize, if

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[160] Lord Justice James, "A Judicial Note on the Control of Discretion in the Administration of Criminal Justice" in R Hood (ed), Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz (1974) 157.
[161] R Pound, Jurisprudence (Vol 2) (1959) 367-8.
[162] [1988] 3 All ER 225.
[163] Id, 231.

> not to eliminate, the power of the personal judge in the regulation of our affairs.[164]

Those opposed to judicial discretion point to the fact that its inherent flexibility produces considerable uncertainty of application. A rule, on the other hand, would go further in ensuring uniformity of treatment, with "like" cases being treated alike.[165] Thus it might be argued against adoption of the principle of legitimacy being advocated in this thesis that the admissibility of a particular item of improperly obtained evidence would be likely in many circumstances to be difficult, or even impossible, to predict. This criticism is clearly unjustifiable. If the flexibility inherent in the similar facts principle (and, indeed, in many other principles of evidence) can be tolerated, it is difficult to see why a "legitimacy" approach to the problem of improperly obtained evidence should be singled out for criticism. Recognition of the importance of the social need to apply the legitimacy principle in individual cases should offset any worries about the undesirability of unpredictability.[166] Moreover, problems of unpredictability and of uncertainty of application are likely in any event to be minimised with the emergence of a body of

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[164] N Isaacs, "The Limits of Judicial Discretion" 32 Yale LJ 339, 343 (1923). For a strong condemnation of discretion, see American Friends Service Committee, Struggle for Justice: A Report on Crime and Punishment in America (1971) Ch 8.

[165] J Jowell and D Oliver, The Changing Constitution (2nd ed 1989) 9. See also M Kelman, A Guide to Critical Legal Studies (1987) 44: "Rules are good because they make the outcome of any possible litigation so certain, so readily ascertainable in advance by both parties, that the administratively expensive process of litigation will rarely be invoked."

[166] Cf G J Postema, Bentham and the Common Law Tradition (1986) 347, where he notes Bentham's "strategy of assigning to the judge, rather than to fixed formal rules, the task of resolving the inevitable conflict amongst the various ends of adjudication. This conflict is to be resolved, upon each occasion, by the judge appealing to the principle of utility. ... [T]he two conflicting sets of ends which define the proper objectives of procedure simply mark out the most important species of utility and disutility which the judge must weigh in each particular case to determine the appropriate way to proceed. Rules have a place in this scheme, but they never impose absolute requirements on decision or action and the judge is empowered to make decisions which appeal directly to the principle of utility."

decisions, particularly appellate decisions.[167] In any event, the very fact that trial judges are seen to be applying the legitimacy principle "will inform the public of the difficulty of choosing between admissibility and inadmissibility and will secure support even from those who might have preferred a different result in an individual case."[168]

In the light of the foregoing discussions, it is now timely to explore some of the theoretical issues associated with discretion in greater detail. There are two important issues underlying the concept of discretion - arbitrariness and fairness - and these will be examined in turn.

(a) Arbitrariness

A common criticism levelled against discretion is that it may result in arbitrary decisions. "[W]herever there is discretion", Dicey wrote, "there is room for arbitrariness".[169] An arbitrary decision may be defined as one based upon improper criteria which do not relate in any rational way to the relevant goal. Thus "[t]he paradigm arbitrary decision", Jowell points out, "is one based upon particularistic criteria such as friendship, or ascriptive criteria such as race, or upon caprice, whim, or prejudice."[170] Some illustrations pertaining to arbitrariness in the exercise of police discretion are provided by Jowell. Suppose that owing to a lack of resources, the police can stop only one of every four motorists found to be speeding. Police discretion moves towards the arbitrary where a police patrolman, instead of randomly selecting one

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[167] In O'Brien, the Irish Supreme Court acknowledged that "[t]he result of [appellate] decisions, based on the facts of individual cases, may in time give rise to more precise rules": [1965] IR 142, 161. Y-M Morissette, "The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What To Do and What Not To Do" (1984) 29 McGill LJ 521, 553 has written of s 24(2) of the Canadian Charter: "It will be exercised judicially, according to reason and, eventually, precedent; furthermore, appellate courts will continue to supervise closely its use by trial courts."

[168] A A S Zuckerman, "Illegally-Obtained Evidence - Discretion as a Guardian of Legitimacy" (1987) 40 Current Legal Problems 55, 59.

[169] A V Dicey, Introduction to the Study of the Law of the Constitution (10th ed 1964) 188.

[170] J L Jowell, Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action (1975) 14.

of every four speeding cars, stops only long-haired drivers of speeding blue cars. The decision would certainly be arbitrary if the police officer were to stop black speeders only, or to refrain from stopping a speeder who is a friend or relative or who has offered him a bribe. Such criteria for not invoking the criminal process (race, friendship) are not rationally related to the goal of preventing unsafe driving, and are therefore improper. However, the use of improper criteria which may be rationally related to the relevant goal will make a decision nonarbitrary (for instance, if customs officials search only long-haired youths for illicit drugs on the basis that a positive correlation between long-haired youth and drug use has been demonstrated).[171]

Thus arbitrariness is, as Galligan points out, the antithesis of rationality. A rational action is one which the actor believes to be a means to a given end, while an action is arbitrary if he does not have that belief.[172] An action is not arbitrary, however, merely because it is less rational than it might be: it must also fall below or violate a minimum threshold of rationality.[173] Galligan points out that the formulation of some level of general standards would normally serve to enhance the rational basis of decisions and eliminate arbitrariness, but that just how precise and exacting these standards should be depends on a number of factors which relate to the effective realisation of the objects of power: the need for guidance, the nature and complexity of the task, the expertise of officials, and the opportunity for participation by individuals and groups.[174]

The rational basis of decisions may be enhanced not only by some level of general standards but also by consistency. The principle of consistency requires that once a set of reasons has been relied upon in reaching a decision, the same reasons should be followed in future cases, unless further reasons are advanced for not so doing.

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[171] Id, 15.

[172] D J Galligan, Discretionary Powers: A Legal Study of Official Discretion (1990) 143.

[173] Id, 144.

[174] See generally id, 147-50.

However, as Galligan points out, consistent treatment does not necessarily imply rational treatment. For instance, a principle of sentencing which required the imprisonment of all first offenders could be applied consistently, but it would be difficult to describe it as rational. Further, it is not necessarily irrational and arbitrary for a judge to depart from, reject or change a previous ruling in deciding the present case: he might change his mind about its wisdom or justice; he might have been mistaken or have acted on wrong or inadequate information; he might be able to think of better reasons for ruling differently; or the previous ruling might lead in the present case to an unacceptable outcome. In such circumstances it would be rational not only not to apply the previous ruling; it would, in fact, be irrational to do so unless such a course of action could be justified for other kinds of reasons.[175]

(b) Fairness

The notion of fairness is based upon the risk of unequal treatment: "treat like cases alike and different cases differently". Similar cases are treated differently where extraneous matters are taken into account, or where not all relevant matters are considered, or where relevant matters are considered differently in similar cases in areas where important personal interests are at stake. Thus Galligan points out that it may be necessary, at the cost of reducing the degree of individualised attention to the circumstances of the particular case, to specify reasonably clear and objective standards against which decisions may be judged. This would remove any suspicion of unfairness in the sense of unequal treatment. By a similar token, there is also a case for acting consistently by extrapolating standards from precedents. However, in assessing how exacting the standards should be and how rigorously consistency should be maintained, equality of treatment, and hence fairness, should in the final analysis be judged on how well substantive principles of fairness are being achieved. It may be necessary, in order

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[175] See generally id, 150-2.

to attain acceptable levels of substantive fairness in particular cases, to maintain open standards and to refrain from applying consistency too strictly.

A further aspect of fairness concerns predictability. However, while some level of predictability may be a requirement of fairness, it may again be necessary to maintain substantial unpredictability in order to facilitate the attainment of substantively fair outcomes.[176]

The above discussions have shown that whilst the exercise of discretion is indispensable to the attainment of individualised justice, there are a number of difficulties inherent in the notion of discretion. What is clearly necessary, then, is an acceptance of discretion, and a recognition at the same time of principles governing its exercise which are aimed at eliminating these difficulties. As Deane J pointed out in Phillips v R,[177] the fact that a discretion exists does not mean that the trial judge is free to act arbitrarily in exercising it. Rather, it must be exercised for the purpose for which it was conferred, and "in the context of relevant legal principle and with due regard being paid to relevant considerations."[178]

In his seminal work on Discretionary Justice,[179] K C Davis makes the point that the aim should not be to eliminate discretionary power, but to confine, structure and check it.[180] As the legitimacy principle being advocated in this thesis is clearly discretionary in nature, it is timely to proceed to an examination of how such confining, structuring and checking may be achieved in relation to this principle.

(c) Confining Discretion

To confine discretion is to eliminate and limit discretionary power, or, in other words, to fix the boundaries and keep discretion within them. The ideal would be "to

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[176] See generally id, 152-61.
[177] (1985) 60 ALJR 76.
[178] Id, 83.
[179] K C Davis, Discretionary Justice: A Preliminary Inquiry (1971).
[180] Id, 26.

put all necessary discretionary power within the boundaries, to put all unnecessary such power outside the boundaries, and to draw clean lines."[181]

There are two main ways in which it is possible for discretion to be confined in the context of the legitimacy principle. The first would be to adopt a rule that any evidence obtained (or any proceedings commenced) as a result of very serious infringements of rights - for example, by torture - must be automatically excluded (or automatically stayed). Thus discretion would be confined to situations where no such infringement has occurred (which would, presumably, represent the vast majority of cases). There is a lot to be said for the adoption of such a rule. Conduct such as torture is so egregious that it should never be excused, factors such as the seriousness of the crime charged notwithstanding. Indeed, as we saw in Chapter 2, there has been legislative recognition of this in England in the context of confessions: section 76(2)(a) of the Police and Criminal Evidence Act 1984 renders any confession obtained by oppression automatically inadmissible.

Another possibility would be to adopt a rule whereby improperly obtained evidence must be automatically admitted, or "tainted" proceedings automatically allowed to continue, where the offence charged is a very serious one. Thus discretion would be confined to situations where other offences are involved. Very serious offences may include offences such as murder, treason, terrorism, and the like. However, I would not propose that such a rule be adopted. While the fact that the offence charged is very serious would tip the scales heavily in favour of admission or the continuation of the proceedings, there may be situations where exclusion or a stay would still be appropriate. This may be the case, for instance, where the executive misconduct can be regarded as egregious even when viewed against the seriousness of the offence charged.

Putting aside the rule which I have proposed in relation to very serious infringements of rights, I would argue that it is inappropriate to attempt to confine

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[181] Id, 55.

discretion in this field by adopting rules that where particular conditions are satisfied, mandatory results should follow. The criteria, concepts, issues and factors which are relevant to the application of the legitimacy principle in particular cases are too various to be subsumed under general rules. It is, indeed, for this very reason that the need for discretion is so crucial in this field.

(d) Structuring Discretion

Structuring a discretion is not the same as confining it, although there may be some overlap between the two. The purpose of confining discretion is to keep it within designated boundaries, while the purpose of structuring is to control the manner of its exercise within these boundaries. To structure discretion is to "regularize it, organize it, produce order in it, so that ... decisions affecting individual parties will achieve a higher quality of justice".[182]

Discretion may be structured through the recognition of guidelines for its exercise.[183] Guidelines have the potential to ensure more open and rational decision-making. First, they provide the basis for accountability: public guidelines can be a yardstick for testing decisions, and thus reduce the scope for reliance upon irrelevant, improper or arbitrary factors. Second, the need to formulate guidelines may encourage officials to think more carefully and critically about the objects to be attained and the policies to be followed. Third, public guidelines may advance a sense of procedural fairness by informing the citizen in advance of how he is likely to be treated, and encouraging consistency in treatment.[184]

Guidelines, however, have a number of disadvantages. In particular, they may by their very nature restrict the factors which will be considered in individual decisions.

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[182] Id, 97.

[183] See generally D J Galligan, "Regulating Pre-Trial Decisions" in I H Dennis (ed), Criminal Law and Justice: Essays from the W G Hart Workshop, 1986 (1987), from which I have benefited in this paragraph and in the next two.

[184] Id, 184-5.

As guidelines become more precise and conclusive and therefore more like rules, they may exclude or restrict consideration of other factors. Thus the level of attainment of goals in individual cases may be reduced. Further, guidelines may tend to ossify once they are formulated, and instead of being reassessed regularly in the light of experience and purposes, come to be regarded as immutable.[185]

A brief analysis of the present legal position in relation to guidelines in pre-trial discretionary decision-making is provided by Galligan. First, the policies of guidelines must be within powers: they cannot be based upon irrelevant considerations, advance improper purposes, or be totally unreasonable. Second, guidelines must not be applied so strictly that they amount to a fettering of discretion (that is, decision-making on the basis of simply applying the relevant guidelines). Rather, an attempt must be made to consider the merits of the individual case, even if this means departing from the guidelines.[186]

It is clear, therefore, that what is required in relation to guidelines, as in relation to most matters pertaining to discretion, is the reaching of an appropriate balance or compromise. On the one hand guidelines must be developed, but on the other hand they must not be applied rigidly to every case. The latter point was emphasised by the Lord Chief Justice in R v Nicholas[187] in the context of the sentencing discretion. Sentencing guidelines, he stressed, were for assistance only and were not to be used as rules which were never to be departed from. And, as was put by Mason and Deane JJ in Norbis v Norbis,[188] in a discussion of the discretionary powers of the Family Court of Australia:

> The point of preserving the width of the discretion which Parliament has created is that it maximises the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the

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[185] Id, 186-7.
[186] Id, 187-8.
[187] The Times, 23 April 1986.
[188] (1986) 60 ALJR 335.

> giving of guidance by appellate courts, whether in the form of principles or guidelines. ... To avoid the risk of inconsistency and arbitrariness, which is inherent in a system of relief involving a complex of discretionary assessments and judgments, the Full Court, as a specialist appellate court with unique experience in the field of family law in this country, should give guidance as to the manner in which these assessments and judgments are to be made. Yet guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be. Reconciliation of these goals suggests that in most, if not all, cases the Full Court of the Family Court should give guidance in the form of guidelines rather than binding principles of law. ... The term "guidelines", though not commonly used in relation to judicial discretions, is familiar enough in the bureaucratic and administrative world, where it denotes rules or standards which are not binding and may be relaxed when it is expedient to do so in order to do justice in the particular case.[189]

Earlier in the chapter I identified a number of guidelines which may be relevant in the exercise of discretion under the legitimacy principle. These involved a consideration of factors such as the importance of the rights infringed; whether the impropriety in question was deliberate; the gravity of the offence charged; the cogency (probative value) of the improperly obtained evidence (if what is at issue is admissibility of evidence rather than stay of proceedings); the presence or otherwise of circumstances of urgency, emergency or necessity; and the availability or otherwise of a direct sanction against the person(s) responsible for the pre-trial executive impropriety. From the foregoing discussions it is clear that these factors should not be applied rigidly and mechanically in every case. The guidelines formulated in appellate decisions ought to be applied by lower courts if the possibilities of unfairness by virtue of varying practice are to be obviated. On the other hand, however, it is important that lower courts do not simply defer blindly to the analyses employed in appellate decisions; constant re-evaluation of the factors to be taken into account is required if the legitimacy principle is to reflect its rationale fully. Appellate decisions may be of limited value inasmuch as

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[189] Id, 337.

decisions taken at first instance are hardly ever reversed (or even seriously reviewed) on appeal. The problem of impropriety is often one of fact, and appellate courts are even more reluctant to review decisions on facts.

(e) Checking Discretion

The "principle of check" implies simply that one officer should check another, as a protection against arbitrariness.[190] For our purposes, checks would be provided primarily by defendants' appeals to the Court of Appeal on the basis of incorrect application of the legitimacy principle.[191] The mechanics of such appeals will be discussed later in the chapter. I have suggested earlier that the application of the legitimacy principle should be required as a matter of law rather than pursuant merely to "judicial discretion", so that the Court of Appeal would not hesitate if it disagreed with the conclusion reached by the trial judge to substitute its own conclusion. However, as was also noted earlier, the appellate court must formulate principles which provide sufficient guidance as to how the discretion should be exercised in individual cases, while at the same time leaving the discretion sufficiently unfettered to enable it to be adapted to new factual circumstances. Again, the "bottom line" is that a careful balance should be reached between flexibility and predictability.

E. ONUS OF PROOF

An important issue for consideration relates to which party should bear the onus of proof once the relevant impropriety is established. Two possibilities may be suggested. The first is that the accused should bear the onus of satisfying the trial judge that the evidence should be excluded or the proceedings stayed. Alternatively, it

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[190] K C Davis, Discretionary Justice: A Preliminary Inquiry (1971) 142.

[191] Cf ibid, where it is suggested that the principle of check may be more effective where it is limited to correction of arbitrariness or illegality than where it includes de novo review. This is because a de novo review may itself introduce arbitrariness or illegality for the first time and not be checked.

may be suggested that the onus should lie on the prosecution to prove that the evidence should not be excluded or that the proceedings should not be stayed.

One might argue that if the accused seeks the exclusion of evidence or a stay of the proceedings on the ground of pre-trial executive impropriety,[192] the onus should be on him to justify the exclusion or stay. I would suggest, however, that it is more appropriate to place the onus on those responsible for the impugned conduct to justify that conduct.[193] An important practical consideration is that it is often the prosecution rather than the defence which will have access to relevant information and witnesses. For example, it was demonstrated earlier in the chapter that a factor which may be taken into account in applying the principle of legitimacy is whether the impropriety was deliberate or merely inadvertent. Surely it is more appropriate to place the onus on the prosecution to prove that the impropriety was not deliberate than to place the onus on the accused to prove the reverse.

The Australian experience in relation to improperly obtained evidence is instructive in this regard. We have seen earlier that the "principle of legitimacy" approach being advocated in this thesis has been adopted in Australia. However, the defendant continues to bear the onus of justifying exclusion. It is interesting to note

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[192] See, eg, R v Lee (1950) 82 CLR 133 on confessions.

[193] See generally Australian Law Reform Commission, Evidence (Vol 1) (Report No 26: Interim) (1985) par 964. It is to be noted that in R v Collins (1976) 12 SASR 501, 508-9, Bray CJ made the following remarks in relation to the admissibility of a confession: "I think I must accept these authorities [R v Lee (1950) 82 CLR 133; Wendo v R (1963) 109 CLR 559; R v Buckskin (1974) 10 SASR 1] and therefore hold, the question of voluntariness not being in dispute, that it was for the appellant to establish on the balance of probabilities that the detectives persisted in questioning him after he had declared his unwillingness to answer except in the presence of his solicitor. I may be permitted, with respect, to express some regrets that the law has developed in this way. I agree wholeheartedly that he who asks the court to exercise some discretion in his favour by relaxing the normal operation of the law should show some reason for it. But it might have been thought a sufficient reason to entitle the judge to reject a voluntary confession if he was left in doubt as to whether or not it had been obtained unfairly."

that an examination of the 16 main reported cases[194] on improperly obtained non-confessional evidence decided in Australia in the 11 years since Bunning v Cross reveals that of the 17 items of improperly obtained evidence considered in these cases it was held that only seven[195] should be excluded in the exercise of the exclusionary jurisdiction.[196] Examination of the circumstances which led to the exclusion of these seven items of evidence is illuminating. In R v Curran and Torney,[197] evidence of illegally obtained tape recordings of conversations carried on by the two defendants was excluded. It would appear that this evidence was excluded essentially on the basis of its possible unreliability rather than on account of the illegality per se. In French v Scarman,[198] Shervill v Shearer,[199] Griffiths v Errington[200] and Pacillo v Hentschke[201] evidence of blood alcohol level was excluded in the exercise of the exclusionary jurisdiction because the police had failed in each case to comply with specific statutory requirements laid down in the very statute which proscribed the conduct of driving with excess alcohol. However, as we have seen, the view has been taken in England that the Road Traffic Act 1972 [now the Road Traffic Act 1988] impliedly prohibits the

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[194] The cases are: French v Scarman (1979) 20 SASR 333; R v Conley (1979) 21 SASR 166; R v Padman (1979) 25 ALR 36; Shervill v Shearer (1979) 26 ALR 454; See v Milner (1980) 2 A Crim R 210; Griffiths v Errington (1981) 7 NTR 3; R v Clune [1982] VR 1; R v Migliorini (1981) 38 ALR 356; R v Curran and Torney [1983] 2 VR 133; Nolan v Rhodes (1982) 32 SASR 207; R v Tilev (1983) 33 SASR 344; Dunsmore v Smith (1983) 32 SASR 498; R v Rogers (1983) 9 A Crim R 209; R v Dugan [1984] 2 NSWLR 554; Pacillo v Hentschke (1988) 47 SASR 261; Zanet v Hentschke (1988) 33 A Crim R 51.

[195] French v Scarman (1979) 20 SASR 333; Shervill v Shearer (1979) 26 ALR 454; Griffiths v Errington (1981) 7 NTR 3; R v Clune [1982] VR 1; R v Curran and Torney [1983] 2 VR 133 (the illegally obtained tape recordings of conversations carried on by the defendants at the City Watchhouse); Nolan v Rhodes (1982) 32 SASR 207; Pacillo v Hentschke (1988) 47 SASR 261.

[196] This may, of course, be a "meaningless statistic". Ashworth points out in the English context that "there are certainly Crown Court trials in which the Judge has exercised his discretion to exclude evidence and the defendant has then been acquitted - with no appeal against the ruling being possible": A J Ashworth, "The Court's Discretion to Exclude Evidence" (1979) 143 JP 558, 559.

[197] [1983] 2 VR 133.

[198] (1979) 20 SASR 333.

[199] (1979) 26 ALR 454.

[200] (1981) 7 NTR 3.

[201] (1988) 47 SASR 261.

admission, in proof of a section 6(1) [section 5(1)] offence, of evidence obtained in contravention of the detailed requirements of section 8 [section 7]. Thus the exclusion of the four items of evidence of blood alcohol level in the Australian cases would perhaps have seemed unsurprising to English eyes.

With respect to the two remaining items of improperly obtained evidence which were excluded, it is again possible that they would have been held inadmissible even in England. At issue in R v Clune[202] was illegally obtained identification evidence. The defendant declined voluntarily to go into a line-up, whereupon the police brought in several men from the street and dispersed them in the room in which the defendant was seated. To prevent his face from being seen the defendant placed his hands over his face and crouched over the floor. The defendant's face was not, in fact, seen, but he was identified on the basis of his voice, build and appearance. McGarvie J held that although what was being investigated was a serious crime, the evidence should be excluded because

> [t]he unlawful conduct of the police placed the applicant in a dilemma. He had presumably been advised by his solicitor that he was not obliged to go into an identification parade. Being forced to participate in a form of identification process, he had the choice of remaining inconspicuous and thereby permitting the police to achieve what he believed they were not entitled to; or he could protest and partially conceal himself as he did, thus creating evidence from which a jury could infer guilt of the crime. In my opinion he was, through unlawful conduct by the police, placed in a most unfair position.[203]

Unlike McGarvie J, the other members of the Full Court of the Victorian Supreme Court thought that, as a new trial was being ordered, it was unnecessary to express a concluded view on the admissibility of the evidence.[204] They considered, however, that "the strongly inculpatory effect of the applicant's behaviour that resulted

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[202] [1982] VR 1.
[203] Id, 26.
[204] Id, 2, 12.

from his attempt to avoid participation in an impermissible procedure would seem to weigh very heavily in favour of the exclusion of the evidence."[205]

It will be recalled that in Chapter 2 we examined the English case of R v Leckie and Ensley,[206] in which certain identification evidence was excluded on the basis of the Sang "self-incrimination" principle. The defendants had been taken against their will to a police station and looked at by witnesses through a hatch in a cell door. There is reason to believe, therefore, that the evidence in Clune may have been excluded even by an English court.

The facts of Nolan v Rhodes[207] are unique and interesting. N, having been given a breath analysis test by a police officer, was informed of his right to have a blood test conducted by a medical practitioner. The officer, after asking N whether he wanted to have a sample of his blood taken for a blood test, said: "It's my advice that you don't have it because in my experience it's always higher". N did not ask for a blood test. It was held that N had been wrongfully convicted on the basis of the result of the breath analysis test. Although the police officer did not act illegally "[h]e was, however, guilty of relevant unfairness in offering bad advice ... He did it in no sinister, hostile or dishonourable sense, but he did overbear the will of the appellant." A conviction obtained by the use of the evidence of the breath analysis would, it was said, be obtained at too high a price.[208] Thus it is to be noted that the evidence was excluded on the basis that the defendant had been persuaded not to produce further evidence which may have been in his favour.

The conclusion is inescapable, therefore, that - if the reported cases are any indication - the rejection in Australia of Kuruma and adoption of the "principle of legitimacy" approach being advocated in this thesis may not have made much difference in practice to the amount (or even the type) of improperly obtained evidence actually

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[205] Id, 12.
[206] [1983] Crim LR 543.
[207] (1982) 32 SASR 207.
[208] Id, 214.

excluded. This phenomenon should not be regarded as demonstrating the inefficacy of the approach. Rather, it suggests that adoption of the approach alone is insufficient; the onus of proof should also be reversed. In making this recommendation, the Australian Law Reform Commission observed correctly that "things would change" only if the onus lay on the prosecution to persuade courts to decide in favour of admissibility.[209] As we have seen in Chapter 2, the original proposal for section 78 of the Police and Criminal Evidence Act 1984 similarly placed upon the prosecution the onus of justifying the inclusion of improperly obtained evidence.

F. THE HEARING

1. The Process of the Voir Dire

It is usual for applications for the exclusion of prosecution evidence or a stay of the proceedings to be considered on a voir dire,[210] or trial within a trial. Where counsel for the defence wishes to object to the admissibility of an item of evidence, the ordinary practice is that he should inform the prosecution of this beforehand so that the prosecution will omit any reference to the evidence in its opening address, which is given in the presence of the jury. Where the point is reached at which the prosecution intends to adduce the impugned evidence, the jury will be sent out and the voir dire will commence.[211] It has been said in England that, where objection is taken to the admissibility of an alleged confession, it is essential that the judge should hear evidence

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[209] Australian Law Reform Commission, Criminal Investigation (1975) par 298. See also Australian Law Reform Commission, Evidence (Vol 1) (Report No 26: Interim) (1985) par 964.

[210] "The title of the procedure comes from the French 'vrai dire' and the Latin 'veritatem dicere' literally to 'tell the truth'. 'Voir' (sometimes spelt 'voire') is the Norman-French for 'vrai' and reflects the long lineage of this judicial procedure": Mr Justice J H Phillips, "The Voir Dire" (1989) 63 ALJ 46, 46.

[211] See Ajodha v The State [1982] AC 204, 223.

in the absence of the jury[212] and give a ruling as to whether the confession should be admitted. The evidence of the alleged confession should not be put before the jury unless the judge has first ruled that it should be admitted.[213] The same approach should clearly be taken in relation to evidence which the defence alleges has been obtained improperly. Further, the defendant should be entitled to a ruling on the admissibility of the impugned evidence before or at the end of the prosecution case. In this respect the recent decision in R v Liverpool Juvenile Court, ex p R[214] on the admissibility of confessions under section 76(2) of the Police and Criminal Evidence Act 1984 is of relevance. Although the Court was speaking specifically of summary proceedings in a magistrates' court, its remarks are nonetheless instructive for our purposes. It was said that a ruling on admissibility before or at the end of the prosecution case would enable the defendant to know the strength of the case against him at the end of the prosecution case, which would affect his decision whether to give evidence in his defence.[215] Different considerations would, of course, apply where the defence does not - for whatever reason - raise the issue of admissibility until after the close of the prosecution case. In such a case it should clearly be incumbent on the trial judge to conduct a voir dire hearing and to rule on admissibility before proceeding further with the trial proper.

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[212] There was a suggestion in the 1929 decision of the Court of Criminal Appeal in R v Anderson (1929) 21 Cr App R 178 that an accused is entitled to demand that the jury remain in the courtroom during a voir dire. The correctness of this has been, however, questioned in the recent decision of the Court of Appeal in R v Hendry, The Times, 14 June 1988. It was said that, so far as the present day is concerned, and whatever might have been the position at the time of the decision in Anderson, it is for the judge to have the final word on whether the jury should remain in court. No doubt the judge would listen to the views of the defence. If this is a departure from Anderson - the Court continued - then it is a departure which is necessary in the circumstances of the present day.

[213] R v Francis and Murray (1959) 43 Cr App R 174.

[214] [1987] 3 WLR 224.

[215] See also Ladlow v Hayes (1983) 8 A Crim R 377, 385: "[A] party to a case has the right to know what evidence he has to meet. It could be that he would necessarily be embarrassed in the conduct of his case if the court were to decline to rule at once on an objection taken to admissibility. If the ruling were not then given, he might be denied the means of knowing whether or not he would be compelled to meet the evidence objected to, or what form his cross-examination on that evidence should take."

If the admissibility of an item of evidence is challenged only after the jury has heard the evidence, the judge must, of course, direct that the evidence be disregarded and "stricken from the record" if he decides to exclude it. Also worthy of note is R v Watson (Campbell),[216] in which the Court of Appeal held that it was open to a judge who had second thoughts about the voluntariness of a statement which he had earlier ruled admissible to change his mind as to its admissibility and to put matters right by, for example, directing the jury to disregard it or discharging the jury and ordering a new trial. It has been held recently[217] that a judge who had ruled that a statement was admissible under section 76 of the Police and Criminal Evidence Act 1984 but had changed his mind in the light of evidence given after the jury had heard the evidence was not obliged to discharge the jury and to order a new trial. Rather, he should take such steps as were necessary, depending on the circumstances, to prevent injustice. A discharge of the jury would be appropriate if it was felt that the matter was not capable of remedy by a direction to the jury to disregard the statement.

A voir dire hearing is generally adversarial rather than inquisitorial in character: it has been remarked in Australia that "[i]n holding a trial within a trial a judge is not engaged in an inquisitorial procedure."[218] It is generally thought that the conduct of a voir dire hearing is a matter best left to be tailored by the trial judge to the circumstances of the individual case. For example, while it has been held on the one hand that an accused is not entitled as of right to give evidence on a voir dire,[219] it has been held on the other that he will be entitled to do so if the justice of the case makes it desirable that this should be done.[220] Mirfield points out that "it is almost inconceivable that any judge would attempt to prevent the accused giving evidence on such a vital issue."[221] Thus, the principle that an accused is not entitled as of right to

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[216] [1980] 1 WLR 991.
[217] R v Sat-Bhambra (1988) 88 Cr App R 55, 62.
[218] MacPherson v R (1981) 55 ALJR 594, 606 per Brennan J.
[219] R v James (1963) 107 SJ 516.
[220] R v Cowell [1940] 2 KB 49.
[221] P Mirfield, Confessions (1985) 94.

give evidence on a voir dire is, in practice, doubtful. At a voir dire hearing conducted to determine the admissibility of a confession, the usual procedure is for the prosecution to call witnesses to testify as to the circumstances in which the confession was obtained, and for the defence to cross-examine these witnesses.[222] The defence may then call any evidence it considers necessary. There is no reason why a similar procedure should not be adopted where the issue for determination is whether evidence should be excluded or proceedings stayed on the ground of pre-trial executive impropriety.

It has been held recently by the Court of Appeal that a judge cannot try an issue of admissibility of evidence in total isolation on a voir dire; he cannot, and should not, put the whole background of the case out of his mind.[223]

Where the accused testifies on a voir dire, may the prosecution lead evidence in the trial proper regarding this testimony? The common law position, according to the Privy Council in Wong Kam-Ming v R[224] and the House of Lords in R v Brophy,[225] is that the prosecution may not do so. However, if the voir dire results in the admission of the impugned confession, the accused may be cross-examined to expose discrepancies and inconsistencies between his testimonies on the voir dire and in the trial proper. Such cross-examination would, naturally, be directed to testing the credibility of the accused. But it is subject, of course, to the judge's usual "duty to ensure that the right of the prosecution to cross-examine or rebut is not used in a manner unfair or oppressive to the defendant", and also to ensure that any relevant statutory provisions

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[222] The issue cannot be determined on the depositions alone: R v Chadwick (1934) 24 Cr App R 138; R v Moore (1972) 56 Cr App R 373. See also R v Little (1976) 14 SASR 556.

[223] R v Tyrer (1989) 90 Cr App R 446.

[224] [1980] AC 247.

[225] [1982] AC 476.

are strictly complied with.[226] Again, there is no reason why similar principles should not apply for our purposes.[227]

The fact that an accused testifies on a voir dire does not affect his right to remain silent in the trial proper.[228]

2. Pre-Trial Inquiries

As has been noted above, it is generally considered that the appropriate time at which to conduct a voir dire hearing is the point at which the prosecution wishes to adduce the impugned evidence. This is not, however, regarded as an inflexible rule, and it is recognised that a voir dire may be held at the commencement of the trial. In R v Hammond[229] counsel for the prosecution, in opening the case, stated that the defendant had made a statement to the police which amounted to a confession of the crime, and that the prosecution intended to relate the circumstances in which the statement had been made. Defending counsel stated that he intended to object to the admissibility of the statement, and the trial judge then heard evidence as to its admissibility in the absence of the jury. The Court of Criminal Appeal stated:

> The Court cannot lay down as a rule of practice that in no case should the Judge decide to hear in advance arguments as to the admissibility of evidence. There may be cases in which it is convenient, and in which no harm can result. The rule stands, however, that in most cases the ordinary practice should be adhered to, and in this

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[226] [1980] AC 247, 259-60.

[227] It should be noted that a possible consequence of s 76 of the Police and Criminal Evidence Act 1984 is that the common law prohibition of adduction of an accused's voir dire testimony in the trial proper may no longer apply: P Mirfield, Confessions (1985) 98.

[228] R v Brophy [1982] AC 476.

[229] (1941) 28 Cr App R 84.

> case there is no question but that it would have been very much better if it had been followed.[230]

In spite of the reservations of the Court of Criminal Appeal in Hammond, there is clearly a lot of merit in holding a voir dire at the commencement of the trial where defence counsel indicates at that stage his intention to seek the exclusion of an item of evidence on the ground that it was obtained improperly. The jury would be excluded immediately from the courtroom without hearing any evidence on the charge against the accused. A decision by the trial judge to admit the impugned evidence may cause the accused to change his plea, with the result that no evidence is in fact required to be called. Similarly, a decision to exclude the impugned evidence may cause the prosecution to elect not to offer any evidence against the accused. These possibilities should not be overlooked. It would be wasteful of judicial resources for the trial proper to proceed to the point at which the impugned evidence is to be offered, and then abandoned as a result of the decision of the trial judge on the admissibility of the evidence.

Such considerations have led most US jurisdictions, including the Federal jurisdiction, to insist that motions to suppress evidence pursuant to the Fourth Amendment exclusionary rule must be made prior to the trial.[231] The position in the Federal jurisdiction is governed by Rule 12 of the Federal Rules of Criminal Procedure. Rule 12(b) requires that motions to suppress evidence be raised prior to trial. A pre-trial motion must be actually determined before the trial unless the court orders "for

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[230] Id, 86. See also R v Mackintosh (1982) 76 Cr App R 177, 181: "[A]s [counsel] had been told at the very beginning of the trial that the admissibility of the statements would be challenged, an application was made to the learned judge for the issue of the admissibility of the alleged confessions to be investigated after arraignment and before the case for the Crown was opened. The judge granted the application and there was held what has come to be called a trial-within-a-trial. The cases for the prosecution and for the defence were put forward. The learned judge went into the matter very carefully and gave a reasoned ruling from which it is clear that he directed his mind to the correct matters." Cf R v Brydon (1983) 6 CCC (3d) 68.

[231] See generally E W Cleary (ed), McCormick on Evidence (3rd ed 1984) 522-3; W R LaFave, Search and Seizure: A Treatise on the Fourth Amendment (Vol 4) (2nd ed 1987) 188 and associated page in 1990 Pocket Part.

good cause" that it be deferred for determination at a later stage: rule 12(e). Rule 12(f) provides: "Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

A similar "pre-trial hearing" procedure could usefully be adopted in England where the defence is aware in advance of the trial that it intends to object to the admissibility of an item of prosecution evidence or to the continuation of the proceedings. In such a situation there should be no need for defence counsel to wait for the trial to commence before indicating his intention to object (as was done in Hammond). He should be entitled to indicate such intention prior to trial so that, instead of a voir dire at the commencement of the trial, a pre-trial hearing may be convened. An advantage of this course of action over that adopted in Hammond is that it avoids the need for a jury to be sworn and then excluded almost immediately from the courtroom for an indefinite period. Further, and perhaps more importantly, a pre-trial inquiry would obviate the need for full-scale preparations for a trial which could very well be abandoned at the outset as a result of the trial judge's decision on the voir dire.

Where a defendant wishes to apply for a stay of the proceedings, the ability to have the matter determined prior to the commencement of the trial is of special importance. By applying for a stay of proceedings, the defendant is arguing in effect that no trial should take place. It is unnecessary that the determination of whether a trial should take place should wait for the commencement of the trial. Unfortunately, the English Court of Appeal refused in R v Heston-Francois[232] to endorse the use of pre-trial inquiries for determination of whether proceedings should be stayed as an abuse of

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[232] [1984] 1 All ER 785; see J Hunter, "'Tainted' Proceedings: Censuring Police Illegalities" (1985) 59 ALJ 709. Note that the Appeal Committee of the House of Lords dismissed a petition by the appellant for leave to appeal from the decision of the Court of Appeal: [1984] 1 All ER 785, 793.

process. While the appellant was on bail awaiting trial on burglary charges, the police, in the course of investigating another offence, seized from his home privileged documents prepared for use in his defence to the burglary charges. These documents were then perused by police officers involved in the prosecution of the burglary charges. The question before the Court of Appeal was whether a trial judge has a duty, on the application of a defendant before arraignment, to conduct a hearing into allegations of oppressive conduct said to constitute an abuse of the court's process, with view to determining whether a stay of the proceedings should be ordered.

It was held that no such duty existed. In so holding, the Court of Appeal did not doubt the existence of an inherent jurisdiction to stay proceedings. But this jurisdiction, it was thought, did not include an obligation to hold a pre-trial inquiry into allegations of improper conduct said to constitute an abuse of process. The Court considered that the performance of such a duty "would present difficult procedural problems, for example (i) of defining the issues claimed to exist, which may be very complex, (ii) of providing for representation of persons whose conduct is impugned, (iii) of ensuring that the persons affected are sufficiently aware of the case they have to meet. Whilst these problems may be overcome, the issues referred to are best left, we think, to be dealt with during the course of the trial and, if necessary, later by the Court of Appeal."[233]

This reasoning is unconvincing. Problems of defining issues and of protecting the interests of those whose conduct is challenged would arise regardless of whether the question of a stay of proceedings was determined at a pre-trial hearing or after the commencement of the trial at a voir dire hearing.[234] Accordingly it is inappropriate to cite these problems as the reason for refusing to endorse the use of pre-trial hearings for determination of whether proceedings should be stayed.

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[233] Id, 791-2.
[234] See generally J Hunter, note 232 supra, 712-3.

It is to be noted that the Criminal Justice Act 1987 grants the judge in a serious and complex fraud trial the power to order a hearing before the jury is sworn.[235] Arraignment would take place at the commencement of the preparatory hearing.[236] At the hearing the judge may determine, inter alia, any question as to the admissibility of evidence.[237] An order or ruling made at or for the purposes of a preparatory hearing is to have effect during the trial, "unless it appears to the judge, on application made to him during the trial, that the interests of justice require him to vary or discharge it."[238] An appeal lies to the Court of Appeal from any order or ruling made at a preparatory hearing, but only with the leave of the judge or of the Court of Appeal.[239] A preparatory hearing may be continued notwithstanding that leave to appeal has been granted, but no jury can be sworn until after the appeal has been determined or abandoned.[240]

In Australia, the Court of Appeal of the State of New South Wales has endorsed the use of pre-trial hearings for determination of whether proceedings should be stayed. The Court has acknowledged that[241] a trial court has jurisdiction to deal even with matters relating to trials which will take place if an indictment is presented. This jurisdiction is exercisable in respect of existing charges notwithstanding that an indictment may not be presented and a trial may not take place in respect of any particular charge. The jurisdiction may be exercised to stay further proceedings on any pending charge.

The Australian State of Victoria has enacted a statutory provision which effectively permits trial courts to hold pre-trial hearings, after the indictment has been presented, to determine the procedural implications of pre-trial executive improprieties.

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[235] S 7(1).
[236] S 8(2).
[237] S 9(3).
[238] S 9(10).
[239] S 9(11).
[240] S 9(13).
[241] Watson v A-G (NSW) (1987) 8 NSWLR 685, 701.

The relevant provision is section 391A of the Crimes Act 1958, which provides:

> Where an accused person is arraigned on indictment or presentment before the Supreme Court or the County Court the Court before which the arraignment takes place, if the Court thinks fit, may before the impanelling of a jury for the trial hear and determine any question with respect to the trial of the accused person which the Court considers necessary to ensure that the trial will be conducted fairly and expeditiously and the hearing and determination of any such question shall be conducted and have the same effect and consequences in all respects as such a hearing and determination would have had before the enactment of this section if the hearing and determination had occurred after the jury had been impanelled.

Steps must be taken, of course, to ensure that pre-trial inquiries do not generate unwanted publicity which would make a subsequent unbiased trial impossible. For example, an order to suppress publicity can be made by the judge presiding at the pre-trial hearing. It may also be appropriate for Parliament to enact specific legislation to enable courts to control pre-trial publicity arising from pre-trial inquiries.

As we have seen, the effect of Rule 12 of the US Federal Rules of Criminal Procedure is that motions to suppress evidence must be raised prior to trial, and that failure to do so will constitute waiver unless relief is granted from the waiver. Such relief may be granted where, for example, the defendant was not aware before the trial of the (factual) grounds for the motion. Authority suggests that ignorance of the legal grounds for having the evidence suppressed will not suffice.[242] But the defendant's ignorance, before the trial, of the factual circumstances surrounding the obtaining of the evidence would appear to suffice.[243]

The following question therefore arises for consideration in the English context. Should the defence be regarded as having waived the right to object to the admission of

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[242] See Isaacs v US 283 F 2d 587 (10th Cir 1960).

[243] See People v Ferguson 135 NW 2d 357 (1965). It was said (id, 359) that "if the factual circumstances are known to defendant in advance of trial, he is responsible for communicating them to his lawyer immediately and his lawyer, in turn, is responsible for making a proper motion in advance of trial. ... If, however, factual circumstances are not known sufficiently in advance of trial to permit such a motion then the trial court may exercise its discretion and consider the motion at trial."

an item of improperly obtained evidence or the continuation of the proceedings if it did not seek a pre-trial hearing even though it can be proved that it was aware of the relevant impropriety? The answer, I would suggest, is no. Where a choice has to be made between promoting trial efficiency and underpinning the legitimacy of the criminal justice system, the latter consideration must prevail. Furthermore, to adopt the US factual grounds/legal grounds distinction would mean that far too much would turn on proof of knowledge of the relevant factual circumstances. Indeed, a rule of waiver would probably have the undesirable effect of encouraging defence counsel to object on slender grounds for fear that he may otherwise lose the right to object altogether.

3. Should a Hearing be Conducted?

There cannot, of course, be a strict set of guidelines as to the circumstances in which it is appropriate to accede to defence counsel's request for a voir dire or a pre-trial hearing into whether certain evidence should be excluded or the proceedings stayed on the ground of pre-trial executive impropriety. In the South Australian case of R v Williams[244] Wells J, speaking in the context of confessional evidence, observed that a voir dire hearing would not normally be allowed simply at the request of counsel. Instead, there must be proper and adequate material before the judge; this material may be constituted by counsel's explicit assurance of his intention to adduce certain evidence, or by some passage or passages in the depositions. It would be wrong for counsel to treat a voir dire hearing as a fishing expedition[245] (in which he attempts to "fish" for details of the prosecution case against the defendant).

The issue of voir dire hearings and the determination of the admissibility of confessions under section 76(2) of the Police and Criminal Evidence Act 1984 was

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[244] (1976) 14 SASR 1.
[245] Id, 3.

recently considered in R v Liverpool Juvenile Court, ex p R.[246] It was said that a voir dire should take place only if it is represented to the court that the confession was or might have been obtained in contravention of section 76(2). "Representation", it was pointed out, is not synonymous with and does not include cross-examination. A court is not obliged, therefore, to embark upon a voir dire merely because of a suggestion in cross-examination that the alleged confession has been obtained in contravention of section 76(2).[247] It would be sensible to adopt a similar rule in relation to the holding of a voir dire to determine whether evidence should be excluded or the proceedings stayed on account of pre-trial executive impropriety.

G. APPEALS

Criminal appeals in England are governed by the Criminal Appeal Act 1968. It should be noted at the outset that this Act does not afford the prosecution the right to appeal to the Court of Appeal. However the Criminal Justice Act 1972 provides that, where a person tried on indictment has been acquitted, the Attorney General may refer a point of law which has arisen in the case to the Court of Appeal for its opinion.[248] A further reference may be taken to the House of Lords.[249] But references under the Criminal Justice Act do not affect the trial in relation to which they are made, or any acquittal in that trial.[250]

The Criminal Appeal Act 1968 affords a person convicted of an offence on indictment the right to appeal to the Court of Appeal against his conviction: section 1(1). Subsection (2) provides that such appeal may be on any ground involving "a question of law alone", or, with the leave of the Court of Appeal, "on any ground

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[246] [1987] 3 WLR 224. As mentioned above, the Court was addressing itself specifically to summary proceedings in a magistrates' court. However, this does not affect the relevance for our purposes of most of its observations.

[247] Id, 230-1.

[248] S 36(1).

[249] S 36(3).

[250] S 36(7).

which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal". An appeal may, however, be taken without the leave of the Court of Appeal if the trial judge grants a certificate that the case is fit for appeal on a ground involving a question of fact, or a question of mixed law and fact. Under section 2(1), the Court of Appeal must allow the appeal if satisfied that the conviction is unsafe or unsatisfactory; or that a wrong decision was reached on a question of law; or that there was a material irregularity in the course of the trial. This is subject, however, to the proviso that "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred."

The House of Lords in Stirland v DPP[251] considered that in situations where a defendant appeals on the ground of wrongful admission of evidence, the proviso should be applied "where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."[252] Thus, an appeal against conviction on the ground of wrongful admission of improperly obtained evidence will be dismissed if a reasonable jury, properly directed, would have convicted the appellant even if the evidence in question had been excluded. In the US the position is governed by the "harmless error" doctrine. Rule 52(a) of the Federal Rules of Criminal Procedure, for instance, provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Supreme Court said in Chapman v California:[253]

> An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless. ... [B]efore a federal constitutional error can be held harmless, the court must

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[251] [1944] AC 315.

[252] Id, 321. Stirland was applied by the Court of Appeal in R v Edwards (Webb) (1983) 77 Cr App R 5.

[253] 386 US 18 (1967).

> be able to declare a belief that it was harmless beyond a reasonable doubt.[254]

Thus in Milton v Wainwright[255] the Court stated that "[o]ur review of the record ... leaves us with no reasonable doubt that the jury ... would have reached the same verdict without hearing [the improperly admitted testimony]".[256]

In theory, then, the position in the US is that the appeal should be dismissed if the appellate court is satisfied beyond reasonable doubt that the jury would have reached the same verdict, while the English position is that the appeal should be dismissed if the court is satisfied that a reasonable jury would have reached the same verdict. In practice, however, it is doubtful whether the tests to be applied really differ. The following observations of the US Supreme Court in Harrington v California[257] are worthy of note:

> It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of [the improperly admitted evidence] and who otherwise would have remained in doubt and unconvinced. We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of [the evidence] on the minds of an average jury.[258]

There is a lot of merit in this statement. Obviously, an inquiry into whether the jury would have convicted the defendant on the basis of the "other evidence" of the crime is an exercise in futility. What the appellate court must inevitably do is to reach its own conclusion as to whether this "other evidence" is sufficient to prove the guilt of the defendant beyond reasonable doubt.[259]

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[254] Id, 23-4.
[255] 407 US 371 (1972).
[256] Id, 377.
[257] 395 US 250 (1969).
[258] Id, 254.
[259] See R v Walsh (1989) 91 Cr App R 161, 164: "Where the strength or otherwise of the other evidence is relevant is in considering the proviso, for if this court concludes that notwithstanding the unfairness of the trial the appellant would have been convicted anyway had the trial been wholly fair, then at the end there may have been no real miscarriage of justice at all. ... We do not reach that conclusion in this case. The other evidence, whilst substantial, was not overwhelming."

CHAPTER 5

DELAY[1]

A. THE ENGLISH POSITION

In this chapter it is proposed to examine the issue of the procedural implications of pre-trial police or prosecutorial delay. The problem of delay in criminal procedure is one which has had a lot of airing in recent times, both in England and in other jurisdictions.

As a preliminary point it should be noted that there do exist, in England, statutory provisions which are of relevance to the issue of delay in criminal proceedings. Section 22(1) of the Prosecution of Offences Act 1985 provides:

> The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period -
> (a) to be allowed to the prosecution to complete that stage;
> (b) during which the accused may, while awaiting completion of that stage, be
> (i) in the custody of a magistrates' court; or
> (ii) in the custody of the Crown Court; in relation to that offence.

"Preliminary stage" is defined as any stage of the proceedings before arraignment in the Crown Court or, in the case of summary proceedings, before the magistrates' court has begun to hear evidence for the prosecution at the trial.[2] Extension of a time limit may be granted by the appropriate court if it is satisfied "that there is good and sufficient cause for doing so"[3] and "that the prosecution has acted with all due expedition."[4] Non-compliance with a time limit will result in the accused being "treated, for all purposes, as having been acquitted of that offence."[5]

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[1] See A L-T Choo, "Abuse of Process and Pre-Trial Delay: a Structured Approach" (1989) 13 Crim LJ 178, which is based on an earlier version of this chapter.
[2] S 22(11).
[3] S 22(3)(a).
[4] S 22(3)(b).
[5] S 22(4). Note that the Prosecution of Offences (Custody Time Limits) Regulations 1987, the Prosecution of Offences (Custody Time Limits) (Amendment)

It is to be noted that field trips were conducted in selected Crown Courts and magistrates' courts prior to the implementation of these provisions, the purpose of the trials being "to examine the practical implications of limits for the parties and the courts and to assist in identifying deadlines which were realistic yet tight enough to act as a discipline, thereby minimising time spent awaiting trial."[6] In particular, the field trips examined the levels of compliance with test limits; case factors associated with long interval to trial; the proportion of elapsed time attributable to courts, prosecution and defence; the intervals between key events or decisions and the reasons given; the difficulties experienced by the prosecution in complying with the test limits; and the views of prosecutors as to the possible grounds for extension under statutory limits.[7] The results of the study are set out in detail in a report,[8] and need not be repeated here.

Also relevant is section 77 of the Supreme Court Act 1981, which provides that "Crown Court Rules shall prescribe the minimum and the maximum period which may elapse" between a person's committal for trial and the beginning of the trial (that is, arraignment). These periods are prescribed by rule 24(1) of the Crown Court Rules 1982, which provides that

> the trial of a person committed by a magistrates' court - (a) shall not begin until the expiration of 14 days beginning with the date of his committal, except with his consent and the consent of the prosecution, and (b) shall,

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Regulations 1988, the Prosecution of Offences (Custody Time Limits) (Amendment) Regulations 1989 and the Prosecution of Offences (Custody Time Limits) (Amendment) (No 2) Regulations 1989 have been made by the Secretary of State pursuant to s 22(1). These regulations apply in specified counties, and make provision as to the maximum period during which a person accused of an indictable offence other than treason may be kept in custody while awaiting trial or committal for trial. See White v DPP, The Times, 20 October 1988: it is possible that a defence request for more time can in certain circumstances constitute "good and sufficient cause" for allowing an extension of the time a defendant can be held in custody under the Prosecution of Offences (Custody Time Limits) Regulations 1987. See also R v Governor of Canterbury Prison, ex p Craig [1990] 3 WLR 126; R v Birmingham Crown Court, ex p Ricketts [1990] Crim LR 745.

See also C Corbett and Y Korn, "Custody Time Limits in Serious and Complex Cases: Will they work in Practice?" [1987] Crim LR 737.

[6] P Morgan and J Vennard, Pre-Trial Delay: The Implications of Time Limits (Home Office Research Study No 110) (1989) 1.

[7] Id, 7.

[8] Note 6 supra.

> unless the Crown Court has otherwise ordered, begin not later than the expiration of 8 weeks beginning with the date of his committal.

However it has been held that the prescribed maximum period of eight weeks is, in effect, directory and not mandatory. Thus a properly conducted trial commencing after that period, without the court having granted an extension of time, is not a nullity.[9] Indeed it would appear that the time limit is commonly exceeded in practice.[10]

The issue of the circumstances in which proceedings may be stayed on account of pre-trial delay has been considered in a number of Queen's Bench Divisional Court decisions.[11] In R v Brentford JJ, ex p Wong[12] the prosecution, without having reached a decision as to whether to prosecute, laid an information just before the expiry of the six-month statutory time limit during which summary proceedings had to be commenced. The summonses were finally served on the applicant 11 months after the commission of the offence. It was held that the proceedings should be stayed:

> [I]t is open to justices to conclude that it is an abuse of the process of the Court for a prosecutor to lay an information when he has not reached a decision to prosecute. ... [The purpose of the six-month statutory time limit] is wholly frustrated if it is possible for a prosecutor to obtain summonses and then, in his own good time and at his convenience, serve them. Of course there may be delays in service of the summonses due perhaps to the evasiveness of the defendant. There may be delays due to administrative reasons which are excusable, but that is not so in this case. ... Here, as I understand it, there was a deliberate attempt to gain further time in which to reach a decision.[13]

Thus it was the culpability of the prosecution, rather than the possibility of prejudice to the applicant's defence as a consequence of the delay, which prompted the Court to stay the proceedings.[14]

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[9] R v Spring Hill Prison Governor, ex p Sohi [1988] 1 All ER 424.

[10] See C Corbett and Y Korn, note 5 supra, 737.

[11] See R Pattenden, "The Power of the Courts to Stay a Criminal Prosecution" [1985] Crim LR 175 for a discussion of the cases up to her time of writing.

[12] (1980) 73 Cr App R 67.

[13] Id, 70.

[14] See also R v Newcastle-upon-Tyne JJ, ex p Hindle [1984] 1 All ER 770 and Sherwood and Hart v Ross [1989] Crim LR 576.

In R v Oxford City JJ, ex p Smith[15] a summons was served on the applicant over two years after the alleged offence. This delay was due solely to the inefficiency of the police; there was no suggestion that they had deliberately failed to make the necessary inquiries, acted in a malicious manner or deliberately played for time.[16] It was held that "this is the type of delay by its nature and its length which inevitably ... must lead to prejudice, unfairness and injustice to the applicant."[17] The proceedings were accordingly stayed on this basis. A month later, the Court in R v Watford JJ, ex p Outrim[18] followed Smith, emphasising the possibility of prejudice to the defence. Evidence of deliberate intent to delay matters was considered unnecessary.[19]

However, in R v Grays JJ, ex p Graham,[20] a stay was refused in respect of committal proceedings which were to be heard approximately two years after the commission of the alleged offences. The Court held that proof of mala fides on the part of the prosecution was necessary and there had been no instance of mala fides in the present case.[21] Graham is thus clearly inconsistent with Smith and Outrim in treating proof of mala fides as a precondition for a stay of proceedings on account of delay. In R v Magnaload and Greenham Premises,[22] a first instance decision, Woodhouse J of the Grimsby Crown Court took the precaution of holding that some evidence of mala fides existed, if proof of such was necessary.

The Smith/Outrim view would seem, however, to have prevailed. The effect of the later cases of R v Canterbury and St Augustine JJ, ex p Turner,[23] R v West London Stipendiary Magistrate, ex p Anderson[24] and R v Derby Crown Court, ex p Brooks[25]

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[15] [1982] RTR 201.
[16] Id, 205.
[17] Id, 208.
[18] [1983] RTR 26.
[19] Id, 29.
[20] [1982] 3 WLR 596.
[21] Id, 602-3.
[22] [1984] CLY 572.
[23] (1983) 147 JPR 193.
[24] (1984) 148 JPR 683.
[25] (1984) 80 Cr App R 164.

appears to be that proof of mala fides is unnecessary. In Brooks, the Court undertook the task of laying down guidelines as to the circumstances in which a stay of proceedings may be ordered on account of delay:

> The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service.[26]

It is likely that courts will treat these guidelines as authoritative, at least until the emergence of a relevant Court of Appeal or House of Lords decision.[27]

It should be noted, however, that the recent Privy Council decision in Bell v DPP[28] involved a consideration of whether there had been an infringement of section 20(1) of the Constitution of Jamaica, which provides: "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time ...". The Privy Council observed that, even prior to the enactment of the written Constitution, Jamaican courts, applying the common law of England, would have been capable of dealing with the problem of pre-trial delay by exercising the power to stay proceedings.[29] Their Lordships expressly acknowledged the "relevance and importance" to their inquiry of the criteria laid down by the US Supreme

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[26] Id, 168-9.

[27] Cases decided subsequent to Brooks include R v Bow Street Magistrates' Court, ex p Van der Holst (1985) 83 Cr App R 114; R v Willesden JJ, ex p Clemmings (1987) 87 Cr App R 280; R v Governor of Pentonville Prison, ex p Parekh, The Times, 19 May 1988; R v Sunderland Magistrates' Court, ex p Z [1989] Crim LR 56; R v Bow Street Stipendiary Magistrate, ex p DPP and Cherry, The Times, 20 December 1989; Daventry District Council v Olins (1990) 154 JPR 478; R v Governor of Pentonville Prison, ex p Sinclair [1990] 2 All ER 789.

[28] [1985] AC 937.

[29] Id, 950.

Court in the case of Barker v Wingo.[30] "[T]he desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings"[31] was also acknowledged. As we shall see later, the US law has been also relied and elaborated upon in Canada.

Given that this area of the law represents a rare instance of the willingness of the English judiciary to borrow directly from the US law in the area, it is appropriate to proceed now to an examination of the US position on the procedural implications of pre-trial executive delay.

B. OTHER JURISDICTIONS

1. The US

(a) The Sixth Amendment Right to a Speedy Trial

The Sixth Amendment of the US Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial ...". Violation of this right, the Supreme Court has held, will result in dismissal of the indictment.[32]

(i) "Attachment" of the Right

The US Supreme Court takes the view that "[a] literal reading of the Amendment suggests that this right attaches only when a formal criminal charge is instituted and a criminal prosecution begins."[33] Thus, "it is either a formal indictment or

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[30] 407 US 514 (1972).

[31] [1985] AC 937, 953 (emphasis added).

[32] The Court observed in Barker v Wingo 407 US 514, 522 (1972): "The amorphous quality of the right ... leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy." See also Strunk v US 412 US 434, 439-40 (1973).

[33] US v MacDonald 456 US 1, 6 (1982).

information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment."[34] In US v Marion[35] the defendants were indicted on 21 April 1970 on 19 counts of fraud alleged to have been committed from 15 March 1965 until 6 February 1967. It was argued that the delay of approximately three years between the end of the criminal scheme charged and the return of the indictment violated the Sixth Amendment. The Supreme Court held, however, that

> the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused,' an event that occurred in this case only when the appellees were indicted on April 21, 1970. ... On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.[36]

Also of interest is US v MacDonald,[37] in which it was held that the time between the dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered in determining whether the delay in bringing the defendant to trial violated his rights under the Speedy Trial Clause of the Sixth Amendment. The Court pointed out that during the intervening period, the defendant had not been under arrest, in custody, or subject to any "criminal prosecution". After the dismissal of the military charges the defendant was in the same position, legally and constitutionally, as he would have been in had no charges been laid; "[h]e was free to go about his affairs, to practice his profession, and to continue with his life."[38]

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[34] US v Marion 404 US 307, 320 (1971).
[35] 404 US 307 (1971).
[36] Id, 313.
[37] 456 US 1 (1982).
[38] Id, 10.

(ii) When is the Right Violated?

Given that violation of the Sixth Amendment right to a speedy trial leads automatically to dismissal of the indictment, it is not surprising that the US Supreme Court has given careful consideration to the issue of what constitutes a violation of the right. The Court has identified four factors which should be considered in determining whether a particular defendant has been deprived of his Sixth Amendment right to a speedy trial. Each of these will be examined in turn.

1. Length of delay

The delay in question must be of sufficient length to be "presumptively improper": if this requirement is not satisfied there is no need to proceed further with a determination of whether the defendant's speedy trial right has been violated.[39] But the issue of whether delay is presumptively improper will be dependent upon the circumstances of the particular case.[40] It is necessary to take into account both the nature of the offence charged and the manner in which the prosecution case is to be proven. Thus "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge"[41] because genuine difficulties in preparing for trial are more likely to be encountered by the prosecution in the latter case than in the former. In a recent case involving serious charges the Court held a 90-month delay to be presumptively improper.[42] The manner in which the prosecution case is to be proven is relevant because documentary evidence, for example, will retain its reliability through a period of delay whereas the memories of eyewitnesses are liable to fade: in a case which depends on eyewitness testimony a delay of even nine months may be presumptively improper.[43]

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[39] Barker v Wingo 407 US 514, 530 (1972); US v $8,850 461 US 555, 565 (1983).
[40] Barker v Wingo 407 US 514, 530-1 (1972); US v $8,850 461 US 555, 565 (1983).
[41] Barker v Wingo 407 US 514, 530-1 (1972).
[42] US v Loud Hawk 106 S Ct 648, 655 (1986).
[43] Barker v Wingo 407 US 514, 531 n 31 (1972).

2. The reason for the delay

"[D]ifferent weights should be assigned to different reasons." For example, deliberate delay which is motivated by a desire to hamper the defence will weigh heavily against the Government. In comparison, "[a] more neutral reason such as negligence or overcrowded courts" will weigh less heavily. Finally, it may be that there is a valid reason for the delay, such as a missing witness.[44] The Court held recently that delay caused by an interlocutory appeal by the Government was justified; there was no showing of bad faith or dilatory purpose on the part of the Government.[45]

3. The defendant's assertion of his right

The fact that the defendant has asserted his speedy trial right will weigh heavily in his favour, while failure to do so will make it difficult for him to establish that he was denied a speedy trial.[46] The strength of any efforts to assert the right is also a relevant consideration: "[t]he strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences."[47] In US v Loud Hawk[48] the Court held that the mere fact that the defendants had repeatedly moved for dismissal on speedy trial grounds did not of itself suffice to establish that they had appropriately asserted their rights: at the same time as making claims for a speedy trial they consumed six months by filing frivolous petitions for rehearing and for certiorari, and "also filled the District Court's docket with repetitive and unsuccessful motions."[49] It is clear, therefore, that a court will look at all relevant circumstances to determine the

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[44] Id, 531.
[45] US v Loud Hawk 106 S Ct 648, 656 (1986).
[46] Barker v Wingo 407 US 514, 531-2 (1972).
[47] Id, 531.
[48] 106 S Ct 648 (1986).
[49] Id, 655-6. See also Barker v Wingo 407 US 514, 534 (1972): "the record shows no action whatever taken between October 21, 1958, and February 12, 1962, that could be construed as the assertion of the speedy trial right."

seriousness with which it should take the fact that the defendant asserted his speedy trial right: a defendant who asserts the right while at the same time delaying matters himself is unlikely to be actually experiencing any personal prejudice as a result of the delay.

Similarly, the time at which an assertion was made is also a relevant consideration: the fact that the defendant asserted his speedy trial right just prior to the trial may suggest that the assertion was merely an attempt to add weight to his speedy trial claim rather than being motivated by any personal prejudice which he was experiencing as a result of the delay. Thus the Sixth Circuit of the Court of Appeals held in Martin v Rose[50] that a demand for a speedy trial five days before the trial was due to commence did not constitute an appropriate assertion,[51] and in Takacs v Engle[52] that an assertion 13 days before the trial was due to commence was also insufficient.[53]

4. Prejudice to the defendant

The fourth factor regarded by the Court as relevant is whether the delay has resulted in "prejudice to the defendant". Essentially, it is considered that a defendant may be "prejudiced" by delay in any one of three ways:[54]

(a) Through oppressive pre-trial incarceration. The Court has adverted to the emotional and practical consequences for an accused of time spent in jail awaiting trial:

> It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.[55]

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[50] 744 F 2d 1245 (6th Cir 1984).
[51] Id, 1252.
[52] 768 F 2d 122 (6th Cir 1985).
[53] Id, 128.
[54] Barker v Wingo 407 US 514, 532 (1972).
[55] Id, 532-3.

(b) Through anxiety and concern, even if the defendant is on bail and not therefore being incarcerated. He is still disadvantaged by restraints on his liberty and by the anxiety, suspicion, and probable hostility resulting from arrest and the presence of unresolved criminal charges.[56]

(c) Through impairment of his defence. This is regarded by the Court as the most serious of the three, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Prejudice will occur where witnesses die or disappear during a delay, or where defence witnesses are unable to recall events accurately.[57] However, the mere possibility of "impairment of a fair trial that may well result from the absence or loss of memory of witnesses" would appear not to suffice.[58]

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The Court has emphasised that the four factors identified by it as relevant to a determination of whether a defendant's speedy trial right has been violated do not constitute an exhaustive list, but must be considered together with any other circumstances which may be relevant.[59] Given that the Court has held that violation of the right will lead automatically to dismissal of the indictment, a determination of whether the right has been violated is in effect synonymous with a determination of whether the defendant should be put on trial after the delay. A cursory examination of the four factors might suggest that there is little connection between them, but a closer examination reveals that the Court is concerned essentially with three issues. The first is that a delay in bringing a person to trial must be in some way improper before any

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[56] Id, 533; US v MacDonald 456 US 1, 8 (1982). See also US v Marion 404 US 307, 320 (1971): "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

[57] Barker v Wingo 407 US 514, 532 (1972).

[58] US v Loud Hawk 106 S Ct 648, 656 (1986).

[59] Barker v Wingo 407 US 514, 533 (1972).

question of protecting him from the trial can arise. Second, it seems that an important consideration in determining whether a person should be put on trial after a delay is whether his defence would be impaired as a result of the delay. Third, it would appear that a further consideration in determining whether a delayed trial should take place is the extent to which the defendant has suffered oppression, anxiety or concern as a result of the delay. We shall see that these three issues are precisely those which should underlie any consideration of whether a defendant should be protected from trial on account of delay by the executive.

(b) Due Process

Given that the Speedy Trial Clause of the Sixth Amendment is concerned solely with delay occurring at the postaccusation stage, the US Supreme Court has had to consider separately the problem of delay occurring prior to that stage. In doing so, the Court has acknowledged that due process principles[60] "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay ... caused substantial prejudice to [the defendant's right] to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused."[61] Thus, it is necessary to consider (1) whether the delay has caused substantial prejudice to the defendant's ability to defend himself; and (2) the reason for the delay.

As to the first of these requirements, it is clear that there must be actual prejudice to the conduct of the defence. This may, for example, be demonstrated by specific events at trial.[62] As to the second, it must be shown "that the Government intentionally delayed to gain some tactical advantage over [the defendant] or to harass [him]."[63] The Supreme Court pointed out in US v Lovasco[64] that this requirement will

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[60] See Chapter 4, n 99 where the due process clauses of the Fifth and Fourteenth Amendments are quoted.
[61] US v Marion 404 US 307, 324 (1971) (emphasis added).
[62] Id, 326.
[63] Id, 325.
[64] 431 US 783 (1977).

not be satisfied by the fact that a prosecutor delayed seeking an indictment until he had probable cause to believe the suspect to be guilty; indeed, it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. Further, prosecutors are under no obligation to file charges as soon as probable cause exists. Such an obligation would have a number of undesirable consequences. First, where a criminal enterprise involves more than one person, an immediate arrest or indictment may impair the prosecutor's ability to continue his investigation and thus bring other offenders to conviction. Even if he is able to continue his investigation and obtain additional indictments, the result will be multiple trials involving the same set of facts. Second, a duty to prosecute as soon as probable cause is established will probably result in an increase in the number of unwarranted charges being filed, and will also add to the time during which defendants stand accused but untried. Thus, a desire to reduce preaccusation delay may lead, ironically, to increased postaccusation delay. Finally, a requirement to prosecute as soon as probable cause is established may prevent the Government from awaiting the information necessary for a proper exercise of its prosecutorial discretion to determine whether prosecution would be in the public interest.[65]

In the circumstances of Lovasco it was held that due process was not violated by delay caused by efforts to identify persons in addition to the defendant who may have participated in the offences in question. "[T]o prosecute a defendant following investigative delay does not deprive him of due process".[66]

(c) Statutory Provisions

In addition to the Sixth Amendment Speedy Trial Clause and due process principles, specific statutory provisions are of considerable importance when considering

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[65] Id, 790-6.
[66] Id, 796. See also Clayton v Ralphs and Manos (1987) 26 A Crim R 43, 84 per Legoe J.

the US approach to the problem of delay in bringing cases to trial. As far as the preaccusation period is concerned, a statute of limitations may provide that prosecution for the offence in question must commence within a certain period after the commission of the offence. For example, 18 USC section 3282 provides that except as otherwise expressly provided by law, a person may not be prosecuted, tried or punished for any non-capital offence "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." Indeed, the attitude of the Supreme Court is that "the applicable statute of limitations ... is usually considered the primary guarantee against bringing overly stale criminal charges."[67] Statutes of limitations, it is said, "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice;"[68] "a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[69]

In the postaccusation period, too, a defendant's speedy trial right under the Sixth Amendment may be buttressed by relevant statutory provisions. For example, rule 48(b) of the Federal Rules of Criminal Procedure authorises the dismissal of a case by a trial court on the ground of unnecessary delay.[70] Also of importance in the Federal jurisdiction is the Speedy Trial Act 1974.[71] This provides that any information or indictment charging an individual with an offence must be filed within 30 days of the date of arrest or service of summons.[72] In the event that a plea of not guilty is entered, trial must commence within 70 days from the filing date of the information or

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[67] US v Ewell 383 US 116, 122 (1966).

[68] US v Marion 404 US 307, 322 (1971).

[69] Toussie v US 397 US 112, 114-5 (1970).

[70] "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

[71] 18 USC §§ 3161-74.

[72] 18 USC § 3161(b).

indictment, or from the date the defendant has appeared before a judicial officer of the court in which the charge is pending, whichever is the later.[73] However, unless the defendant consents to the contrary in writing, the trial must not commence less than 30 days from the date on which the defendant first appears before the court through counsel or pro se.[74] The Act provides that certain types of delay are to be excluded in computing the time within which an information or indictment must be filed, or within which a trial must commence.[75] To be excluded, for example, are any delay resulting from other proceedings involving the defendant;[76] any delay resulting from the absence or unavailability of the defendant or an essential witness;[77] any period resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial;[78] and any period resulting from a continuance granted by a judge on the basis "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."[79]

If an indictment or information is not filed within the time limit required by the Act, the charge must be "dismissed or otherwise dropped."[80] And if a defendant is not brought to trial within the time limit required by the Act, the information or indictment must be dismissed on a motion by the defendant. The defendant carries the burden of proof on the motion, and failure to move for dismissal prior to trial constitutes a waiver of the right to dismissal.[81] A case may be dismissed under the Act either with or without prejudice, and in determining whether to dismiss a case with or without prejudice the court must consider, inter alia, the following factors: (1) the seriousness of the offence; (2) the facts and circumstances of the case which led to the dismissal;

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[73] 18 USC § 3161(c)(1).
[74] 18 USC § 3161(c)(2).
[75] 18 USC § 3161(h).
[76] 18 USC § 3161(h)(1).
[77] 18 USC § 3161(h)(3).
[78] 18 USC § 3161(h)(4).
[79] 18 USC § 3161(h)(8)(A).
[80] 18 USC § 3162(a)(1).
[81] 18 USC § 3162(a)(2).

and (3) the impact of a reprosecution on the administration of the Act and on the administration of justice.[82]

(d) Conclusion

It is clear that the problem of delay in bringing cases to trial has received considerable attention in the US. There appears, however, to be a divergence between US attitudes to postaccusation and preaccusation delay. Where delay occurs after a suspect has in some way become an "accused" (for example, after arrest), protection is afforded not only by the Speedy Trial Clause of the Sixth Amendment, but also, in the Federal jurisdiction, by the detailed provisions of the Speedy Trial Act 1974. In determining whether a defendant's right to a speedy trial has been violated, trial courts are required to consider and to weigh up a number of relevant factors. It is evident that protection from prejudice to the conduct of the defence is merely one aspect of the speedy trial right. Also relevant are such considerations as the reason for the delay, and the oppression which would inevitably be felt by an accused while awaiting trial (whether in jail or on bail).

By contrast, preaccusation delay is dealt with on a different level. The Speedy Trial Clause is inapplicable to such delay, and statutes of limitations and due process principles form the basis of the arguments available to a defendant. Where a criminal prosecution is instituted within the time limit stipulated in any relevant statute of limitations, there is some reluctance to hold that due process has been violated. For a violation of due process to be established there must exist evidence of prejudice to the conduct of the defence as well as proof of intent to gain a tactical advantage over or to harass the defendant. This is a far more rigid approach than that taken to a determination of whether the speedy trial right of a defendant has been violated, and this rigidity is clearly unfounded. It is a mistake to assume that preaccusation delay cannot

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[82] See generally 18 USC § 3162(a)(1) and (2).

have serious consequences. In particular, it should be noted that the ability to defend oneself may be hampered to a greater extent by preaccusation delay than by postaccusation delay. Where a person has been accused of a specific offence, he is able at least to take steps to preserve his memory, or the memories of witnesses, of relevant details pertaining to the alleged occurrences. But a person who is unaware that criminal charges will eventually be brought against him will have no reason to do so.[83]

In sum, therefore, a shortcoming of US law in this area lies in its failure to deal with preaccusation delay in a manner commensurate with that in which it deals with postaccusation delay. This position is, of course, attributable to the fact that the Speedy Trial Clause is regarded as inapplicable to preaccusation delay, with the result that the only Constitutional protection applicable to such delay is provided by due process principles.

2. Canada: Canadian Charter of Rights and Freedoms, Section 11(b)

As in the US, there exists in Canada a specific Constitutional provision directed at the problem of delay in criminal procedure. Section 11(b) of the Canadian Charter of Rights and Freedoms provides: "Any person charged with an offence has the right ... to be tried within a reasonable time ...". This provision has been the subject of recent scrutiny by the Canadian Supreme Court in a series of cases.[84] The approach adopted by the Court will be sketched briefly here, as considerations drawn from this approach will be useful in our later discussion of how an English court should determine whether proceedings ought to be stayed on account of pre-trial delay.

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[83] US v Marion 404 US 307, 331 (1971); A L Schneider, "The Right to a Speedy Trial" 20 Stanford LR 476, 489 (1968). Further, the view has been expressed that "[t]he anxiety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future": US v Marion 404 US 307, 330-1 (1971).

[84] Mills v R (1986) 52 CR (3d) 1; BC (AG) v Craig Prov J (1986) 52 CR (3d) 100; Rahey v R (1987) 57 CR (3d) 289; R v Conway (1989) 96 NR 241; R v Kalanj and Pion (1989) 96 NR 191; R v Stensrud and Smith (G W) (1989) 103 NR 191; R v Smith (M H) (1989) 102 NR 205.

The Canadian Supreme Court has identified four factors which must be weighed or balanced in determining whether section 11(b) has been violated. These are (1) the length of the delay; (2) the reason for the delay; (3) waiver of time periods; and (4) prejudice to the accused.[85] It can be seen that these factors are very similar to those considered by the US Supreme Court as relevant to a determination of whether a defendant's speedy trial right under the Sixth Amendment has been violated.

(a) The Length of the Delay

Obviously, a longer delay would weigh more heavily in favour of a conclusion that section 11(b) has been violated.

(b) The Reason for the Delay

The Canadian Supreme Court has adopted the position that because we do not live in an ideal world where there is no difficulty in securing adequate funding, personnel and facilities for the administration of justice, the fact of inadequate institutional resources may be used to some extent to excuse delay. Statutes laying down specific time periods, both in Canada and in other jurisdictions, may, in the view of the Court, provide useful guidelines as to what might constitute appropriate limits on delay caused by inadequate institutional resources. We have earlier examined one such statute: the Speedy Trial Act 1974 in the US Federal jurisdiction.[86]

Further, the Canadian Supreme Court is of the view that, in determining the section 11(b) issue, it is necessary for the judge to

> fix an objective and realistic time period for the preparation of the type of case which is at bar. It must determine the period which would normally be required, taking into account the number of charges, the number of accused, the complexity and volume and similar objective elements, for the preparation and completion of the case if fully adequate institutional resources and facilities were available.

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[85] R v Smith (M H) (1989) 102 NR 205, 216-7.
[86] Mills v R (1986) 52 CR (3d) 1, 77-83.

In determining appropriate time delays judges must inevitably "rely heavily upon their practical experience and good sense".[87] Because this determination is an objective one, it is immaterial whether the delay was deliberate or negligent, or the result of mere inadvertence. Similarly, the existence of a valid reason for the delay is irrelevant.[88]

(c) Waiver of Time Periods[89]

Delay which is waived (that is, requested, caused, or consented to) by the accused is justifiable except in cases where "the delay requested by the accused may be directly attributable to antecedent delay by the state: for example, where a key defence witness has moved during the delay period and must be traced by the defence."[90]

Waiver must be clear, unequivocal, express and informed. It cannot therefore be inferred from silence except in cases where the delay was actually caused by the accused. Additionally, failure by the accused to assert his section 11(b) right does not constitute waiver. Waiver of one period of delay cannot be construed as waiver of antecedent delay.

(d) Prejudice to the Accused

The Canadian Supreme Court is agreed that delay may prejudice an accused in three ways: by impairing his liberty interest, by impairing his security interest, and by impairing the conduct of his defence. The liberty of an individual should not be curtailed by way of unduly lengthy detention (or similar restrictions) prior to trial. Of equal importance is the security of a person: this concept of security encompasses not only physical integrity but also such factors as "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible

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[87] Id, 75.
[88] Id, 76-7.
[89] Id, 71-4.
[90] Id, 72.

disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction."[91]

There is disagreement among the members of the Court, however, as to whether impairment of the conduct of the defence is a relevant consideration under section 11(b). The view of Lamer J is that it is not. Rather, such impairment is to be considered under sections 11(d) and 7 of the Charter, which afford an accused the right to a "fair trial". Section 11(d) affords any person charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal", while section 7 provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 11(b) is, in the view of Lamer J, concerned with ensuring that the trial occurs with minimal delay, and not with the "fairness" of the actual trial. On the other hand, sections 11(d) and 7

> require that a wider, and to some extent different, range of factors be considered in the analysis of the delay: the conduct of the Crown may be properly considered; timely assertion by the accused of his right and disclosure of the nature of the impairment thereto may be required; remedial relief will be more varied; and the length of time elapsed will generally be a less critical factor than under s 11(b), and is to be considered in a different light, given the difference of purpose for so doing. Indeed, a trial might well be considered unfair because matters were brought to trial too fast.[92]

By contrast, Wilson J considers that impairment of the conduct of the defence is a relevant consideration under section 11(b), this being the "legal" rather than the psychological and sociological effect of the delay. It is not purely a section 11(d) ("fair trial") consideration. Indeed, in situations where the trial of the accused lies in the future and the basis of his entire complaint is the right to be protected from unconstitutional delay, section 11(b) may be more appropriate than section 11(d).[93]

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[91] Id, 65.
[92] Id, 67.
[93] Id, 91-2.

A further point of disagreement relates to proof of impairment of an accused's security interest. In Rahey v R,[94] Lamer J took the view that there is an irrebuttable presumption that the accused suffers prejudice from delay,[95] while Wilson and Estey JJ considered that prejudice had to be inferred by the court.[96]

(e) Burden of Proof

In R v Conway[97] Sopinka J expressed the view that a defendant alleging a violation of section 11(b) should have the initial burden of satisfying the court that, prima facie, the delay is unreasonable, before calling upon the Crown to justify the delay.[98] This approach did not, however, commend itself to the majority of the Court. Whilst "[i]t may be that a de facto shift of the burden of proof occurs in the minds of individual judges in the overall assessment of reasonableness"[99] there was no reason of principle or policy to enshrine this phenomenon in a rule. In view of the importance of the facts in individual cases, a more flexible or functional approach would be appropriate.[100]

(f) Conclusion

The above discussion of the approach of the Canadian Supreme Court to the interpretation of section 11(b) demonstrates that the considerations taken into account by the Court are similar to those taken into account in the US in relation to the speedy trial right. Nonetheless, there exist points of disagreement, even among the members of the Canadian Supreme Court themselves, on a number of issues. This division of opinion reflects an unsurprising lack of consensus as to the precise effect of a provision

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[94] (1987) 57 CR (3d) 289.
[95] Id, 302.
[96] Id, 310-1.
[97] (1989) 96 NR 241.
[98] Id, 298.
[99] Id, 254.
[100] Id, 255-6.

which simply affords a person charged with an offence the right to be tried within a reasonable time. The fact that there does not exist in England a written Constitutional right to a speedy trial or to a trial within a reasonable time means that English courts can face the issues squarely instead of becoming immersed in the interpretation of Constitutional provisions. Of course, examination of the analyses undertaken in the US and in Canada has had the advantage of bringing out for us the different considerations implicit in the issue of delay in bringing persons to trial.

(g) R v Smith (M H):[101] A Case Study

A decision as to whether proceedings should be stayed on account of pre-trial delay is notoriously sensitive to the particular facts of the case in question. Accordingly, it may be useful to examine briefly the recent decision of the Canadian Supreme Court in R v Smith (M H).

The defendant was charged on 22 January 1987, but the matter could not be scheduled for preliminary inquiry until 9 May 1988. An application was made for a stay of proceedings on the basis that the defendant's right to be tried within a reasonable time under section 11(b) had been denied.

(i) The Length of the Delay

The period between the date the charge was laid (22 January 1987) and the dates scheduled for the preliminary hearing (10-14 August 1987) was about a month longer than normal, and the Crown did not attempt to justify the subsequent delay of approximately nine months on the basis of time required for preparation.[102]

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[101] (1989) 102 NR 205.
[102] Id, 219.

(ii) The Reason for the Delay[103]

Two explanations for the delay were offered: first, it was said that the first two dates proposed were during holiday periods, when no judge was available. The hearing was to be conducted by a Provincial Court judge from Winnipeg rather than by a local Provincial Court judge. The Supreme Court felt that "[i]n the absence ... of an explanation as to the necessity of having the case tried by a judge from Winnipeg rather than a local judge, the delay cannot be justified on this basis."[104]

The second, and principal, reason for the delay was the desire by the Crown to schedule the hearing at a time when the investigating officer could assist the Crown for the duration of the hearing. The Supreme Court considered, however, that "[t]he convenience of the investigating officer should have been secondary to the expeditious conduct of the preliminary inquiry."[105]

(iii) Waiver of Time Periods[106]

The argument of the Crown was that by agreeing to the May 1988 date for the preliminary inquiry, the defendant could not attribute to the Crown any delay prior to the filing of the originating motion on 21 December 1987. In other words, the defendant had waived his right to assert that the delay prior to 21 December formed part of the total delay.

This argument, too, was rejected by the Supreme Court. Rather than demonstrating waiver of his rights, the defendant demonstrated his desire to move the proceedings along quickly. On 6 July 1987 the defendant's counsel agreed to a request made by counsel for the Crown to dispense with the requirement that the original investigator of the matter appear at the scheduled August hearing. More importantly, a letter from the defendant's counsel to counsel for the Crown, dated 6 July 1987, made it

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[103] Id, 219-21.
[104] Id, 220.
[105] Id, 221.
[106] Id, 221-5.

clear that the defendant was not waiving his section 11(b) rights. The defendant accordingly neither caused nor acquiesced in the postponement of the hearing to May 1988.

(iv) Prejudice

"Having found that the delay is substantially longer than can be justified on any acceptable basis, it would be difficult indeed to conclude that the appellant's s 11(b) rights have not been violated because the appellant has suffered no prejudice."[107]

(v) Conclusion

It was held, therefore, that section 11(b) had been violated.

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[107] Id, 225.

C. SOME OBSERVATIONS

In the light of the above discussions[108] it is now timely to offer some recommendations as to the way in which an application for a stay of proceedings on the ground of pre-trial delay by the executive should be approached.

1. Preliminary Issues

The first step is to determine whether the delay in question can be regarded as improper. In many cases there will be nothing improper about bringing a person to trial after a substantial period has elapsed either since the commission of the offence or since he was first "accused" of the offence.[109] To determine whether a delay in bringing a person to trial can be considered improper, it is necessary to consider the explanation or

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[108] Also worthy of note is the position in Australia where, as in England, but in contrast to the position in the two other jurisdictions which we have considered, there does not exist a written Constitutional right to a speedy trial or to a trial within a reasonable time. However, the issue of delay in criminal litigation has been recently brought to prominence in Australia by a decision of the High Court of Australia (Jago v District Court (NSW) (1989) 63 ALJR 640) and by a number of decisions of the New South Wales Court of Appeal: see Herron v McGregor (1986) 6 NSWLR 246; Watson v A-G (NSW) (1987) 8 NSWLR 685; A-G (NSW) v Kintominas (1987) 28 A Crim R 371; Carver v A-G (NSW) (1987) 29 A Crim R 24; Young v Torrington, unreported, 22 September 1987; Aboud v A-G (NSW) (1987) 10 NSWLR 671; Gorman v Fitzpatrick (1987) 32 A Crim R 330; R v Sams (1988) 36 A Crim R 245; Jago v District Court (NSW) (1988) 12 NSWLR 558; Cooke v Purcell (1988) 14 NSWLR 51; R v Grassby (1988) 15 NSWLR 109; R v Hakim (1989) 41 A Crim R 372; Adler v District Court (NSW), unreported, 19 March 1990.

Other Australian cases include R v Helmhout (1981) 5 A Crim R 42; R v Hill (1982) 7 A Crim R 161; Tebbutt v Muggleton (1985) 6 NSWLR 583; R v McConnell (1985) 2 NSWLR 269; R v Climo and Bentley (1986) 7 NSWLR 579; Whitbread v Cooke (No 2) (1986) 5 ACLC 305; R v Clarkson [1987] VR 962; Joel v Mealey (1987) 27 A Crim R 280; Clayton v Ralphs and Manos (1987) 26 A Crim R 43; R v Cawley and Clayton (1987) 30 A Crim R 324; Higgins v Tobin, unreported, 5 November 1987; Newby v Moodie (1987) 88 ATC 4072; Murphy v Tavernstock (1988) 93 FLR 14; R v Gonis and Farinola (1988) 48 SASR 228; Boehm v DPP [1990] VR 475; Wilson v DPP (Vic), unreported, 22 August 1989.

For New Zealand, see generally J Kovacevich, "The Inherent Power of the District Court: Abuse of Process, Delay and the Right to a Speedy Trial" [1989] NZLJ 184.

[109] "There is a vast difference between a case in which an accused who has successfully concealed his crime for twenty years is brought to trial expeditiously after the crime is discovered and a case in which the prosecutor fails to bring a person to trial within, for instance, five years when there were eyewitnesses to the incident and all the facts were known within days of the commission of the alleged crime": Cooke v Purcell (1988) 14 NSWLR 51, 79 per Clarke JA.

reason given by the executive for the delay.[110] Any of the following reasons, for example, will weigh in favour of a conclusion that the delay was not improper:

1. Search for a missing prosecution witness.

2. Genuine difficulties in preparing for trial owing to the complexity of the case. As we have seen, the US Supreme Court has acknowledged that a delay which would be presumptively improper in the case of a street crime might not be so in the case of a serious complex crime.

3. Efforts by the police to identify persons in addition to the defendant who may have participated in the offence in question.[111] (Failure by the police to do so may result in multiple trials involving the same set of facts.)

4. Deliberate slowness to act by the police in the hope that the defendant would lead them to "bigger fish".[112]

In contrast to these factors which, as mentioned, would tend in favour of a conclusion that there was no impropriety on the part of the executive, a delay which

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[110] Cf R v Cawley and Clayton (1987) 30 A Crim R 324, 330: "In the circumstances of this case I am satisfied that the delay, notwithstanding its duration, has been explained and has been justified. Two Crown witnesses have admitted to lying at the coronial inquest and a third Crown witness (Hansberry) has come forth at a very late stage: the prosecuting authorities having no prior knowledge of his evidential worth. Notwithstanding that two of these three people were police officers at the relevant time, I do not consider that that is the responsibility of the prosecuting authorities."

[111] Cf Lovasco: see the text accompanying note 66 supra.

[112] Cf R v Canterbury and St Augustine JJ, ex p Turner (1983) 147 JPR 193. The offence in question was alleged to have been committed between 1 September 1980 and 15 October 1980, but the applicant was not interviewed and charged until 23 December 1982. The detective inspector in evidence refuted the suggestion that there had been some impropriety in the failure to interview the applicant earlier, pointing out that the interview had been delayed in the hope that it might be possible for the applicant to lead the police to "bigger fish". This explanation was accepted by the court.

was motivated by a desire to gain tactical advantage over or to harass the defendant must, of course, be regarded as having been improper.

In determining the propriety of the actions of the State in permitting the lapse of a substantial period of time before bringing a person to trial it is also relevant to have regard, as was pointed out by the Privy Council in Bell v DPP,[113] to the prevailing system of legal administration and the prevailing economic and other conditions. For instance, longer delays in bringing persons to trial can obviously be expected in "bad times", when overcrowded courts are commonplace, than in "good times". And, as acknowledged by Lamer J of the Canadian Supreme Court, statutes laying down specific time periods may provide some guidance as to what should constitute proper time periods.[114] Similarly, evidence of the normal length of time that people are kept awaiting trial in similar cases can usefully be taken into account in determining the propriety of the conduct of the executive in the case at hand.[115]

Another preliminary issue which must be addressed concerns situations in which it is found that the lapse of time in question is attributable in part to delay by the executive and in part to delay by the defendant.[116] In such a situation, the court should make an estimate of what proportion of the delay is attributable to the conduct of the

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[113] [1985] AC 937.

[114] See the text accompanying note 86 supra.

[115] Note, however, that the average length of time which people are kept awaiting trial can be expected to increase over time. See Aboud v A-G (NSW) (1987) 10 NSWLR 671, 695 per McHugh JA: "Considerations applicable in an age when cases depended upon the oral evidence of a few witnesses are not comparable with cases where great masses of documents and other exhibits must be analysed and put together. The laborious preparation of this class of case stands outside the experience of earlier times."

[116] It may even be the case that the delay attributable to the defendant was caused by a deliberate attempt on his part to delay matters. The US Supreme Court noted in Barker v Wingo 407 US 514 (1972) that deprivation of an accused's right to a speedy trial may work to his advantage and that, accordingly, "[d]elay is not an uncommon defense tactic": id, 521.

executive.[117] Only the delay attributable to the executive is relevant to the consideration of the defendant's application for a stay of proceedings.

Further, any delay which has been caused by the executive but waived by the defendant is no longer, of course, attributable to the executive. In determining whether a period of delay can be regarded as having been waived by the defendant, the observations of Lamer J of the Canadian Supreme Court, discussed above,[118] should be adopted.

2. Protection of Legitimacy

In Chapter 3 it was seen that criminal justice should be concerned not only with the conviction of the guilty and acquittal of the innocent, but also with protection of the moral integrity of the criminal process. We observed that the relevant consideration in relation to improperly obtained, but reliable, evidence is that it is in the public interest that criminal offenders are brought to conviction in a civilised and publicly acceptable manner. Where improper pre-trial executive delay is concerned, however, there is, as our discussions in this chapter will have made clear, an added consideration: the possibility of the conviction of an innocent person if the proceedings were allowed to continue.

(a) Protection of the Innocent from Wrongful Conviction

The legitimacy of criminal proceedings may be compromised if they could result in the conviction of an innocent person. Thus the first basis on which improper pre-trial

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[117] Cf R v West London Stipendiary Magistrate, ex p Anderson (1984) 148 JPR 683, in which a Divisional Court considered the problem of delay which "can be attributed in part to, for example, inefficiency on the part of the prosecution, and in part to the conduct of the defendant." It was said that it is necessary in such circumstances to "consider, taking into account the conduct of the defendant, to what extent the delay which has occurred is attributable to the inefficiency of the prosecution;" if it is considered "that there has been substantial delay resulting from the inefficiency of the prosecution and that the defendant has been or must have been prejudiced by such delay," the proceedings may be stayed. (Id, 687 (emphasis added).)

[118] See the text accompanying notes 89-90 supra.

executive delay may require a stay of the proceedings relates to the notion that the executive cannot justifiably bring a person to trial after leaving him without a fair opportunity to defend himself as a result of its improper conduct. With the passage of time, "[m]emories fade"; "[r]ecollection is replaced by reconstruction which is in turn transformed into recollection."[119] "Relevant evidence becomes lost."[120] Accordingly, pre-trial police or prosecutorial delay may well leave the defendant without a fair opportunity to defend himself. This could lead to the defendant being convicted even if innocent. It is, of course, impossible to determine definitively whether the delay in question has actually deprived the defendant of a fair opportunity to defend himself. I would therefore suggest that a substantial risk that the delay has left the defendant without a fair opportunity to defend himself should be sufficient to lead to a stay of proceedings.[121] The gravity of the offence charged is irrelevant here; defendants are entitled to a fair opportunity to defend themselves regardless of whether they are accused of a minor offence or a serious one.

In determining whether a stay of proceedings should be ordered on this basis, the court must consider and weigh up all factors which it regards as relevant to the inquiry. It will be relevant, for example, to consider the length of the delay since the time of the alleged offence. Obviously, the longer the delay, the more likely that the defendant will be prejudiced in the preparation and conduct of his defence. In cases of very great delay the length of the delay may of itself suffice to lead to a stay of proceedings. Speaking of delay in civil procedure, a NSW judge, Cross J, observed in

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[119] Cooke v Purcell (1988) 14 NSWLR 51, 87 per Clarke JA.

[120] Herron v McGregor (1986) 6 NSWLR 246, 254.

[121] Cf Zurich Australian Insurance Ltd v Cannata, The Australian, 4 January 1988, in which the Full Court of the Supreme Court of Victoria held that a fire insurance claim should be dismissed for want of prosecution because the delay since the fire meant that there was a substantial risk that a fair trial of the issues could not take place.

an unreported case[122] that "[t]here probably comes a time when the delay has been so great that the best and most honest recollections would begin to play substantial tricks, so that the trial of the action would be valid only as to form but, other than in an unreal sense, not as to substance."[123]

Schneider[124] has pointed out that a delay in the prosecution of a crime proven primarily by testimonial evidence creates a greater possibility of prejudice to the defence than does delay in the prosecution of a crime proven primarily by documentary evidence. As was said in Tynan v US:[125] "The transactions involving individual witnesses are generally unique in their experience, and where documentary evidence is accepted, it, by its very nature, retains its reliability."[126] In addition, the factual circumstances common to a class of cases may also be relevant. For example, the possibility of prejudice to the defence is relatively great when a narcotics addict is being prosecuted for the possession or sales of narcotics, since addicts have difficulty remembering events even over very short periods of time.[127]

Another relevant factor for consideration relates to whether the delay occurred before or after the defendant had been alerted to the prospect of litigation against him. As has been noted earlier in the chapter, a person who has been "accused" of a specific offence is able at least to take steps to preserve his memory, or the memories of

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[122] Calvert v Stoliznow, unreported, 1980. This decision was affirmed by the NSW Court of Appeal (Stoliznow v Calvert [1980] 2 NSWLR 749), which described the judgment of Cross J as "most valuable": id, 750. An extract from the judgment of Cross J is to be found in M I Aronson, J B Hunter and M S Weinberg, Litigation: Evidence and Procedure (4th ed 1988) 120-2.

[123] For further discussion of delay in civil procedure see R Cranston, P Haynes, J Pullen and I R Scott, Delays and Efficiency in Civil Litigation (1985).

[124] A L Schneider, "The Right to a Speedy Trial" 20 Stanford LR 476, 499 (1968).

[125] 376 F 2d 761 (DC Cir 1967).

[126] Id, 763.

[127] Note 124 supra.

witnesses, of relevant details relating to the alleged occurrences.[128] But a person unaware that criminal charges will eventually be brought against him will have no reason to do so.

The death or disappearance, during the delay, of a person who would otherwise have been a vital witness (either for the defence or for the prosecution) may be a relevant factor. In the case of a potential defence witness the defence will have lost the opportunity of calling him as a witness, and in the case of a potential prosecution witness the opportunity of cross-examining him.

Finally, the prior attitude of the defendant to the delay is also a relevant factor. The fact that the defendant has acquiesced silently in the delay will make it difficult for him to assert that as a result of the delay, there is a substantial risk that he has been left without a fair opportunity to defend himself. On the other hand, any efforts which he has made to secure a trial without further delay[129] will weigh in his favour. The stronger his efforts, the stronger the case for a stay of proceedings.

(b) Moral Integrity

The second basis on which improper pre-trial executive delay may lead to a stay is analogous to that on which, for example, improperly obtained evidence may be excluded or proceedings may be stayed on account of illegal extradition. That is, the legitimacy of criminal proceedings may be compromised even if there is no danger of wrongful conviction, and merely because standards of propriety have not been observed in the course of bringing a criminal offender to conviction. Thus, what is relevant is what Wilson J of the Canadian Supreme Court has termed, as we have seen, the

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[128] Cf Calvert v Stoliznow, note 122 supra: "If [the defendant] is served with a statement of claim promptly after the incidents giving rise to the litigation, he has the opportunity of consulting legal advisers, preparing his defence, marshalling his witnesses, obtaining statements from them, inspecting the scene (if such is relevant), etc - all when time has not affected the observable, physical phenomena or the location and memories of his witnesses."

[129] Eg, by attempting to obtain a court order requiring the police or prosecution (as the case may be) to act with greater expedition.

"psychological" and "sociological" effects rather than the "legal" effect of the delay.[130] We have adverted throughout this chapter to the possible effects of pre-trial executive delay on a person who has been "accused" of a crime and is awaiting trial. Whether in jail or on bail, he is likely to suffer restraints on his liberty, stigmatisation, loss of privacy, and considerable stress and anxiety. Such considerations are by no means confined solely to postaccusation delay. Indeed, certain consequences of preaccusation delay may be more serious than those of postaccusation delay. It is possible, for example, that greater anxiety and concern may be felt by an individual who has not been formally indicted or arrested, "for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future."[131]

Thus the issue of whether, and to what extent, the defendant has suffered oppression (prior to trial) as a result of the delay should be considered in determining whether the proceedings ought to be stayed. In appropriate circumstances it may be considered that in spite of the public interest in bringing the offender to conviction, the delay has, by causing the defendant to suffer oppression, anxiety or concern, compromised the moral integrity of the criminal process to such an extent that the public interest still requires a stay of the proceedings.[132]

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[130] See the text accompanying note 93 supra.

[131] Note 83 supra.

[132] Contra the recent case of Daventry District Council v Olins (1990) 154 JPR 478, where the Court apparently took the (in my submission incorrect) view that delayed proceedings can be stayed only on account of prejudice to the preparation of the defence; the anxiety, uncertainty and distress suffered by a defendant as a result of delay is relevant only to the exercise of the sentencing discretion of the judge: "The other factor referred to by the justices, namely that the respondent had suffered anxiety, uncertainty and distress because of the delay, is not one which, in my judgment, they could properly take into account in arriving at their decision. If guilt is proved, distress caused by needless delay may no doubt be a factor properly to be taken into account in determining the appropriate sentence, but it does not justify the dismissal of the prosecution case because it is not prejudicial to the preparation of the defence. If this second reason had been the sole or the main reason for the decision of the justices to dismiss the prosecution case, then in my judgment that decision could not stand. As it is, however, they made it plain this was merely an additional factor in their mind and that the reason for their decision was the prejudice to the defence caused by the delay and in particular by the withholding of the identity of the complainant." (Id, 485.)

In considering this second limb of the principle of legitimacy, it is to be noted that, in contrast to the position in relation to the first limb, the gravity of the offence charged is a relevant consideration. Thus the oppression, anxiety or concern suffered by a defendant as a result of delay may be more readily tolerated if the offence charged is a serious rather than a minor one.

3. Conclusion

The aim here has been to apply the principle of legitimacy developed earlier in the thesis to the specific issue of the circumstances in which proceedings should be stayed on account of pre-trial police or prosecutorial delay. Problems such as delay, as acknowledged earlier in the chapter, often flow from a serious lack of resources, and courts are notoriously unwilling to make decisions which are potentially embarrassing to the executive. It is to be hoped that the discussions in this chapter will have demonstrated that, in appropriate circumstances, precisely such decisions do need to be made. I am not suggesting, of course, that the power to stay proceedings represents a total solution to the problem of pre-trial delay. On the contrary, it is of relevance only in situations where delay has occurred <u>and</u> legitimacy would be compromised if the proceedings were allowed to continue. What is required also is the enactment of specific time limits beyond which a criminal trial cannot commence without leave. To its credit, the English criminal justice system has, as we have seen, made considerable advancements in relation to the setting of time limits. Time limits should be set realistically and with due regard to the capacity of the criminal justice system. They should be aimed at ensuring that the criminal justice system functions to its full capacity in every case, rather than at forcing the system to do something of which it is not capable.

CHAPTER 6

ENTRAPMENT[1]

A. INTRODUCTION

> [W]hen Eve, taxed with having eaten the forbidden fruit, replied "the serpent beguiled me," her excuse was, at most, a plea in mitigation and not a complete defence.[2]

This judicial explanation of the events of the Garden of Eden[3] highlights the English courts' attitude to the problem of entrapment. In R v Sang,[4] the issue before the House of Lords was what a trial judge should do "when he is satisfied that an accused has been deliberately procured, incited or tricked [by an official of the Government] into the commission of a crime which he would not otherwise have committed."[5] This practice of facilitation or incitement, by an official of the Government, of the commission of a crime which the defendant would not otherwise have committed will be referred to as "entrapment". The House of Lords in Sang held that entrapment could not be taken into account except in the exercise of the judge's discretion in sentencing. In this chapter I seek to expose the flaws in the reasoning of the House of Lords and to examine a number of alternative approaches.

First, it is necessary to consider briefly the context in which the issue of entrapment may arise.

Generally the police rely on members of the public, typically victims, to report the commission of crimes. In some situations, however, sole reliance on such reporting would prove ineffective. One of these, obviously, is the situation where a potential complainant is unaware that a criminal offence has been committed. Violations of the multiplicity of modern safety laws, for example, could easily go unnoticed by the people

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[1] See A Choo, "A Defence of Entrapment" (1990) 53 MLR 453, which is based on this chapter.

[2] R v Sang [1980] AC 402, 446 per Lord Fraser.

[3] Genesis 3.

[4] [1980] AC 402.

[5] Id, 425.

they are designed to protect.[6] In order to detect possible breaches, it may be necessary in such cases for the appropriate authorities to offer the opportunity for their commission. Indeed, in some cases such action may be sanctioned expressly by the statute creating the offence.[7]

Another situation in which pro-active law enforcement techniques may be employed involves potential complainants who may be aware that an offence has been committed but are unwilling to report it. This unwillingness may be due to any number of reasons. It is well known, for example, that victims of offences do not always report the commission of the offences and that in the case of some common crimes complaints may not be made where it is believed that it would be futile to do so. A further possibility is that the crime involved may be a victimless or consensual offence generally one constituted by consensual activity involving narcotics, liquor or sex. Because of the consensual nature of such offences there is no victim to bring a complaint and to provide evidence. Furthermore, independent observers could well be unwilling to come forward, given the widespread acceptance (if not approval) which many of these crimes receive from some sections of the public. Alternatively the only observers may be those who are either unwilling to incriminate the accused or reluctant to direct police attention to their own illicit affairs.[8] Such considerations suggest that it may be necessary in some circumstances for pro-active law enforcement techniques to be employed in the detection of victimless offences. Pro-active techniques involve "modes

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[6] See also R v Mack (1988) 90 NR 173, 185-6: "[S]ome criminal conduct may go unobserved for a long time if the victims are not immediately aware of the fact that they have been the subject of criminal activity, in the case, for example, of commercial fraud and also bribery of public officials."

[7] For example, s 27 of the Trade Descriptions Act 1968 provides:

> A local weights and measures authority shall have power to make, or to authorise any of their officers to make on their behalf, such purchases of goods, and to authorise any of their officers to secure the provision of such services, accommodation or facilities, as may appear expedient for the purpose of determining whether or not the provisions of this Act and any order made thereunder are being complied with.

[8] J D Heydon, "The Problems of Entrapment" [1973] CLJ 268, 269.

of investigation in which the reporting, observation and testimony can be done by the officials themselves."[9] The use of such techniques in the enforcement of narcotics laws is well documented.[10] It is in the context of the use of pro-active law enforcement techniques that allegations of entrapment typically arise.

In England the issue of entrapment received considerable public attention in 1974 with the murder of Kenneth Lennon, who prior to his death had confessed to having acted as an agent provocateur for the Special Branch.[11] There has been, in recent years, great public awareness in the US of the issues associated with entrapment as a result of the John DeLorean[12] and ABSCAM[13] affairs.

It should be noted that an attempt to deal with the problem of entrapment in England is to be found in a circular issued by the Home Office to the police.[14] This circular, the contents of which have received judicial approval,[15] provides inter alia that "[n]o member of a police force, and no police informant, should counsel, incite or procure the commission of a crime." It was apparently intended that breaches of this should lead to internal disciplinary proceedings,[16] but the extent to which such proceedings are instituted is unknown. Also noteworthy is the fact that the Law

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[9] G Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime" 4 Law and Philosophy 17, 18 (1985).

[10] Skolnick provides an account of the use of the informer in narcotics control in the US: J H Skolnick, Justice without Trial: Law Enforcement in Democratic Society (2nd ed 1975) 120-4. N L A Barlow, "Recent Developments in New Zealand in the Law Relating to Entrapment: 1" [1976] NZLJ 304, 309 states: "Narcotics use being, particularly with soft drugs, a gregarious habit, the objective of the police in this area is the infiltration of the 'scene' and the surveillance and detection of its members and those within its wide peripheral fringe."

[11] See Report to the Home Secretary from the Commissioner of Police of the Metropolis on the Actions of Police Officers concerned with the Case of Kenneth Joseph Lennon (1974); G Robertson, Reluctant Judas (1976).

[12] See M F J Whelan, "Lead Us Not into (Unwarranted) Temptation: A Proposal to Replace the Entrapment Defense with a Reasonable-Suspicion Requirement" 133 U Pa LR 1193, 1197-1200 (1985).

[13] See id, 1200-3.

[14] Reproduced in Law Commission, Criminal Law: Report on Defences of General Application (Law Com No 83) (1977) 68.

[15] R v Mealey and Sheridan (1974) 60 Cr App R 59, 64.

[16] Note 14 supra, 5.43.

Commission recommended in 1977 the creation of an offence of entrapment.[17] However, as the concern in this chapter is not with how the executive should deal with the problem of entrapment but with how the judiciary should do so, it is unnecessary to consider how efficacious such an offence might be in controlling entrapment.[18]

B. THE ENGLISH APPROACH: SENTENCING CONSIDERATIONS ONLY

1. R v Sang: Non-Recognition of Defence of Entrapment

In R v Sang,[19] the House of Lords was confronted with the argument that the trial judge should have excluded all prosecution evidence of the commission of certain offences if satisfied that their commission had been incited by an agent provocateur. This argument was rejected. As we saw in Chapter 2, only evidence obtained after the commission of the offence was regarded as excludable on the ground that it was improperly obtained. Further, it was held that entrapment was not a defence known to English law, and that the exclusion of all evidence of the commission of the crimes would have been tantamount to recognition of such a defence.[20] The House of Lords

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[17] Id, 5.48-5.52.

[18] It is likely to be of doubtful efficacy in view of prosecutorial discretion. In Chapter 2 we noted the effect that exercise of prosecutorial discretion can have on the initiation of criminal proceedings. Indeed it has been expressly acknowledged by the New Zealand Court of Appeal that agents provocateurs "are seldom, if ever, exposed to any danger of prosecution, and ... in the unlikely event of being prosecuted, would certainly suffer no substantial penalty": R v Phillips [1963] NZLR 855, 858. The point has been noted succinctly by two Canadian commentators (J Shafer and W J Sheridan, "The Defence of Entrapment" (1970) 8 Osgoode Hall LJ 277, 295): "One extremely important element, little discussed in the texts, is that the police have a large discretion in the decision whether to arrest or not, including arrests of fellow constables. ... [I]n charging a policeman or agent with exceeding his authority in law, the broad police discretion is always a first, and perhaps decisive, hurdle." It is unlikely that administrative law remedies can be used successfully to compel a prosecution: see generally R v Commissioner of Police of the Metropolis, ex p Blackburn [1968] 2 QB 118 and R v Commissioner of Police of the Metropolis, ex p Blackburn (No 3) [1973] 1 QB 241. See also Evans v Pesce and Atty Gen for Alberta (1969) 8 CRNS 201.

[19] [1980] AC 402.

[20] Id, 432 per Lord Diplock; 441 per Viscount Dilhorne; 443 per Lord Salmon; 446 per Lord Fraser. See also R v Harwood [1989] Crim LR 285, in which it was similarly held that because entrapment was not a substantive defence in English law, s 78 of the Police and Criminal Evidence Act 1984 could not be utilised in a case of entrapment to prevent the prosecution adducing evidence of the commission of the offence. However

considered that the trial judge's sentencing discretion constituted adequate protection for a defendant who had committed an offence as the result of incitement by an agent provocateur. Thus, it was held that the fact of entrapment could be taken into account in mitigation of sentence[21] and that it was even open to a trial judge to grant the defendant "an absolute or conditional discharge and refuse to make any order for costs against him."[22]

The House of Lords gave two reasons for the view that entrapment was not a defence in English law, and each of these reasons warrants separate examination.

The first reason outlined by the House of Lords was that neither the actus reus nor the mens rea of the offence would have been negatived by the fact of entrapment.[23] The flaws in this argument are obvious. Quite simply, it is incorrect to suggest that a "defence" in criminal law must negative the actus reus or the mens rea of the offence in question.[24] Duress and necessity, for example, are considered defences but it would be extremely artificial to regard them as negativing actus reus or mens rea. Indeed it was recognised by Lord Hailsham LC in the recent case of R v Howe[25] that the defence of duress does not negative mens rea.[26]

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the Court of Appeal has expressed reservations about the correctness of this: R v Gill and Ranuana [1989] Crim LR 358.

[21] [1980] AC 402, 433 per Lord Diplock; 443 per Lord Salmon; 446 per Lord Fraser; 451 per Lord Scarman.

[22] Id, 443 per Lord Salmon.

[23] Id, 432 per Lord Diplock; 443 per Lord Salmon; 445-6 per Lord Fraser.

[24] See M J Allen, "Entrapment: Time for Reconsideration" (1984) 13(4) Anglo-Am LR 57, 65; A J Ashworth, "Defences of General Application - The Law Commission's Report No 83 - (3) Entrapment" [1978] Crim LR 137, 138; D Lanham, "Entrapment, Qualified Defences and Codification" (1984) 4 Oxf J Leg Studies 437, 439; G F Orchard, "Unfairly Obtained Evidence and Entrapment" [1980] NZLJ 203, 204.

Contra J D Watt, "The Defence of Entrapment" (1970-1) 13 Crim LQ 313, 336 and J D Watt, "Entrapment as a Criminal Defence" (1971) 1 Queen's LJ 3, 29.

[25] [1987] 1 All ER 771.

[26] Id, 777. Lord Hailsham LC endorsed statements that

> the decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and is therefore that of a man with, perhaps to some exceptionally limited extent, a "guilty mind".

and that

> [t]rue duress is not inconsistent with act and will as a matter of legal definition, the maxim being coactus volui.

Secondly, the House of Lords pointed out that the fact that the commission of an offence had been incited by a person other than an official could not confer a defence upon the defendant. Accordingly, it was said, there was no reason why incitement by an official should make a difference to the defendant's liability: "It would confuse the law and create unjust distinctions if incitement by a policeman or an official exculpated him whom they incited to crime whereas incitement by others - perhaps exercising much greater influence - did not."[27] A person who has committed an offence as a result of incitement is obviously less blameworthy and less dangerous than an ordinary offender;[28] however, this diminished culpability will not lead to an acquittal if the incitement has come from a "lay" person. Thus, in the view of the House of Lords, if the diminished culpability of a defendant incited to crime by a "lay" person does not constitute sufficient grounds for an acquittal, there is no reason why the diminished culpability of a defendant incited to crime by a policeman or an official should do so.

The House of Lords would appear therefore to have regarded the identity of an official inciter as irrelevant. Its reasoning, in essence, is that the actual culpability of an entrapped defendant would be no different from what it would have been had the incitement come from a person unconnected with the executive. As was put by the American Law Institute:

> The defendant whose crime results from an entrapment is neither less reprehensible or dangerous nor more reformable or deterrable than other defendants who are

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> Fear of violence does not differ in kind from fear of economic ills, fear of displeasing others, or any other determinant of choice; it would be inconvenient to regard a particular type of motive as negativing of will.

The defence of provocation is another example: see Lee Chun-Chuen v R [1963] AC 220, in which the Privy Council took the opportunity to reaffirm the law as stated by Lord Goddard in giving the opinion of the Privy Council in A-G for Ceylon v Perera [1953] AC 200. Lord Goddard had stated that "[t]he defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation": id, 206 (emphasis added).

[27] [1980] AC 402, 451 per Lord Scarman.

[28] See R Park, "The Entrapment Controversy" 60 Minn LR 163, 240 (1976).

> properly convicted. Defendants who are aided, deceived or persuaded by police officials stand in the same moral position as those who are aided, deceived or persuaded by other persons.[29]

However, culpability is clearly not the sole consideration here.[30] "Official" incitement of an offence stands in a completely different position from incitement of an offence by a person unassociated with the executive. The executive has a duty to uphold the law and to prevent crime. Accordingly, it is contrary to the very purpose of the law for the executive to take a hand in crime and to seek to bring to conviction an "otherwise innocent" individual. The State is seeking, in effect, to bring to conviction a member of the public for an offence for which it has itself "set him up". An analogy may be drawn between this situation and the prosecution of a person for an offence in respect of which he has been "framed" by the police. In both cases the State is prosecuting an individual for an offence which was - in a broad sense - of its own creation.

What the House of Lords fails to recognise, therefore, is that the acquittal of an entrapped defendant is not dictated solely by his diminished culpability, but by the fact that this diminished culpability is a consequence of the actions of an official - a consideration absent in the case of "lay" incitement.

There is a second, related, reason why incitement by a person associated with the executive is to be distinguished from "lay" incitement. This relates to the repute of the criminal justice system. The phenomenon of court proceedings which involve the State's prosecution of individuals for crimes engineered by itself can hardly enhance public respect for the administration of justice. This consideration is, of course, absent in the case of prosecutions for crimes incited by "lay" persons.

An eloquent and telling comment on the approach to entrapment recommended by the House of Lords has been made by a member of the Supreme Court of Canada:

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[29] American Law Institute, Model Penal Code: Tentative Draft No 9 (1959) 14.

[30] See generally G P Fletcher, Rethinking Criminal Law (1978) 541-4; note 28 supra, 240-3; P H Robinson, "Criminal Law Defenses: A Systematic Analysis" 82 Columbia LR 199, 236-9 (1982).

> For the courts to acknowledge at the sentencing stage of the trial a sense of outrage at the position in which the accused and the court have been placed at the instigation of the police, is a wholly unsatisfactory response to the realization that a flagrant abuse of the process of the court has occurred. The harm to both the accused and to the administration of justice is complete with the substantive determination of guilt.[31]

Ironically one of the Law Lords in Sang, Lord Salmon, had observed only three years prior to Sang that "[f]or a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for [a stay of proceedings]."[32]

2. Exercise of Discretion in Sentencing

There are only a few reported decisions in which the exercise of the sentencing discretion in cases of entrapment has been considered. It cannot be said that there has emerged from these decisions a coherent set of principles on which the discretion is to be exercised. In R v Birtles[33] the defendant pleaded guilty to burglary and carrying an imitation firearm with intent to commit burglary. On the defendant's appeal against sentence it was held that his sentence should be reduced from five to three years. The Court took into account, on the one hand, the "real likelihood" that the defendant "was encouraged to commit an offence which otherwise he would not have committed", and on the other "the fact that the defendant had been minded to use a real firearm".[34]

Similarly, in R v McCann,[35] "a possibility - not perhaps the real possibility of which Lord Parker spoke of the facts of [Birtles] but at least some possibility - that McCann might not have carried through this theft had this opportunity not been

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[31] Amato v R (1982) 140 DLR (3d) 405, 449 per Estey J (dissenting). Besides, mitigation or a discharge would obviously be irrelevant in the case of an offence for which the sentence is fixed by law.

[32] DPP v Humphrys [1977] AC 1, 46. For a surprising endorsement of the Sang approach see J Maxton, "The Judicial Discretion to Exclude Evidence Obtained by Agents Provocateurs" (1980) 9 NZULR 73.

[33] [1969] 1 WLR 1047.

[34] Id, 1049.

[35] (1971) 56 Cr App R 359.

provided by the police"[36] was sufficient to lead to a reduction in sentence from four to two years. Again, no attempt was made to determine definitively whether the offence would otherwise have been committed by the defendant. It is to be noted that the Supreme Court of South Australia has apparently adopted a similar approach: "In deciding whether to extend leniency by reason of entrapment, the sentencing judge should take a common sense view of the evidence for the purpose of deciding whether there is a reasonable possibility that the convicted person would not have committed the offence but for the encouragement involved in the setting of the trap."[37]

However the Court of Appeal in the post-Sang case of R v Underhill,[38] in determining whether the appellant's sentence should be reduced, applied the principle that "[i]f a court is satisfied that a crime has been committed which in truth would not have been committed but for the activities of the informer or of police officers concerned, it can, if it thinks right so to do mitigate the penalty accordingly."[39]

It would therefore appear that the protection afforded to an entrapped defendant by the sentencing discretion of the trial judge suffers from lack of certainty in its application. There does not appear to have emerged from the cases[40] a coherent set of principles on which the discretion is to be exercised. Birtles and McCann, we have seen, suggest that a possibility or likelihood that the defendant would not otherwise have committed the offence will be sufficient to lead to a reduction in sentence. But Underhill would seem to require definitive proof that the defendant would not otherwise have committed the offence; a possibility or likelihood would appear not to suffice.

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[36] Id, 365.
[37] R v Mandica (1980) 24 SASR 394, 404 per King CJ (emphasis added).
[38] (1979) 1 Cr App R(S) 270.
[39] Id, 272 (emphasis added).
[40] See also R v Beaumont (1987) 9 Cr App R(S) 342; R v Kelly and Holcroft [1989] Crim LR 671; R v Chapman (1989) 11 Cr App R(S) 222.

C. US SUPREME COURT

Having indicated the problems associated with the English approach to the issue of entrapment, we should now consider whether any alternative approaches are available[41] or worthy of consideration. It is appropriate to begin with a discussion of the approaches taken in the US Supreme Court.

The 1932 case of Sorrells v US[42] is the first in which the US Supreme Court undertook a thorough and sustained consideration of the issue of entrapment. However, the case produced a division of opinion which has persisted in all the cases in which the issue of entrapment has subsequently confronted the Court.[43] The debate is as to the relative merits of what may conveniently be termed the "substantive" and "procedural" approaches. The former has been supported by a majority of the Supreme Court,[44] while academic commentators have generally endorsed the latter.

1. The Substantive Approach

It was observed earlier that to convict entrapped defendants is to find them guilty of offences for which the State has, in effect, "set them up" and then prosecuted them. Recognising this, the majority of the Supreme Court has taken the view that "when the criminal design originates with the officials of the Government",[45] and the Government by its conduct "actually implants the criminal design in the mind of the

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[41] It should be noted that, in appropriate circumstances, one of the conventional defences may be available to the defendant. In R v Woods (1968) 7 CRNS 1 two off duty police officers in plain clothes, pretending to be Toronto gangsters, threatened the defendant with violence if he did not commit certain offences. The Ontario Court of Appeal held, apparently on the basis of the defence of duress, that his convictions should be quashed and a verdict of not guilty entered.

[42] 287 US 435 (1932).

[43] Sherman v US 356 US 369 (1958); Masciale v US 356 US 386 (1958); US v Russell 411 US 423 (1973); Hampton v US 425 US 484 (1976).

[44] Note, however, that an advocate of the procedural approach, Brennan J, has decided in the recent case of Mathews v US 108 S Ct 883 (1988) to "bow to stare decisis" and accept the substantive approach: id, 889.

[45] Sorrells v US 287 US 435, 442 (1932).

defendant",[46] the defendant must be acquitted. Whether the defence is available to a defendant in a particular case is an issue for determination by the jury.[47]

What is recognised by the majority, therefore, is a substantive defence of entrapment. The focus of an inquiry into whether the defence is available is upon "the intent or predisposition of the defendant to commit the crime."[48] It is said that the rationale of the defence is that in enacting the statute creating the offence, the legislature could not have intended "that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them".[49] Accordingly, entrapment "takes the case out of the purview of the statute".[50]

The above quotations would suggest that for the defence to succeed the defendant must have had no previous intent to commit the offence charged, doing so only because of "official" instigation. Yet it can be demonstrated that the actual test applied by those following the majority view is altogether different. In Sherman v US[51] the defendant had been convicted of three sales of narcotics. The evidence was that a Government informer had asked the defendant to supply him with a source of narcotics, stating that he (the informer) was not responding to treatment for addiction to narcotics. The defendant was initially reluctant but acquiesced after repeated requests involving appeals to sympathy. It was held that the defence of entrapment was available. There was no evidence that the defendant himself had been in the trade, and when his apartment was searched after his arrest, no narcotics were found. There was in addition no significant evidence that the defendant had even made a profit on any sale to the informer. The defendant's 1942 conviction of illegally selling narcotics and 1946

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[46] US v Russell 411 US 423, 436 (1973).
[47] See generally Sorrells v US 287 US 435, 452 (1932); Sherman v US 356 US 369, 377 (1958).
[48] US v Russell 411 US 423, 429 (1973).
[49] Sorrells v US 287 US 435, 448 (1932).
[50] Id, 452.
[51] 356 US 369 (1958).

conviction of illegally possessing them were held to be of no consequence: "a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had a readiness to sell narcotics at the time Kalchinian [the informer] approached him, particularly when we must assume from the record he was trying to overcome the narcotics habit at the time."[52] Thus it can be seen that the focus of the inquiry was in fact upon the defendant's general readiness to sell narcotics. The defence of entrapment was held to be available on the facts as the evidence was found to reveal no such "general readiness".

This focus on "general readiness" indicates an unconscious refusal by the Court to accept the consequences of a test which focuses on the question of whether the defendant had had the requisite criminal design (that is, had intended to commit the offence in question) prior to the Governmental involvement. The minority in Sherman observed: "[I]t is wholly irrelevant to ask if the 'intention' to commit the crime originated with the defendant or government officers ... Of course in every case of this kind the intention that the particular crime be committed originates with the police ... The intention referred to [by the majority] must be a general intention or predisposition to commit, whenever the opportunity should arise, crimes of the kind solicited".[53]

Even though "predisposition" is crucial to conviction, once inducement by law enforcement agents is proved, the courts do not require that "predisposition" be adequately proved. They often permit the admission of general propensity evidence which may otherwise be inadmissible[54] without seriously considering the degree of

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[52] Id, 375-6 (emphasis added).

[53] Id, 382 (emphasis added). See also W E Mikell, "The Doctrine of Entrapment in the Federal Courts" 90 U Pa LR 245, 251 (1942): "When it is said that the defendant is entitled to an acquittal if the offense was conceived and planned by the officer, of what 'offense' is the court speaking? Presumably the offense for which the defendant is on trial. But in practically every case of entrapment that [emphasis in original] offense was 'conceived' and 'planned' by the officer; that offense, that sale, that mailing, would never have taken place if the officer had not conceived it, planned it and instigated it, for the defendant was unaware even of the existence of the officer before the latter approached him, and therefore could not have 'planned' or had the 'conception' of dealing with him."

[54] See W R LaFave and J H Israel, Criminal Procedure (1985) 253.

relevance of this evidence to the issue of "predisposition". This is demonstrated by a number of decisions of the Court of Appeals,[55] of which Carlton v US[56] provides an example. The defendant was charged with the sale of morphine and with the receipt, concealment and facilitation of the transportation of the morphine. These offences were alleged to have been committed in 1951. Evidence that in 1948 the defendant had been convicted of a misdemeanour narcotics violation was held admissible.[57] Why this evidence was sufficiently probative of the defendant's "predisposition" to warrant admission was not explained. And in Pulido v US,[58] where the defendants were charged with narcotics offences, it was held that evidence that one of the defendants had been arrested 12 years previously on State narcotics charges (from which no conviction had resulted) was admissible.[59] In some cases evidence of doubtful reliability, such as hearsay evidence, has been held admissible. The defendant in US v Wolffs[60] was charged with one count of conspiring to possess with intent to distribute marijuana and conspiring to distribute marijuana, and two counts of using a communication facility (a telephone) in the commission of a felony. It was held that the evidence of a detective that he had learned through informers that the defendant had a reputation for dealing in marijuana was admissible.

The availability of the defence of entrapment in a particular case is, we have seen, an issue for determination by the jury. The dangers of leaving to a jury evidence of a defendant's prior acts of misconduct are well known. There is a possibility that

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[55] The relevant cases are conveniently collected in D E Feld, "Admissibility of Evidence of Other Offenses in Rebuttal of Defense of Entrapment" 61 ALR 3d 293.

[56] 198 F 2d 795 (9th Cir 1952).

[57] See also Nutter v US 412 F 2d 178 (9th Cir 1969).

[58] 425 F 2d 1391 (9th Cir 1970).

[59] See also Robison v US 379 F 2d 338 (9th Cir 1967). But see De Jong v US 381 F 2d 725 (9th Cir 1967) (defendant charged with knowingly facilitating the transportation and concealment of marijuana and with knowingly selling the marijuana; held that evidence of defendant's previous arrest for burglary and drunkenness was not admissible); US v Daniels 572 F 2d 535 (5th Cir 1978).

[60] 594 F 2d 77 (5th Cir 1979). See also Trice v US 211 F 2d 513 (9th Cir 1954); Rocha v US 401 F 2d 529 (5th Cir 1968); US v Brooks 477 F 2d 453 (5th Cir 1973); US v Simon 488 F 2d 133 (5th Cir 1973).

the jury will decide - consciously or subconsciously - that the defendant is deserving of punishment for his prior misconduct, and find him guilty of the crime charged on this basis.[61] This is the consequence of a substantive approach which is in any event an illusion, as we have just seen.

The substantive approach may, therefore, be summed up as follows. In theory, a defendant is to be found not guilty if he would not have committed the offence in question but for the impugned Governmental conduct. But the consequences of applying this test are (implicitly) recognised as being undesirable, and in practice the focus of the inquiry is upon the defendant's general intent ("predisposition") to commit crimes of the kind in question. Unfortunately it is apparent that on the whole the courts do not require that this "predisposition" be adequately proved.

2. The Procedural Approach

We have seen earlier that the second basis on which entrapment may be regarded as objectionable relates to the repute of the criminal justice system. The minority of the Supreme Court concentrates on this aspect and offers the test of whether the impugned official conduct is "beyond judicial toleration"[62] or, to put it another way, "falls below standards, to which common feelings respond, for the proper use of governmental power."[63] The minority holds that a court, out of concern for "[t]he protection of its own functions and the preservation of the purity of its own temple",[64] cannot countenance the practice of entrapment.[65] Factors to be taken into account in determining the issue of entrapment vary from case to case, but include the setting in which the inducement took place; the nature, secrecy and difficulty of detection of the

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[61] It is a recognition of this which has led to the evolution of the similar facts rule in English law: see DPP v Boardman [1975] AC 421. See also A A S Zuckerman, "Similar Fact Evidence - The Unobservable Rule" (1987) 103 LQR 187.

[62] US v Russell 411 US 423, 443 (1973) per Stewart J.

[63] Sherman v US 356 US 369, 382 (1958) per Frankfurter J.

[64] Sorrells v US 287 US 435, 457 (1932) per Roberts J.

[65] Sherman v US 356 US 369, 380 (1958) per Frankfurter J.

crime involved; and the manner in which the particular criminal activity is usually carried on.[66]

The basis of the entrapment doctrine under the procedural approach is that the need to protect the repute of the criminal justice system requires that the judiciary should not countenance certain Governmental conduct. It follows that the issue of entrapment is one for determination by the trial judge rather than by the jury.[67] Additionally it is said that it is only the court which can, through the gradual evolution of explicit standards in precedents, provide significant guidance for official conduct in the future.[68] Proof of entrapment, at any stage of the proceedings, "requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."[69]

According to the minority judges, the relevant question in determining the issue of entrapment is whether the impugned conduct, objectively considered,[70] would have been likely to instigate or create a criminal offence.[71] Yet, as the judgment of the minority in US v Russell[72] (discussed below) demonstrates, this is not the test actually applied by the minority. Rather, a close examination is made of all the circumstances of the case to determine the propriety of the Governmental involvement in relation to the commission of the offence. The minority judges do not therefore embark solely upon a consideration of whether the offence was likely to have been committed as a result of the Governmental involvement.

US v Russell is a useful case for the purposes of illustrating the difference between the majority and minority approaches. The defendant was charged with unlawfully manufacturing and selling methamphetamine ("speed"). A Government

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[66] Id, 384-5.
[67] Sorrells v US 287 US 435, 457 (1932) per Roberts J.
[68] Sherman v US 356 US 369, 385 (1958) per Frankfurter J.
[69] Sorrells v US 287 US 435, 457 (1932) per Roberts J.
[70] Sherman v US 356 US 369, 384 (1958) per Frankfurter J.
[71] US v Russell 411 US 423, 441 (1973) per Stewart J.
[72] 411 US 423 (1973).

undercover agent had made an offer to supply the defendants with phenyl-2-propanone - an essential ingredient in the manufacture of methamphetamine - in return for one-half of the drug produced. The manufacturing process having been completed, the agent was given one-half of the drug. The agent agreed to buy, and the defendant agreed to sell, part of the remainder.

The majority of the Supreme Court held, on the basis of the defendant's "predisposition", that the defence of entrapment was unavailable to him. The minority, however, held that entrapment was established. In his dissenting opinion Douglas J[73] regarded as immaterial the fact that the chemical supplied by the agent might have been obtained from other sources. He considered that

> [f]ederal agents play a debased role when they become the instigators of the crime, or partners in its commission, or the creative brain behind the illegal scheme. That is what the federal agent did here when he furnished the accused with one of the chemical ingredients needed to manufacture the unlawful drug.[74]

The other dissenting opinion was delivered by Stewart J,[75] who regarded as significant the fact that

> the Government's agent asked that the illegal drug be produced for him, solved his quarry's practical problems with the assurance that he could provide the one essential ingredient that was difficult to obtain, furnished that element as he had promised, and bought the finished product from the respondent - all so that the respondent could be prosecuted for producing and selling the very drug for which the agent had asked and for which he had provided the necessary component.[76]

It can therefore be seen that, in contrast to the substantive approach, the procedural approach to entrapment focuses upon the morality of the impugned Governmental action rather than upon the character of the defendant. In effect the

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[73] With whom Brennan J concurred.
[74] 411 US 423, 439 (1973).
[75] With whom Brennan and Marshall JJ joined.
[76] 411 US 423, 449 (1973).

defendant will be held to have been "entrapped"[77] if the Governmental involvement in relation to the commission of the offence was such that the need to protect the repute of the criminal justice system requires that the proceedings should not continue.

3. Due Process

The applicability of due process principles in an "entrapment case" was considered by the Supreme Court in Hampton v US.[78] The defendant in this case was charged with selling heroin to undercover Government agents. The drug had been actually supplied to the defendant by a Government informer. It was argued by the defendant that the case involved a violation of his due process rights.

In an opinion in which Burger CJ and White J joined, Rehnquist J held, in effect, that due process principles could never be invoked to prevent the conviction of a "predisposed" defendant.[79] Powell J, with whom Blackmun J joined, held that there had been no denial of due process in this case[80] but was unwilling to conclude that due process principles could never protect a "predisposed" defendant.[81] It was emphasised, however, that[82] "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction"; this would be especially difficult

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[77] Of course, the term "entrapment" is used by the minority in a wide sense and not solely to mean the instigation, by an official of the Government, of an offence which the defendant would not otherwise have committed.

[78] 425 US 484 (1976).

[79] Id, 490-1. Rehnquist J conceded that the present case differed from Russell in that while in Russell the ingredient supplied by the agent could have been obtained from other sources, "[h]ere the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the corpus delicti for the sale of which the petitioner was convicted": id, 489. This difference was held, however, to be immaterial because of the defendant's "predisposition".

[80] Id, 491-2. The fact that what was supplied by the Government in this case was contraband whereas the ingredient supplied in Russell had not been contraband was held not to be material. "Although phenyl-2-propanone is not contraband, it is useful only in the manufacture of methamphetamine ('speed'), the contraband involved in Russell. Further, it is an essential ingredient in that manufacturing process and is very difficult to obtain": id, 492 n 1.

[81] Id, 493-5.

[82] Id, 495 n 7.

to show in the case of contraband offences, of which detection was difficult in the absence of Government undercover involvement.

The three dissenting judges thought that due process principles would prevent the defendant being convicted. By, in effect, "buying contraband from itself through an intermediary and jailing the intermediary", "the Government's role [had] passed the point of toleration."[83] Due process principles, Brennan J thought, required that conviction be barred in all cases where a defendant was charged with the sale of contraband which had been actually provided by a Government agent.[84]

In sum, five of the eight members of the Court were of the view that due process principles could be engrafted upon the substantive approach to entrapment. It is therefore unfortunate that there was no consensus among the five as to the scope of the due process protection - with the consequence that only three members of the Court considered the protection to be applicable in the case. Of course, this division of opinion or indeterminacy reflects the same kind of indecision we have seen elsewhere in this work. Since Hampton, there has been only one "entrapment case" in which the Court of Appeals has held that the conviction of a defendant should be barred on due process principles.[85]

It would appear, then, that the procedural and "due process" approaches share the same rationale - the protection of the repute of the criminal justice system. In some cases the impugned Governmental involvement in relation to the commission of the offence may be of such a nature that the proceedings should not be allowed to continue. What is lacking, however, is a set of criteria which is of assistance in determining whether, in a particular case, the proceedings should be stayed. As we have seen, this absence of guiding principles led to a divergence of opinions in Hampton as to the scope of the due process protection.

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[83] Id, 498.
[84] Id, 500.
[85] US v Twigg 588 F 2d 373 (3rd Cir 1978).

D. CANADIAN SUPREME COURT

For the sake of completeness it should be mentioned that the Supreme Court of Canada has recently given extensive consideration to the problem of entrapment in the case of R v Mack.[86] It was said that proof of entrapment should lead to a judicial stay of the proceedings as an abuse of process. The court held that "entrapment" can occur in two ways. First, it is entrapment for the authorities to offer a person an opportunity to commit a criminal offence unless they have a reasonable suspicion that he is already engaged in criminal activity, or unless such an offer is made pursuant to a bona fide investigation.[87] "The absence of a reasonable suspicion or a bona fide inquiry is significant in assessing the police conduct because of the risk that the police will attract people who would not otherwise have any involvement in a crime and because it is not a proper use of the police power to simply go out and test the virtue of people on a random basis."[88] "Reasonable suspicion" can be based on many factors; it is unnecessary for one of these to be a prior criminal record.[89] There must be "some rational connection and proportionality" between the offence in relation to which the authorities have reasonable suspicion and the offence which they offer the accused the opportunity to commit - the offences cannot, for example, be totally unrelated.[90] There must also be a sufficient temporal connection - "[i]f the reasonable suspicions of the police arise by virtue of the individual's conduct, then this conduct must not be too remote in time."[91]

The second form of entrapment arises, in the view of the Canadian Supreme Court, where, although having a reasonable suspicion or acting pursuant to a bona fide investigation, the authorities go beyond offering an opportunity and induce the

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[86] (1988) 90 NR 173. See also R v Showman (1988) 90 NR 262.
[87] See, eg, (1988) 90 NR 173, 237, 244.
[88] Id, 245.
[89] Id, 236-7.
[90] Id, 236.
[91] Ibid.

commission of an offence.[92] The test to be applied is an objective one - the question is "whether the conduct ... would have induced the average person in the position of the accused, ie, a person with both strengths and weaknesses, into committing the crime."[93]

E. OTHER APPROACHES

It has been argued by some commentators that recognition of a jurisdiction to exclude the evidence of an agent provocateur on the ground that it was improperly obtained would be an appropriate judicial response to the problem of entrapment.[94] On this basis it may be suggested that an exclusionary jurisdiction, such as that argued for earlier in the thesis, would constitute sufficient weaponry for dealing with entrapment. I would, however, argue that recognition of an exclusionary jurisdiction cannot be regarded as a satisfactory response to the problem of entrapment.

We have seen that in Sang the argument of the defendant was that if entrapment had been established, all prosecution evidence of the offences should have been excluded by the trial judge. In R v Ameer and Lucas,[95] a case overruled by the House of Lords in Sang, an application to have all prosecution evidence of the crime excluded in the exercise of discretion, on the ground that this evidence had come about as a result of the activities of an agent provocateur, was successful. On other occasions, applications have been made to have only the evidence of the alleged agent provocateur excluded.[96] However, this misses the point that the central complaint in a case of entrapment is that the offence was, in a broad sense, manufactured by the State. If the only evidence which can be regarded as improperly obtained in a case of entrapment is that obtained by the agent provocateur, the exercise of a jurisdiction to exclude improperly obtained evidence would produce arbitrary results. The effect of exclusion on the outcome of the

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[92] See, eg, id, 237, 244.
[93] Id, 238 (emphasis added).
[94] See, eg, J D Heydon, "The Problems of Entrapment" [1973] CLJ 268.
[95] [1977] Crim LR 104.
[96] See, eg, R v Murphy [1965] NI 138; R v Veneman and Leigh [1970] SASR 506; R v Williams (1978) 19 SASR 423; R v Coward (1985) 16 A Crim R 257.

trial would depend on the existence of other prosecution evidence of the crime. If the prosecution has independent evidence of the commission of the crime, or has obtained a confession from the defendant, the defendant could be convicted in spite of the exclusion of the evidence obtained by the agent provocateur. If, on the other hand, the evidence of the agent provocateur is the only prosecution evidence of the crime, its exclusion would lead to the proceedings being stayed de facto.

It is possible that in many cases an agent provocateur will not be called as a witness for the prosecution. In R v Burnett and Lee[97] (which was also overruled by Sang) Lee testified that the offences charged had been committed as the result of incitement by a police informer, who was not called to give evidence. The Court held that all evidence against the defendants was inadmissible. It was said that "[t]he absence of Edith's [the informer's] testimony left Lee's account uncontradicted and strengthened the suspicion that her conduct fell on the wrong side of the line. The conduct of Edith could only be regarded as that of an agent provocateur and ... [thus] the case should be withdrawn from the jury on the general ground of unfairness."[98] If the view had been taken that the entrapment tainted only the evidence obtained by the agent provocateur, there would have been no improperly obtained evidence to exclude. The view taken in this case, however, was that the entrapment tainted all evidence against the defendants - with the result that the proceedings were stayed de facto.

Thus, it is clear that to exclude the evidence of agents provocateurs is an inadequate judicial response to the problem of entrapment. Such exclusion is not directed at the central consideration in a case of entrapment: that the actual commission of the crime, and not merely an item of evidence, can be regarded as having been a fruit of the impropriety. It is inappropriate that the conviction of an entrapped defendant be dependent on such arbitrary factors as the existence of other prosecution evidence of the crime, whether the agent provocateur is called as a witness for the

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[97] [1973] Crim LR 748.
[98] Id, 748-9.

prosecution, and so on.[99] For this reason a single judge of the Supreme Court of South Australia has recently held that proof of entrapment should lead directly to a stay of the proceedings rather than merely to the exclusion of the evidence of the agent provocateur. It was said that

> [w]here the court is satisfied in an entrapment case that the prosecution ought to be stopped on policy grounds, it is preferable, in my opinion, that it should avoid the artificiality of evidentiary exclusion and simply make an order that the proceedings be stayed as an abuse of process.[100]

In New Zealand it appears that where entrapment is established both the exclusion of evidence and the staying of proceedings are powers available to the trial judge; the exact position has yet to be clarified and properly articulated.[101]

It is arguable that it has not been decided definitively in England that entrapment cannot lead to a stay of the proceedings as being an abuse of the process of the court. The only reference in Sang to the concept of abuse of process occurred in the speech of Lord Scarman, who remarked that "[s]ave in the very rare situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial."[102] It is to be noted, however, that another member of the Court, Lord Salmon, stated: "It is only fair to observe that in the present case there was not a shred of evidence that the police sergeant was an agent provocateur."[103] Consequently it is not inconsistent with Sang to hold that proof of entrapment can lead to a stay of the proceedings as being an abuse of the process of the court. It could be argued that it was because there was no evidence of entrapment that the House of Lords considered

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[99] See also G Marjoribanks, "Entrapment - The Juristic Basis" (1990) 6 Auckland ULR 360, 381.

[100] R v Vuckov and Romeo (1986) 40 SASR 498, 518 per Cox J. See also R v Romeo (1987) 45 SASR 212.

[101] See generally R v Capner [1975] 1 NZLR 411; R v Pethig [1977] 1 NZLR 448; Police v Lavalle [1979] 1 NZLR 45; R v Loughlin [1982] 1 NZLR 236. See also G Marjoribanks, "Entrapment - The Juristic Basis" (1990) 6 Auckland ULR 360.

[102] [1980] AC 402, 455 (emphasis added).

[103] Id, 443.

that this case did not involve an abuse of process. The possibility is therefore left open that proof of entrapment can render proceedings an abuse of process, and hence liable to be stayed.

F. SOME RECOMMENDATIONS

1. A Defence of Entrapment

It has been demonstrated in this chapter that entrapment is of a different dimension from other forms of pre-trial executive misconduct inasmuch as it has actually caused, in a broad sense, the commission of a crime. In other words the actual commission of the crime, and not merely the proceedings or an item of evidence, can be regarded as having been a fruit of the impropriety. The judicial response to entrapment should accordingly reflect this fact. What is required is a direct recognition by the law that there is, as we have seen earlier in the chapter,[104] no justification for conviction of an entrapped defendant - in other words, recognition of a defence of entrapment.

It is now timely to consider what form a defence of entrapment in England might take. First, however, it is necessary to consider whether the availability of the defence of entrapment in a particular case should be determined by the court or by the jury.

(a) Court or Jury?

I would suggest that it is more appropriate for the availability of the defence of entrapment in a particular case to be determined by the court than by the jury. As our discussion of the US substantive approach will have made clear, proof of entrapment can raise complex issues. Thus, to leave a jury to convict or acquit a defendant on the basis of whether it is satisfied that entrapment has been adequately proved will cause

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[104] See p 220 and also the discussion of the US "substantive approach" at pp 223-7.

considerable practical problems, leading to the danger that the defence will not be taken seriously and will be abandoned eventually if it is discovered that the practical problems generated by it are insurmountable. However, if it is accepted that an entrapped defendant must not be convicted, then surely the fact that it may be difficult in particular instances to determine whether entrapment has occurred should not preclude recognition of a defence of entrapment. Interestingly, the US State of Minnesota has taken the innovative step of adopting the US Federal entrapment defence while allowing the defendant to "elect whether to have his claim of entrapment presented in the traditional manner as a defense to the jury, or to have it heard and decided by the court as a matter of law."[105] In England the power of a court to stay proceedings makes it possible for the law to recognise a defence of entrapment while leaving the issue to be determined by the court. Hence the court will hear evidence on the issue of entrapment on a voir dire or at a pre-trial hearing, and if it concludes that entrapment is established, order that the proceedings be stayed.

(b) Elements of the Defence

(i) General Intent ("Predisposition")

In their monograph on Causation in the Law,[106] Hart and Honoré write:

> Whenever it is appropriate to say that one person has acted in consequence of what another has done or said ..., it must be the case that the person so acting should have made up his mind to act only after the first actor's intervention by words or deeds. If before this intervention the second actor had already intended to do the act in question, ... the intervention could not be the second actor's reason for deciding to do what he did, though it may be his reason for persisting in a resolution already formed rather than changing his mind.[107]

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[105] State v Grilli 230 NW 2d 445 (1975).
[106] H L A Hart and T Honoré, Causation in the Law (2nd ed 1985).
[107] Id, 55.

It is clear that this point has been appreciated by the US Supreme Court. We have seen that the focus of an inquiry into whether the defence of entrapment is available in a particular case is upon the existence or otherwise of "predisposition" (general intent) to commit crimes of the type in question should the opportunity to do so arise.[108] If the prosecution proves that the defendant had been "predisposed" prior to the Governmental intervention, then it cannot be said that he has acted in consequence of the intervention. The shortcoming of the US Federal entrapment defence lies, however, in its failure to address properly the issue of how "predisposition" should be proved. General intent should not be confused with mere desire. As has been put by Lord Hailsham in R v Hyam:[109] "[I]t is clear that 'intention' is clearly to be distinguished ... from 'desire' ...".[110] Possession of a desire to commit crime does not necessarily imply the existence of a general intent to commit it should the opportunity to do so arise. Yasuda observes that "considerations not wholly laudable may influence behavior, including fear of punishment, pragmatic appreciation of the benefits of a legal course of conduct, or realistic assessment of the difficulty of successfully committing a crime."[111] Thus the fact that I have a desire to evade paying my fare on a bus does not necessarily imply that I have made up my mind to do so if a relevant opportunity should present itself.

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[108] It is to be noted that the fact that an intent to carry out a criminal act is not an "immediate" one but is conditional upon the appearance of a relevant opportunity to offend does not preclude it from being an intent to carry out that act. In R v Bentham [1973] QB 357 the Court of Appeal had the task of interpreting section 16 of the Firearms Act 1968, which prohibits the possession of a firearm with intent to endanger life. It was held that it was unnecessary to show an intent immediately and unconditionally to endanger life; it was sufficient that the appellants had been in possession of firearms with a view to using them if and when the occasion arose. See also R v Buckingham (1976) 63 Cr App R 159 in relation to section 3 of the Criminal Damage Act 1971 which provides that anyone possessing anything with intent to destroy or damage property is guilty of an offence.

[109] [1975] AC 55.

[110] Id, 74.

[111] T K Yasuda, "Entrapment as a Due Process Defense: Developments After Hampton v United States" 57 Ind LJ 89, 128 (1982).

The failure of the US Federal entrapment defence to address properly the issue of how "predisposition" should be proved has not gone completely unnoticed by other courts in the US. The Supreme Court of South Dakota, for example, has adopted the Federal entrapment defence while requiring that the defendant's "predisposition" be more seriously proved. It has decided that evidence that the defendant had previously committed similar crimes, or had the reputation for involvement in the commission of such crimes, or was suspected by the police of criminal activities, is not admissible on the issue of "predisposition".[112] In so deciding, the Supreme Court of South Dakota has endorsed the approach taken in California prior to 1979.[113]

The following are examples of evidence regarded as admissible in South Dakota, and in California before 1979, on the issue of a defendant's "predisposition":

1. The nature of the alleged inducement. Appeals to friendship, appeals to sympathy and offers of excessive sums of money would suggest the lack of predisposition.[114]

2. Whether the defendant first suggested the crime. Such a suggestion would be probative of predisposition, while "[a]n original contact initiated solely by the police"[115] would not.

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[112] State v Nelsen 228 NW 2d 143 (1975); State v Nagel 279 NW 2d 911 (1979); State v Huber 356 NW 2d 468 (1984); State v Iverson 364 NW 2d 518 (1985); State v Moeller 388 NW 2d 872 (1986).

[113] See People v Benford 345 P 2d 928 (1959) and its progeny. In 1979 the Supreme Court of California adopted the procedural approach: People v Barraza 591 P 2d 947 (1979).

[114] See State v Nelsen 228 NW 2d 143, 148 (1975).

[115] People v Marsden 44 Cal Rptr 728, 730 (1965).

3. The response of the defendant to the alleged inducement. A quick or ready response would suggest the existence of predisposition,[116] while a slow, hesitant or reluctant response would not.[117]

4. Whether the defendant's dealings with the alleged agent provocateur indicated that he was already familiar with the criminal activity. Such familiarity would suggest predisposition,[118] while lack of familiarity would not.[119]

5. Whether, prior to the alleged inducement, the defendant would have had a reasonable prospect of being able to commit the offence.[120] In State v Moeller[121] the absence of evidence that the defendant had had ready access to cocaine was a factor

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[116] See People v Harris 26 Cal Rptr 850, 852 (1962) ("Defendant readily obliged the officer, not only on the first occasion, but also made a second sale, all with no apparent reluctance or hesitation"); People v Estrada 27 Cal Rptr 605, 607 (1963) ("lack of any expressed reluctance to effect a sale"); State v Iverson 364 NW 2d 518, 528 (1985) ("Iverson was prepared to sell Hammer marijuana within a few hours of Hammer's inquiry").

[117] See State v Moeller 388 NW 2d 872, 877 (1986) (Response "[n]ot very ready, in light of Agent's endeavor to obtain a response which continued almost a full year." "For up to a whole year, the defendant refused all of the Agent's solicitations to sell marijuana or cocaine. This despite the fact defendant was already a user of marijuana").

[118] See People v Estrada 27 Cal Rptr 605, 607 (1963) ("knowledge of the sources of supply; ... knowledge of the going price of a marijuana cigarette").

[119] See Patty v Board of Medical Examiners 508 P 2d 1121, 1130 (1973) ("lack of familiarity with the vernacular - 'whites' or 'dexies' - used by the Board's agent ... ; the doctor apparently did not even know the common names of the drugs").

[120] It is to be noted that in Cunliffe v Goodman [1950] 2 KB 237 Asquith LJ made the following comments: "An 'intention' to my mind connotes a state of affairs which the party 'intending' - I will call him X - does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition. X cannot, with any due regard to the English language, be said to 'intend' a result which is wholly beyond the control of his will. ... If there is a sufficiently formidable succession of fences to be surmounted before the result at which X aims can be achieved, it may well be unmeaning to say that X 'intended' that result": id, 253 (emphasis added). In R v Hyam [1975] AC 55, 74 Lord Hailsham said that "I know of no better judicial interpretation of 'intention' or 'intent' than that given in a civil case by Asquith LJ (Cunliffe v Goodman [1950] 2 KB 237) ...".

[121] 388 NW 2d 872 (1986).

which led the dissenting Justices to hold that entrapment had been established as a matter of law.

Thus there may be some merit in the argument (although the facts of the case as reported make it difficult to assert this with any certainty) that the defendant in Hampton v US[122] could not have had a general intent to sell heroin whenever the opportunity to do so arose, given that he had apparently had no access to the substance. It is to be noted that, in contrast, the defendant in US v Russell[123] had apparently had access to the chemical supplied by the Government.

6. Any relevant testimony and admissible out-of-court statements of the defendant.[124]

The above are merely examples; obviously it is necessary in a given case for all relevant factors to be considered and weighed up. Thus in People v Goree[125] it was held that the defendant's "hair-trigger susceptibility" did not of itself negative entrapment as a matter of law.[126] The response of the defendant to the alleged inducement must be weighed against other relevant factors.

This approach represents, then, a serious attempt to overcome the problems which have plagued the application of the entrapment defence in the Federal jurisdiction. The purpose of the prohibition against the admission of evidence of the prior misconduct of the defendant is, of course, to prevent evidence with a high prejudicial effect from going to the jury. As we have seen, the failure of the US Federal courts to regulate carefully the admissibility of such evidence has meant that the defence is in effect unavailable to defendants with a record of prior misconduct. If, however, the

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[122] 425 US 484 (1976). See supra for a discussion of the case.
[123] 411 US 423 (1973). See supra for a discussion of the case.
[124] State v Nelsen 228 NW 2d 143, 149 (1975).
[125] 49 Cal Rptr 392 (1966).
[126] Id, 395.

availability of the defence in a particular case is to be determined by the court, there is clearly no reason to forbid the adduction by the prosecution of evidence of the defendant's prior misconduct. In appropriate circumstances evidence of prior misconduct may, when considered in conjunction with other evidence, be probative of the defendant's "predisposition".

It is obvious that the courts should articulate clear guidelines in order that a coherent body of criteria which are of relevance to determination of the issue of predisposition will gradually emerge.

(ii) Objectively Unacceptable Conduct Only

An important question arises as to whether any "official" conduct is capable of constituting entrapment so long as it induces the commission of an offence by a member of the public who has no pre-existing general intent to commit offences of the type whenever the occasion arises. For the purposes of illustration, a hypothetical example formulated by Professor Friedland is appropriate.[127] Suppose that a number of indecent assaults have occurred in a certain park at night, and the police decide to employ pro-active law enforcement techniques to trap the offender(s). Accordingly, a police agent sits alone in a provocative pose on a park bench. A passer-by sees the woman, decides, without any pre-existing general intent, to assault her, and is arrested just as he has begun to do so. Should he have a defence to a charge of assault? Our definition of entrapment would appear to be satisfied: a person who had not already formed a general intent to commit offences of the type whenever the opportunity to do so arose was induced into the commission of the offence charged by the conduct of a police agent. Yet it is far from obvious why a defence should be available to the defendant in the circumstances. As Friedland puts it: "Society expects people like him to exercise restraint." The police have engaged in what appear to be perfectly reasonable (and

[127] See M L Friedland, "Controlling Entrapment" (1982) 32 U Tor LJ 1, 24.

possibly even laudable) actions in discharging their duties; these actions have, however, resulted in the "creation" of crime because of the unusual susceptibility to temptation of the defendant. To allow him a defence would be to undermine completely the role of the police in law enforcement.

It is clear, therefore, that the conduct alleged to constitute entrapment must first be shown to be objectively unacceptable. The determination of this issue should be made in isolation of the "predisposition" issue. Thus, what has to be determined is whether - taking into consideration the crime(s) being investigated - the impugned conduct was objectively reasonable. In relation to the above example the issue would therefore be whether it was objectively reasonable for the police, in investigating sexual assaults which had taken place in a park, to use a female decoy in the way in which they did. The answer, clearly, is yes.

(iii) Onus of Proof

In respect of onus of proof the defence should be similar to the substantive common law defences in English criminal law, with the exception of insanity. Thus, the defendant must first adduce sufficient evidence to put the defence of entrapment in issue - that is, he carries the evidential burden - unless such evidence has already emerged in the course of the prosecution case. It should be sufficient for the defendant to discharge this burden by demonstrating, for example, that "the government had a meaningful presence, directly or indirectly, in the alleged criminal enterprise or affair which could reasonably have influenced defendant's conduct to commit the offenses charged against him."[128] The burden then falls on the prosecution to negate this evidence, which it must do beyond reasonable doubt. In other words, the prosecution bears the legal burden of proof.

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[128] J B Ehrlich, "Sorrells - Entrapment or Due Process? A Redefinement of the Entrapment Defense: Part II" 55(6) NY State Bar J 42, 46 (1983) (emphasis added).

(iv) Identity of Alleged Inducer

As a final point it should be noted that the concept of official or Governmental conduct should extend to all conduct which is sufficiently linked to the executive - in particular, the conduct of lay persons who were co-operating with the State, or who were acting either in expectation of or in the hope for a reward or immunity from prosecution. In Sherman the following comments were made by the Supreme Court:

> The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced.[129]

(c) Conclusion

As we have seen, the attitude to entrapment of the House of Lords reflects the extreme reluctance of the English judiciary to become involved with the issue of the accountability of the police for their crime detection methods. By contrast, the US Supreme Court has paid far greater attention to the problems associated with entrapment. In the light of the US experience, it is unlikely that such problems are not encountered in England. The recommendations which I have made in relation to recognition of a defence of entrapment provide at least a starting point for serious judicial consideration in this country of the topic of entrapment.

2. Disclosure Requirements

An issue which should not be overlooked in the context of entrapment relates to whether, and to what extent, the prosecution should disclose relevant aspects of State involvement in relation to the offence. In the English case of R v Macro[130] the

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[129] 356 US 369, 373-4 (1958).
[130] [1969] Crim LR 205.

defendant pleaded guilty to robbing (together with a "man unknown", S) a postmaster. S was in fact an informer who together with the police had warned the postmaster of the intended crime. The postmaster was accordingly aware that a raid was to take place and a police officer was placed on hand to protect him. The Court of Appeal held that the defendant's conviction of robbery with violence should be quashed, since it might well have been the case that the postmaster was not in fear of violence.[131] (The offence which was in fact committed by the defendant might well, therefore, have amounted to no more than larceny or theft.) The Court "hoped" that such a situation would not arise again, since judges could not be expected to exercise their functions properly if they were not permitted to know the true and complete facts. In R v Birtles,[132] decided three months later, Macro was cited by the Court of Appeal for the proposition that "[t]here is of course no harm in not revealing the fact that there is an informer, but it is quite another thing to conceal facts which go to the quality of the offence."[133] More recently, the Court has stated, obiter, that

> a mere failure on the part of the prosecution to disclose the fact that one of their witnesses is an informer is not on the face of it irregular conduct or any ground for upsetting a subsequent conviction. Different situations may arise where the effect of the conduct of the prosecution is to mislead the Court in some vital feature of the charge which is being tried, or if the non-disclosure of the evidence, as Lord Parker CJ put it [in Birtles], effects [sic] the quality of the offence.[134]

Defence counsel's argument that his cross-examination of the witness - and indeed the course of the trial - would have been very different if disclosure had been made stirred no emotions in the Court.

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[131] For similar situations see R v Martin (1811) Russ & R 196 (no offence of aiding a prisoner at war to escape if the prisoner had been acting merely to detect the defendant and consequently neither escaped nor intended to escape); R v Mills (1857) 7 Cox CC 263 (no offence of obtaining money by false pretences if the prosecutor knew when he parted with his money that the representation was false; cf R v Hensler (1870) 11 Cox CC 570 - attempt to obtain money by false pretences).

[132] [1969] 1 WLR 1047.

[133] Id, 1049 (emphasis added).

[134] R v O'Brien (1974) 59 Cr App R 222, 227 (emphasis added).

That the principles articulated by the Court of Appeal simply do not go far enough is obvious. Disclosure of State involvement is relevant in a number of other respects. It may, for example, inform the defendant that he had been in fact entrapped into committing the offence. Since there would not have been an entrapment if the commission had been incited by someone unassociated with the executive, knowledge that the inciter was - for instance - a police officer is crucial.

The problem of disclosure may also arise where the fact of State involvement is known but the identity of the individual concerned (usually a lay informer) is not. It has been recently affirmed by the Court of Appeal that, on the grounds of public interest, "police and other investigating officers cannot be asked to disclose the sources of their information."[135] This rule of exclusion is, however, "subject to a duty to admit in order to avoid a miscarriage of justice."[136] These principles had been endorsed previously in guidelines issued by the Attorney-General on the disclosure of information to the defence in cases to be tried on indictment.[137]

If the individual whose identity is unknown was a witness to the offence, the principles articulated in Dallison v Caffery[138] may be relevant. Diplock LJ held there that if a prosecutor "happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence".[139] Lord Denning MR similarly thought that the prosecution should call a

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[135] R v Rankine [1986] 2 All ER 566, 568. See also A-G v Briant (1846) 15 M & W 169; R v Brown (1987) 87 Cr App R 52; R v Hardy [1988] Crim LR 687; R v Agar (1989) 90 Cr App R 318; R v Langford [1990] Crim LR 653.

[136] R v Rankine [1986] 2 All ER 566, 569. See also Marks v Beyfus (1890) 25 QBD 494 and R v Richardson (1863) 3 F & F 693, in which the defendant was indicted for administering poison with intent to murder. The police had, on the receipt of certain information, found the bottle containing the poison in a place used only by the defendant. It was held that they were obliged to disclose the names of the persons from whom they had received the information.

[137] See Practice Note, [1982] 1 All ER 734. See also K Vaughan, "Protecting Those Who Grass" (1990) 87(34) Law Society's Guardian Gazette 16.

[138] [1965] 1 QB 348.

[139] Id, 375-6 (emphasis added).

credible witness who could give evidence which would tend to show the defendant to be innocent,[140] or should make his statement available to the defence. Lord Denning added, however, that even where the prosecution knew of witnesses whom it did not accept as credible, it should inform the defence about them so that the defence could call them if it wished.[141] Thus Dallison suggests that there may be a greater obligation on the prosecution to disclose the identity of a person who actually witnessed the commission of the offence.[142] However it should be realised that Diplock LJ and Lord Denning MR were not addressing the specific issue of the disclosure of the identity of informers, and the question arises whether in cases concerning informers the interests of crime control are not overriding.

The specific issue of the disclosure of the identity of lay informers was the subject of consideration by the US Supreme Court in Roviaro v US.[143] The Court stated that what was known as the "informer's privilege" was in reality an acknowledgement that by the preservation of their anonymity, members of the public would be encouraged to perform their obligation of communicating any knowledge of the commission of crimes to law enforcement officials.[144] Accordingly there must be limitations on the applicability of the privilege, such as

> [w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause ... In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.[145]

The issue of disclosure, the Court held, was to be determined by "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense"; relevant factors in this determination might include a consideration of the

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[140] Unlike Diplock LJ, Lord Denning made no mention of evidence which would be otherwise helpful to the defendant.
[141] [1965] 1 QB 348, 369.
[142] See also R v Lawson (1989) 90 Cr App R 107.
[143] 353 US 53 (1957).
[144] Id, 59.
[145] Id, 60-1 (emphasis added).

crime charged, the possible defences, and the possible significance of the informer's testimony.[146] Thus the fact that in Roviaro the informer's testimony might have disclosed an entrapment[147] was one of the factors which led the Court to hold that disclosure should have been made.[148]

In determining the issue of disclosure, trial courts in the US have generally utilised in camera interviews of the informer "to assess the relevance and possible helpfulness of the informant's testimony to the defense."[149] Where the defendant claims entrapment he must adduce some evidence of entrapment. Thus in US v Sharp[150] it was found that there had been

> an abuse of discretion in the trial court's ordering disclosure based solely on defense counsel's representations, without conducting an in camera interview of the informant, and without first requiring that the defendant adduce some evidence of entrapment. We emphasize that it is ordinarily not even appropriate for the trial court to compel the production of the suspected informant for an in camera interview unless the defendant has first borne his burden of producing some evidence supportive of his entrapment defense, and not merely unsworn assertions of his counsel.[151]

In some US States the in camera hearing procedure has been the subject of statutory provision.[152]

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[146] Id, 62.
[147] Id, 64. See also US v Price 783 F 2d 1132 (4th Cir 1986).
[148] Recent decisions of the US Court of Appeals on the disclosure of the identity of informers include US v Nixon 777 F 2d 958 (5th Cir 1985); US v Sharp 778 F 2d 1182 (6th Cir 1985); US v Price 783 F 2d 1132 (4th Cir 1986); US v Zamora 784 F 2d 1025 (10th Cir 1986); US v Reardon 787 F 2d 512 (10th Cir 1986); US v Giry 818 F 2d 120 (1st Cir 1987); US v De Los Santos 819 F 2d 94 (5th Cir 1987); US v Cerone 830 F 2d 938 (8th Cir 1987); US v Smith 857 F 2d 682 (10th Cir 1988); US v Parikh 858 F 2d 688 (11th Cir 1988); US v Yunis 867 F 2d 617 (DC Cir 1989); US v Fryar 867 F 2d 850 (5th Cir 1989); US v Vizcarra-Porras 889 F 2d 1435 (5th Cir 1989); US v Eniola 893 F 2d 383 (DC Cir 1990).
[149] US v Sharp 778 F 2d 1182, 1187 (6th Cir 1985).
[150] 778 F 2d 1182 (6th Cir 1985).
[151] Id, 1187.
[152] See, eg, California Evidence Code, §§ 1041 and 1042.

In England, the House of Lords has acknowledged that a court may in the exercise of its inherent jurisdiction order that a hearing be conducted in camera where this is required in the interests of justice.[153]

In sum, the recommendations made earlier in this chapter as to how problems of entrapment should be approached would be largely ineffective in the absence of prosecutorial disclosure of all relevant aspects of State involvement in relation to the offence. It is only with the benefit of such knowledge that defence counsel can properly assess what arguments he might raise. Where the fact of State involvement is known but the identity of the individual concerned is not, the court should be prepared to determine the issue of the disclosure of his identity if called upon to do so. In determining the issue, the US approach of balancing the public interest in protecting the flow of information against the right of the defendant to prepare his defence should be adopted.

3. Pro-Active Techniques not Culminating in Entrapment

As we saw at the beginning of the chapter, it is to obtain evidence of certain crimes that pro-active law enforcement techniques are typically employed. Entrapment occurs where the use of such techniques actually causes, in a broad sense, the commission of an offence. However, even in the absence of entrapment, the obtaining of evidence by the use of pro-active law enforcement techniques may in certain circumstances be regarded as objectionable. Pro-active law enforcement techniques often place police agents in situations where they are forced, so as not to "blow their cover",

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[153] A-G v Leveller Magazine [1979] AC 440, 450 per Lord Diplock; 457 per Viscount Dilhorne. See also D v D [1903] P 144; Scott v Scott [1913] AC 417; R v Governor of Lewes Prison, ex p Doyle [1917] 2 KB 254, 271 per Viscount Reading CJ; R v Malvern JJ, ex p Evans [1988] 2 WLR 218.

to commit or participate in crime.[154] Accordingly it is generally accepted that orthodox crime detection methods should be employed wherever possible, with pro-active techniques being resorted to only where they prove necessary. But in practice, it appears that pro-active techniques may on occasion be employed not because they are necessary but merely because they provide a relatively easy means of investigation. Another important consideration is that the use of pro-active law enforcement techniques may on occasion carry the risk of injury to innocent members of the public. This may happen, for example, where an undercover operation involving a violent or dangerous suspect is set up in a public place.

Thus it is clear that when applying the principle of legitimacy in the context of determining whether evidence obtained by the use of pro-active law enforcement techniques should be excluded, a number of special factors (in addition to the general factors discussed in Chapter 4) need to be taken into account. First, one should consider whether it was necessary for the police to resort to pro-active law enforcement techniques in the circumstances. That is to say, is the offence charged one which, by its nature, generally necessitates executive involvement prior to its commission to ensure enforcement of the law? Victimless crimes, as we have seen, fall into this category. On the other hand, evidence of crimes of violence is usually provided by complaining victims and eyewitnesses.[155]

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[154] In R v Pethig [1977] 1 NZLR 448 an undercover police officer, for the purpose of detecting drug offenders, "took up residence with a young man named Stewart and two girls, those three being users of marijuana, and in fact entered upon a sexual liaison with one of the girls. It was also not in dispute that he joined with them from time to time in smoking marijuana."

[155] See generally B L Gershman, "Entrapment, Shocked Consciences, and the Staged Arrest" 66 Minn LR 567, 617 (1982).

Second, even if executive involvement prior to the commission of the offence was necessary in the circumstances, would a lesser degree of involvement have sufficed?[156]

Third, it is necessary to consider whether the pro-active law enforcement techniques employed actually posed a danger to society. This point has been noted succinctly by Klar: "If the police know that a particular person is violent, the risk that others might be injured during the course of the criminal acts allowed, outweighs the benefit of gathering the evidence needed to gain a conviction. For example, the risk that innocent bystanders might be hurt is too great to allow the police to set up an undercover drug purchase in a public place with a person known to carry and use weapons."[157]

Finally, did the pro-active law enforcement techniques involve illegality? Obviously, courts should be slow to turn a blind eye to the use of pro-active techniques which involve the commission of, or participation in, crime by police agents.[158]

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[156] Cf DPP v Marshall [1988] 3 All ER 683, 684: "In regard to the particular offences which were alleged in this information, one can conceive that by keeping the premises under observation the police could have obtained the evidence without adopting the strategem which was adopted in this case. Clearly, while that could have been done it would have been much more time consuming and difficult than adopting the simple procedure which was adopted in this case of trying to make a purchase which would contravene the law in the way alleged in the information."

[157] J N Klar, "The Need for a Dual Approach to Entrapment" 59 Wash ULQ 199, 220-1 (1981). See also note 155 supra, 626-8.

[158] Cf Brannan v Peek [1948] 1 KB 68, 72 per Lord Goddard CJ: "If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence."

CHAPTER 7

CONCLUSION

The preceding study has shown that the issue of the consequences for a criminal trial of pre-trial police or prosecutorial misconduct has not been subjected to serious judicial consideration in England. It is to be hoped that my suggestions for reform will eventually receive the imprimatur of the English courts. I have argued that where pre-trial executive impropriety is established the court must apply what I have called the principle of legitimacy. This principle is premised on a recognition that a criminal court must take into account not only its responsibility to bring to conviction those who commit criminal offences, but also the need for protection of the moral integrity of the criminal justice system. We saw in Chapter 3 that criminal justice has a clear public dimension as well as a moral dimension. The conviction of an offender imposes upon him a special moral stigma of community condemnation, and has the effect of warning the public against engaging in illegal actions. It is precisely because of this public dimension of criminal justice that criminal justice has also acquired a moral dimension: the law has recognised that it is inappropriate to expose an offender to the stigmatic effects of conviction and punishment unless the values attached to dignity and freedom have been respected in the course of bringing him to conviction. This philosophy is reflected in the doctrine of mens rea, and in the law's articulation of "fair process norms" which place substantive and procedural limits on the State's exercise of power.

Thus, the public interest in maintaining the moral integrity of the criminal process is an accepted and entrenched notion in the criminal law. What is surprising, however, is that this notion is not often confronted squarely by courts faced with the issue of whether improperly obtained evidence should be excluded or "tainted" proceedings stayed. I have argued that the public interest in the moral integrity of the criminal process requires that a court disassociate itself from pre-trial executive impropriety and refrain from bringing such impropriety to fruition; this may be achieved

by the exclusion of any evidence obtained as a result of the impropriety, or by a stay of any proceedings commenced on the basis of the impropriety.

The principle of legitimacy which I am advocating is premised on the notion that it is in the public interest that the legitimacy of the criminal process and of the verdict should be protected. Such legitimacy is dependent, on the one hand, upon the conviction of the guilty (and acquittal of the innocent) and, on the other hand, upon the moral integrity of the criminal process. Thus a decision as to whether an item of improperly obtained evidence should be excluded or whether an improperly obtained prosecution should be stayed is to be reached by weighing the public interest in the conviction of the guilty against the public interest in the moral integrity of the criminal process. If it is concluded that in the circumstances of the particular case the latter outweighs the former, then the evidence must be excluded or the proceedings stayed, as the case may be. It is entirely inappropriate to regard a criminal trial as being concerned solely with determination of the "truth". The criminal trial is an integral part of the entire criminal justice system; the "use" in court by the executive of the fruit of its impropriety may be viewed as the natural conclusion of a criminal investigation. Thus, the court effectively becomes implicated in the conduct of the executive.

The merit of the legitimacy principle lies in the fact that the conviction of the guilty as well as the protection of the moral integrity of the criminal process are both accepted functions of criminal justice. Thus the weighing exercise required by the legitimacy principle is not a problematic one. This is to be contrasted with the position in relation to the compensatory and deterrent principles. The compensatory principle would require that the public interest in the conviction of the guilty be weighed against individual rights; while the deterrent principle would require the same public interest to be weighed against the speculative future benefits of exclusion.

We have seen that English courts determine the procedural implications of pre-trial executive improprieties in particular cases by reference to the judicial duty to ensure

a fair trial[1] and the concomitant judicial power to prevent an abuse of process. I have indicated that it does not matter whether this nebulous concept of a "fair trial" is utilised to accommodate the reforms which I have suggested. However, section 78 of the Police and Criminal Evidence Act 1984 does provide the courts with a convenient vehicle for achieving any reforms of the English law in relation to improperly obtained evidence. Indeed there is some evidence, as we have seen, that the English Court of Appeal is already moving towards an implicit adoption of the legitimacy principle in its section 78 jurisprudence. The extent to which Crown Courts are faced with applications for the exclusion of evidence or a stay of proceedings on account of pre-trial executive impropriety is uncertain. The reality is that some trial judges may in fact be adopting a relatively liberal approach in considering such applications, mindful of the fact that no prosecution appeal is available.[2] However, what is required is acceptance by the appellate courts of the need for reform of the area, in order that a coherent body of law will develop.

Application of the legitimacy principle would inevitably involve the exercise of judicial discretion, in the sense that there can be no automatic way of determining whether, in a particular case, the public interest in the moral integrity of the criminal process outweighs the public interest in convicting the guilty. On the one hand it is clear that a measure of judicial discretion is necessary to enable all relevant circumstances to be taken into account in the individual case. On the other hand, the flexibility inherent in judicial discretion may produce considerable uncertainty of application. However, problems of unpredictability and of uncertainty of application may be minimised if the discretion is appropriately structured and checked. The main way in which discretion may be structured is through the recognition of guidelines for its exercise. In Chapter 4 a number of guidelines which may be relevant to the exercise

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[1] This is the case both under the common law and under s 78 of the Police and Criminal Evidence Act 1984.

[2] Note also that the binding effect of Crown Court decisions is doubtful: see "The Binding Effect of Crown Court Decisions" [1980] Crim LR 402.

of discretion under the legitimacy principle were identified. These involve a consideration of factors such as the importance of the rights infringed; whether the impropriety in question was deliberate; the gravity of the offence charged; the cogency of the improperly obtained evidence (if what is at issue is the admissibility of improperly obtained evidence); the presence or otherwise of circumstances of urgency, emergency or necessity; and the availability or otherwise of a direct sanction against the perpetrator(s) of the impropriety. Checks of discretion would be provided primarily by defendants' appeals to the Court of Appeal on the basis of incorrect application of the legitimacy principle. The Court of Appeal should not hesitate to substitute its own conclusion if it disagreed with that reached by the trial court. In this way, a body of principles which provide sufficient guidance to trial judges as to how the principle of legitimacy should be applied in individual cases would gradually emerge.

It was argued in Chapter 4 that the onus of proof should lie on the prosecution once the relevant pre-trial executive impropriety is established. In other words, the onus should lie on the prosecution to satisfy the judge that the evidence should not be excluded, or that the proceedings should not be stayed, as the case may be. Some relevant procedural issues associated with determination of whether evidence should be excluded or proceedings stayed on account of pre-trial executive impropriety were also considered in Chapter 4. Most importantly, it was recommended that the law should recognise a jurisdiction to hold a pre-trial inquiry where a defendant indicates, prior to trial, his intention to seek the exclusion of an item of evidence or a stay of the proceedings on the ground of pre-trial executive impropriety.

The specific issue of the circumstances in which proceedings should be stayed on account of improper pre-trial executive delay was examined in Chapter 5. We saw that there are two independent bases on which the principle of legitimacy would require improperly delayed proceedings to be stayed. First, it is necessary to consider the possibility that the delay may have left the defendant without a fair opportunity to defend himself. Some of the factors which might be taken into account in determining

whether there is a substantial risk that the delay has left the defendant without a fair opportunity to defend himself were identified. These include the length of the delay since the time of the alleged offence; whether the offence is to be proven primarily by testimonial rather than documentary evidence; whether the delay occurred before or after the defendant had been alerted to the prospect of litigation against him; the death or disappearance during the delay of a person who would otherwise have been a vital witness; and the prior attitude of the defendant to the delay. The existence of a substantial risk that the delay has left the defendant without a fair opportunity to defend himself should, I argued, be sufficient to lead to a stay of the proceedings. But if it is considered that the proceedings ought not to be stayed on this basis, then the second basis on which a stay may be ordered must be considered. This second basis is analogous to that on which, for example, improperly obtained evidence may be excluded or proceedings may be stayed on account of illegal extradition. That is, even though there is no danger of wrongful conviction, the delay may, by causing the defendant to suffer oppression, anxiety and concern, have compromised the moral integrity of the criminal process to such an extent that the public interest requires a stay of the proceedings.

The problem of entrapment deserves special mention. The English approach to entrapment reflects the same conservatism and lack of sustained analysis which has pervaded all other judicial considerations in England of pre-trial executive improprieties. I have argued that it is entirely appropriate that a stay of proceedings should be ordered where entrapment is established. As entrapment actually causes (in a broad sense) the commission of a crime, it is obviously of a different dimension from the other pre-trial executive improprieties discussed in the thesis. The main problems with recognition of a defence of entrapment are likely to arise in relation to the determination of whether entrapment has actually occurred. Leaving the responsibility for determining the issue of entrapment to the trial judge rather than to the jury will ensure that difficulties with the practical application of the defence do not arise.

Of course, the recommendations made in this thesis will be unlikely to be accepted by the English courts in the absence of a preliminary recognition by them of the necessity of subjecting pre-trial executive activities to judicial scrutiny. Pre-trial processes being an integral part of the administration of justice, the courts have a responsibility not to be concerned solely with executive improprieties occurring at trial, but also with executive improprieties which have occurred at the pre-trial stage. The issue of the accountability of the executive for the way in which it has dealt with the case at the pre-trial stage is just as important as the need to ensure that the executive behaves properly at trial. The judiciary must, as has been put by a judge in the US,

> care about the sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more.[3]

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[3] US v Jannotti 673 F 2d 578, 623 (3rd Cir 1982) per Aldisert J (dissenting).

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